
NATIONAL
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Queensland rail access regime Draft recommendation

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Abbreviations and defined terms

Abbreviation	Description
Application	Application of 18 January 2021 by the Premier of Queensland, the Hon Anastacia Palaszczuk MP for a recommendation that the Queensland rail access regime be certified
AU2	Queensland Rail access undertaking approved by the QCA and which became effective on 1 July 2020
Aurizon	Aurizon Holdings Limited
Aurizon Network	Aurizon Network Pty Ltd
Aurizon Operations	Aurizon Operations Limited
Aurizon Service	The service described in paragraphs 2.4 to 2.8
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Clause 6 principles	The principles set out in cl 6(2)-6(5) of the CPA
Commonwealth Minister	The Commonwealth Minister responsible for making a decision to extend the certification of an access regime under s 44NB of the <i>Competition and Consumer Act 2010</i> (Cth)
Council	National Competition Council
CPA	Competition Principles Agreement
QCCN	Central Queensland Coal Network, comprising the Blackwater, Goonyella, Moura and Newlands systems as set out in Schedule 1 and Part 12 in the QCA Act
IAP	Indicative access proposal
Pacific National Holdings	Pacific National Holdings Pty Ltd
Part IIIA	Part IIIA of the <i>Competition and Consumer Act 2010</i> (Cth)
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i> (Qld)

Queensland Rail	Queensland Rail Limited
Queensland rail access regime	The rail network access regime as described in Chapter 4.
Queensland Rail service	The service described in paragraphs 2.9 to 2.13
Rail Safety National Law Act	<i>Rail Safety National Law (Queensland) Act 2017</i>
TI Act	<i>Transport Infrastructure Act 1994 (Qld)</i>
UT5	Aurizon Network's access undertaking approved by the QCA on 21 February 2019

1 Draft recommendation

- 1.1 The Queensland rail access regime comprises of:
- the *Queensland Competition Authority Act 1997* (Qld) (**the QCA Act**).
 - access undertakings from Aurizon Network Pty Ltd and Queensland Rail limited, as accepted by the Queensland Competition Authority (**QCA**) under the provisions of the QCA Act and amended from time to time.
 - the rail safety regime in Queensland, which is established by the *Rail Safety National Law (Queensland) Act 2017* (Qld), the Rail Safety National Law and provisions under the *Transport Infrastructure Act 1994* (Qld).
- 1.2 The Council's draft view is that the Queensland rail access regime meets the requirements for certification and is therefore an effective access regime. Accordingly, the Council's draft recommendation is that the Commonwealth Minister extends the certification of the regime.
- 1.3 Under s 44NA(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the Council must recommend to the Commonwealth Minister a time period for any extension. The Council's draft view is that the extension of 20 years requested by the Queensland Government is not appropriate. Changes in market conditions over time have the potential to affect whether duplication of a facility is economically feasible; and whether access to a service is necessary in order to permit effective competition in a related market.
- 1.4 In these circumstances, the Council considers that a 10 year extension period for certification of the Queensland rail access regime provides an opportunity for review of whether such changes have materialised, and therefore is appropriate in this instance. Accordingly, the Council's draft recommendation is that the access regime be extended for a period of 10 years, that is, until 19 January 2031. This mirrors the length of the previous certification period.
- 1.5 The Council's reasons for its draft recommendation is set out in section 5 of this report.

How to make a submission in response to the draft recommendation

- 1.5 The Council seeks written submissions in response to the draft recommendation and Reasons. Information on making a submission is available on the Council's website (www.ncc.gov.au). The deadline for submissions is 11 June 2021.
- 1.6 Submissions (with a completed cover sheet) should be emailed to the Council at info@ncc.gov.au (in both MS Word and PDF formats).
- 1.7 A person may, at the time of making a submission, request the Council not to make available or publish a submission or part of the submission because of the confidential

information contained within it. Otherwise, the Council intends to publish all submissions received on its website.

- 1.8 The Council will consider submissions received by the closing date in developing its final recommendation to the Commonwealth Minister.

2 Application to extend certification of the Queensland rail access regime

This application

- 2.1 On 18 January 2021, the Queensland Government applied to the Council, under s 44NA(2) of the CCA, for a recommendation to the Commonwealth Minister to extend the certification of the Queensland rail access regime.
- 2.2 The previous certification period for the Queensland rail access regime ran from 19 January 2011 to 19 January 2021. The proposed extension is for the period 19 January 2021 to 19 January 2041.
- 2.3 The Queensland rail access regime relates to ‘below-rail’ services provided by Aurizon Network Pty Ltd (Aurizon Network) and Queensland Rail Limited (Queensland Rail).¹ These below-rail services are declared services under the QCA Act, meaning access to relevant rail infrastructure is governed by the general access regime in Part 5 of the QCA Act. Each service is discussed in more detail in the paragraphs below.

Aurizon service

- 2.4 In May 2020, the Queensland Treasurer declared the use of a coal system for providing transportation by rail as a service under the QCA Act (**Aurizon service**).² The Treasurer declared this service for a period of 20 years from 9 September 2020 to 8 September 2040.
- 2.5 The declared Aurizon service relates to below-rail services on four major coal systems of the Central Queensland coal network (**CQCN**) – Newlands, Goonyella, Blackwater, and Moura – and to the Goonyella Abbot Point Expansion, which is the connecting system link for the Newlands and Goonyella systems.
- 2.6 The CQCN is a 2,670-kilometre multi-user track network that links over 40 mines. The CQCN delivers over half of seaborne metallurgical coal globally. Approximately 226 million tonnes of coal were delivered in the 2019–20 financial year. A diagram of the CQCN is provided in **Appendix 1**.
- 2.7 Aurizon Network operates and manages the CQCN under a 99-year lease arrangement with the Queensland Government. Aurizon Network is a subsidiary of Aurizon Holdings

¹ Below-rail services relate to the use of the railway lines themselves that sit ‘below’ the rolling stock to transport goods; and require the use of rail track, bridges, tunnels signalling equipment and other associated infrastructure. By comparison, above-rail services involve the use of rolling stock such as locomotives or carriages to haul cargo over railways lines between points of origin and destination.

² Coal system is defined in s 250(3) of the QCA Act to cover the Central Queensland Coal Network.

Limited (**Aurizon**), Australia's largest rail-based transport business and an ASX50 company.

- 2.8 Aurizon Network enters into access agreements for the supply of below-rail services with above rail haulage operators or mining companies. The four coal haulage operators currently using the CQCN are Aurizon Operations Limited (**Aurizon Operations**), Pacific National Holdings Pty Ltd (**Pacific National**), BMA Rail and One Rail Australia.

Queensland Rail service

- 2.9 In May 2020, the Queensland Treasurer declared the below-rail services provided by Queensland Rail as a service under the QCA Act. The declaration relates to the following parts of the Queensland Rail service:

- i. the North Coast Route service
- ii. the Mount Isa Route service
- iii. the West Moreton Route service
- iv. the Central Western Route service
- v. the Western Route service
- vi. the South Western Route service.

- 2.10 The Treasurer declared these parts for a period of 15 years from 9 September 2020 to 8 September 2035.

- 2.11 Queensland Rail provides below-rail services and above-rail passenger services on its rail system. Queensland Rail also enters into access agreements for the supply of below-rail services with above-rail haulage operators. Pacific National, Aurizon Operations, Linfox Australia Pty Ltd and Watco Australia provide above-rail coal and non-coal freight services on various parts of the Queensland Rail system.

- 2.12 The Queensland Rail system extends more than 6,600 kilometres across Queensland and is used by freight and passenger trains. Queensland Rail is a statutory authority responsible for the management of the rail system; provision of the rail transport services; and the construction and maintenance of the rail transport infrastructure.

- 2.13 A diagram of the Queensland Rail systems is extracted in **Appendix 2**.

Timeline for this certification inquiry

- 2.14 The Council is required under Part IIIA of the CCA to make a recommendation on an application by the end of a ‘consideration period’ of 180 days after the application was received (s 44NC(2) of the CCA).
- 2.15 The 180 day application consideration period does not include time periods agreed by the Council, applicant and service provider; or the time period the Council specified in an information request to a person under s 44NAA of the CCA.³ However, these ‘clock-stopping’ periods cannot exceed 60 days.⁴
- 2.16 After receiving the Queensland Government’s application on 18 January 2021, the Council published it on its website.
- 2.17 The Council invited interested parties (via a notice on its website and through an advertisement published in *The Australian* newspaper) on 27 January 2021 to make written submissions on the application by 19 February 2021. Submissions were received from:
- Herbert Smith Freehills
 - Aurizon Network.
- 2.18 The submissions, summarised in **Appendix 3**, were supportive of the Application.
- 2.19 The Council intends to follow the below timeline for the remainder of this inquiry.

Date	Milestone
11 June 2021	Submissions in relation to the draft recommendation due
19 July 2021 ⁵	Due date for Council to send its final recommendation and reasons to the Commonwealth Minister

³ CCA, s 44NC(3) and (5).

⁴ CCA, s 44NC(4)(b).

⁵ The CCA sets a 180 day consideration period for the Council to make its final recommendation, under s 44NC of the CCA. This period expires on Saturday 17 July 2021. However as this is a weekend, by the operation of s 36(2) of the *Acts Interpretation Act 1901* (Cth), the due date for the Council’s final recommendation is Monday 19 July 2021.

3 Overview of the legislative framework - certification

The history and purpose of the certification regime

- 3.1 At the 25 February 1994 meeting of the Council of Australian Governments, all Australian governments agreed to the principles for a national competition policy as outlined in the report of the Hilmer committee. That agreement is embodied in the CPA (as amended on 13 April 2007).
- 3.2 Clause 6 of the CPA concerns reforms relating to third party access to significant infrastructure under which Australian governments agreed that the Commonwealth would establish a generic national third party access regime. The regime is established in Part IIIA of the CCA and provides for regulated access to infrastructure services that are declared on a case by case basis or subject to an access undertaking.
- 3.3 Governments also agreed that states and territories would retain the ability to regulate access to services within their jurisdiction and that the national access regime would not apply to services covered by effective state or territory regimes. An effective regime is one that conforms to the set of principles set out in clause 6 of the CPA. These principles are not applied as binding rules but rather in the nature of a guideline for assessing the effectiveness of a regime.

What does a regime being effective mean?

- 3.4 Where the Minister decides that a state access regime is an effective access regime for the service or the proposed service, this means that a service subject to the regime cannot:
 - be declared under Part IIIA and thereby become subject to the general access regime in Division 3 of that Part⁶
 - be the subject of an access undertaking accepted by the Australian Competition and Consumer Commission.⁷
- 3.5 This means that access to the infrastructure that is the subject of the regime will be regulated exclusively under state law. Where the Minister decides that an access regime is effective, that is commonly referred to as 'certifying' the access regime for the purposes of Part IIIA of the CCA.
- 3.6 This is intended to provide access seekers, infrastructure operators, developers and other parties with certainty about how access will be regulated.

⁶ CCA, s 44F(1)(a).

⁷ CCA, s 44ZZA(3AA).

What is the process for deciding whether an access regime is effective?

- 3.7 The responsible minister in the state or territory may make a written application to the Council asking the Council to recommend that the Commonwealth Minister decide that a regime for access to a service or a proposed service is an effective access regime.
- 3.8 Upon receipt of an application for certification, the Council commences a public consultation process by publishing the application in a national newspaper and on its website; and invites interested parties to make submissions. As noted above, where the Council seeks public submissions on an application, it must give at least 14 days after the notice is given to receive submissions.⁸
- 3.9 After considering submissions, the Council publishes a draft recommendation, including the reasons for its proposed recommendation, and invites interested parties to make further submissions.
- 3.10 The Council must make a recommendation to the Commonwealth Minister that he or she should decide that the access regime is either effective or not effective for the service or the proposed service⁹ and, if effective, how long that certification should be in force.¹⁰
- 3.11 As mentioned earlier, the Council must make its decision within 180 days, subject to certain 'clock-stopping' provisions (set out at 44NC(3) of the CCA and noted at para 2.3 above). In certain circumstances, the Council may extend this 180 day decision-making time period.¹¹
- 3.12 The Council must inform the applicant and the service provider when it has provided its final recommendation to the Commonwealth Minister.
- 3.13 After receiving the Council's recommendation, the Commonwealth Minister must decide whether the regime is or is not an effective access regime and the period for which certification will be in force.¹² The Commonwealth Minister must also publish his or her reasons for the decision.
- 3.14 A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA.
- 3.15 If the Commonwealth Minister does not publish their decision on a recommendation within the period starting at the start of the day the recommendation is received from the Council, and ending at the end of 60 days after that day, the Commonwealth

⁸ CCA, s 44NE(2).

⁹ CCA, s 44M(3).

¹⁰ CCA, s 44M(5).

¹¹ CCA, s 44NC(7).

¹² CCA, s 44N(3).

Minister is taken to have made a decision in accord with the recommendation of the Council and to have published that decision.¹³

3.16 The applicant for certification can apply to the Australian Competition Tribunal (the Tribunal) for a review of the Commonwealth Minister's decision.¹⁴ The application for review must be made within 21 days after the publication of the Commonwealth Minister's decision.¹⁵

3.17 The Tribunal may affirm, vary or reverse the original decision and the Tribunal's decision is taken to be the decision of the Commonwealth Minister. The Tribunal must make a decision within 180 days of the application for review being made, although this period can be extended.¹⁶

What does the decision-maker have to consider when deciding whether a regime is effective?

3.18 The Council, in deciding what recommendation it should make to the Commonwealth Minister, must:

- (a) assess whether the access regime is an effective access regime by applying the relevant principles set out in the CPA.¹⁷ However, each of these relevant principles have the status of a guideline rather than a binding rule.¹⁸
- (b) have regard to the objects of Part IIIA¹⁹
- (c) must not consider other matters (although the regime itself may contain additional matters that are not inconsistent with the CPA).²⁰

3.19 The objects of Part IIIA are:

- (a) to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
- (b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

¹³ CCA, s 44NB(3A)(a).

¹⁴ CCA, s 44O(1).

¹⁵ CCA, s 44O(2).

¹⁶ CCA, s 44ZZOA.

¹⁷ CCA, s 44NA(4) and s 44M(4)(a).

¹⁸ CCA, s 44DA(1).

¹⁹ CCA, s 44NA(4) and s 44M(4)(aa).

²⁰ CCA, s 44NA(4) and s 44M(4)(b).

3.20 For further information in relation to the legislative framework for the certification of state and territory access regimes and how the Council intends to apply this regime, see the Council's 'Certification of State and Territory Access Regimes - A guide to Certification under Part IIIA of the *Competition and Consumer Act 2010 (Cth)*' available on the Council's website.²¹

²¹ NCC, *Certification of State and Territory Access Regimes- A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, December 2017, Version 6, http://ncc.gov.au/images/uploads/Certification_Guide_2017.pdf, viewed 23 October 2019

4 The Queensland rail access regime

4.1 The Queensland rail access regime is comprised of:

- the QCA Act.
- Aurizon Network's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. The current access undertaking is the 2017 access undertaking, due to expire on 30 June 2027.
- Queensland Rail's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. The current access undertaking is the 2020 access undertaking, due to expire 30 June 2025.
- the rail safety regime in Queensland which is established by the Rail Safety National Law Act (**Rail Safety National Law Act**), the Rail Safety National Law and provisions under the Transport Infrastructure Act 1994 (QLD) (**TI Act**).

QCA Act

4.2 Part 5 of the QCA Act establishes Queensland's third party access regime for services provided by means of significant infrastructure facilities in Queensland. The object of Part 5 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 (s 69E of the QCA Act).

4.3 Part 5 of the QCA Act has the following core features:

- *Ministerial declarations*: Division 2 sets out a generic process for the ministerial declaration of services. The terms and conditions of this access can be set:
 - either via negotiated agreements between the access providers and access seekers, or failing that, via arbitration; or
 - through access providers offering an undertaking which, if accepted, governs terms and conditions of access. An arbitration determination cannot be made which is inconsistent with the undertaking.
- *Negotiation framework*: Division 4 sets out the rights and obligations of parties in negotiating access agreements for declared services.
- *Dispute resolution process*: Division 5 provides for arbitration of disputes about access to a service. The QCA may act as an arbitrator and make an access determination to settle the dispute. Part 7 of the QCA Act sets out how arbitrations are to be conducted by the QCA.
- *Access undertaking framework*: Division 7 sets out a process for the submission and approval of access undertakings.

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- *Enforcement:* Division 8 sets out various enforcement mechanisms, including orders to enforce access determinations; injunctions and orders to enforce access undertakings; and a prohibition on hindering access.

Ministerial declarations

- 4.4 If a service is declared by the Minister for access it will be subject to the access regime set out in the QCA Act and regulated by the QCA.
- 4.5 Section 77 of the QCA Act allows an application to be made to the QCA for a recommendation that a particular service be declared by the Minister. Section 79 requires the QCA to then make a recommendation to the Minister as to whether the service should be declared.
- 4.6 Section 80 of the QCA Act outlines that the QCA must recommend that a service be declared by the Minister if the QCA is satisfied about all of the access criteria for the service, which are set out in s 76(2) of the QCA as follows:
- (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service;
 - (b) that the facility for the service could meet the total foreseeable demand in the market—
 - i. over the period for which the service would be declared; and
 - ii. at the least cost compared to any 2 or more facilities (which could include the facility for the service);
 - (c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy;
 - (d) 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.
- 4.7 Section 84 of the QCA Act requires the Minister, on receiving a recommendation, to make a decision as to whether the service should be declared. Pursuant to s 86 of the QCA Act, the Minister must declare a service if the Minister is satisfied about all of the access criteria for the service.

Access undertakings

- 4.8 Until 30 June 2027, the CQC services declared under the Queensland rail access regime are subject to the 2017 access undertaking (**UT5**). UT5 is made and enforced under the QCA Act and covers a range of issues, including:
- (a) ring fencing arrangements (Part 3)
 - (b) framework for negotiating access (Part 4)
 - (c) the development of access agreements (Part 5)
 - (d) pricing principles (Part 6)
 - (e) the allocation and management of available capacity (Part 7)
 - (f) network development and expansions (Part 8)
 - (g) reporting, compliance and audits (Part 10)
 - (h) dispute resolution and decision making processes (Part 11).
- 4.9 Until 30 June 2025, QR services declared under the Queensland rail access regime are subject to the 2020 access undertaking (**AU2**). AU2 is made and enforced under the QCA Act and covers a range of issues, including:
- (a) network extensions (Part 1.4)
 - (b) process for negotiating access (Part 2)
 - (c) pricing rules (Part 3)
 - (d) operating requirements (Part 4)
 - (e) reporting requirements and obligations (Part 5)
 - (f) dispute and complaint resolution processes (Part 6).
- 4.10 Previous access undertakings also covered the matters listed above. Section 137 of the QCA Act prescribes the specific matters that must be included in a compliant access undertaking.

Rail safety regime

- 4.11 The rail safety regime in Queensland is established by the Rail Safety National Law Act and the TI Act.
- 4.12 The Rail Safety National Law Act governs the safe use of rail infrastructure and is applied by a national regulator, the Office of the National Rail Safety Regulator. This allows for a nationally consistent rail safety law whereas prior to the introduction of this legislation, rail safety regulation was delivered by State and Territory regulators.

4.13 Chapter 14 of the TI Act contains provisions relating to the transportation of dangerous goods by rail. This is governed by the Department of Transport and Main Roads as the dangerous goods regulator for rail.

5 Assessment

5.1 The Council's approach is to organise its consideration against the guiding Clause 6 principles into categories as follows:

- the scope of the access regime
- the treatment of interstate issues
- the negotiation framework
- dispute resolution
- efficiency promoting terms and conditions of access
- Part IIIA Objectives

5.2 In the Council's view, the categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements of an effective access regime. The categories do not however replace the Clause 6 principles as the basis for assessing a regime's effectiveness. In making its recommendation the Council considers each Clause 6 principle relevant to each of the categories.

5.3 After undertaking this assessment, the Council's draft recommendation to the Commonwealth Minister is that the Queensland rail access regime is an effective access regime.

5.4 The Council's reasons for this assessment are set out in the tables below.

Assessment of the Queensland rail access regime against the CPA Principles and objects of Part IIIA of the CCA

Scope of the regime

CPA Principle 6(3)(a) places limits on the types of infrastructure that are subject to an access regime.

CPA Principle 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. An infrastructure facility might at the present time not be economically feasible to duplicate (so warranting access regulation) but this situation may change over time removing the need for access regulation.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>Clause 6(3)(a): For a State or Territory access regime to conform to the principles set out in this clause, it should:</p> <p>(a) apply to services provided by means of significant infrastructure facilities where:</p> <ul style="list-style-type: none"> (i) it would not be economically feasible to duplicate the facility; (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and 	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies cl 6(3)(a) as the services subject to the access regime are clearly defined and the access criteria in the QCA Act are consistent with the cl 6(3)(a) principles, such that the facilities that provide the relevant services can be considered to be significant infrastructure.</p> <p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cl 6(3)(a). The reasons are set out below.</p> <p>As set out at 2.4- 2.13, the Aurizon service and Queensland Rail service subject to the Queensland rail access regime are declared services under the QCA Act. Section 76(2) of the QCA Act sets out the criteria the Minister must consider before declaring a service or part of a service. Section 76(2) of the QCA Act broadly reflects cl 6(3)(a) sub-clauses (i) and (ii).</p>

<p>(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.</p>	<p>Regarding cl 6(3)(a) subclause (iii), the rail safety regime as set out at 4.11- 4.13 provides for appropriate safety provisions to ensure the safe use of the rail infrastructure by the person seeking access.</p>
<p>Clause 6(4)(d): Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies cl 6(4)(d) as it provides for the expiry of declarations after a specified period of time and also includes a mechanism for the revocation of a Ministerial declaration where the access criteria are no longer satisfied. If a declaration is revoked or expires then existing contractual rights and obligations are preserved.</p> <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(d). For the reasons set out below, the access regime contains adequate mechanisms for reviewing the right to negotiate while ensuring that existing contractual rights under an access agreement are preserved.</p> <p>Review of the right to negotiate access in the QCA Act</p> <p>Ministerial declarations under the Queensland rail access regime must specify a date upon which the declaration will expire under s 84(4) of the QCA Act.</p> <p>The declaration of the Aurizon service under the QCA Act will expire after 20 years (see para 2.4) and the declaration of the Queensland Rail service will expire after 15 years (see para 2.10). These Ministerial declarations are subject to the revocation provisions in Part 5, Division 2, Subdivision 5 of the QCA Act. No significant changes have been made</p>

to these provisions since the Council's previous consideration of the Queensland rail access regime. The following provisions related to the right to negotiate access under the QCA Act are relevant:

- The owner of the declared service may ask the QCA to recommend revocation of the declaration of the service or part of the service under s 88(2) of the QCA Act. The QCA may also recommend, of its own initiative, to the Minister that the declaration be revoked (s 88(1) of the QCA Act). The QCA may conduct an investigation about the declared service for the purpose of making a recommendation to revoke.
- To recommend revocation, the QCA must be satisfied that, at the time of the recommendation, s 86 of the QCA Act would prevent the Minister from declaring the service (s 88(3) of the QCA Act). In other words, the QCA can only make a revocation recommendation if it is satisfied that the declared service no longer meets the access criteria in s 76 of the QCA Act. Similarly, the Minister may only revoke the declaration after receiving a revocation recommendation from the QCA and after being satisfied that, at the time of the revocation, s 86 of the QCA Act would prevent the declaration of the service (s 92 of the QCA Act).

Accordingly, the Council's draft view is that cl 6(4)(d) is satisfied.

Since the previous certification of the Queensland rail access regime, Subdivision 4A (Review of declaration) was inserted into Part 5, Division 2 of the QCA Act to provide a process for the pre-expiry review of an existing declaration of a service. These provisions require the QCA to review an existing declaration before it expires and make a recommendation to the Minister about whether a declared service should continue to be declared after the existing declaration expires. The subdivision provides certainty about whether a service will continue to be declared for third party access immediately following the expiry of the existing declaration.

The Council considers this inclusion provides greater assurance that the need for access regulation of services under the Queensland rail access regime is reviewed periodically.

Protecting existing rights

Section 95 of the QCA Act preserves existing access rights in the event that a declaration is revoked or expires. These rights include mediation or arbitration of an access dispute, the operation of an access agreement, and the operation and enforcement of an access determination.

Treatment of interstate access issues

Clause 6 (2) establishes principles for treatment of a service(s) provided by a facility with an influence beyond a jurisdictional boundary or where there are difficulties because the facility providing the service that is subject to a regime is located in more than one jurisdiction.

Clause 6(4)(p) is aimed at ensuring there is a single seamless process for obtaining access to a service, so promoting timely and efficient outcomes.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>Clause 6(2): The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless: (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or (b) substantial</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies cls 6(2) and 6(4)(p) as the rail infrastructure does not extend beyond the jurisdictional boundary of Queensland. As such, the services are not subject to multiple state and territory access regimes.</p> <p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cls 6(2) and 6(4)(p).</p> <p>Since the Council's previous consideration of the Queensland rail access regime, the access criteria under the QCA Act was amended to have regard to the treatment of interstate access issues.</p> <p>Section 76(5)(a) of the QCA Act requires that the QCA and Minister must have regard to cross jurisdictional issues when considering whether a service meets the criteria for declaration under Part 5 of the QCA Act. Specifically, if the</p>

difficulties arise from the facility being situated in more than one jurisdiction.

Clause 6(4)(p): Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

facility for the service extends outside Queensland, the QCA and the Minister must have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

The Council considers this insertion into the QCA Act enhances the extent to which the Queensland rail access regime satisfies cls 6(2) and 6(4)(p) as it requires consideration of the treatment of interstate access issues.

In any event, the Queensland rail access regime only applies to railway lines and rail infrastructure which are situated wholly within the state of Queensland. The interstate rail track situated between Acacia Ridge and the New South Wales border is leased and operated by the Australian Rail Track Corporation and is not covered by the Regime.

Negotiation framework

Competition Principles Agreement Principle /Part IIIA objective

Clause 6(4)(a): Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

Clause 6(4)(b): Where such agreement cannot be reached, Governments should establish a right for persons to negotiate

Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?

Clauses 6(4)(a)–(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.

Application

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>access to a service provided by means of a facility.</p> <p>Clause 6(4)(c): Any right to negotiate access should provide for an enforcement process.</p>	<p>The Queensland Government submits that the Queensland rail access regime satisfies the cls 6(4)(a)–(c) principles as:</p> <ul style="list-style-type: none"> • the regime provides for the primacy of commercial negotiations • the regime requires the provision of extensive information to access seekers in respect of the terms and conditions of access, including pricing issues, safety requirements, the allocation and expansion of capacity, operational issues and service quality issues; • there is independent and transparent regulation and enforcement under the regime. <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access. The Council considers that the negotiation provisions under UT5 and AU2 establish an appropriate balance between the interests of service providers and access seekers.</p> <p>The Council considers that the QCA is sufficiently resourced and vested with appropriate powers under the QCA Act to undertake its duties in an independent and objective manner. The combined roles of the QCA and the arbitrator in arbitrating access disputes means that commercial negotiations are supported by credible enforcement mechanisms.</p> <p>Therefore, the Council’s draft view is that the regime satisfies cls 6(4)(a)-(c). Below is a summary of the provisions in the regime that are relevant to our assessment of the negotiation framework, QCA’s independence and transparency and the enforcement mechanisms.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p data-bbox="743 379 1178 403">Negotiation framework in the QCA Act</p> <p data-bbox="743 448 1229 472">Once a service is declared under the regime:</p> <ul data-bbox="797 517 2004 727" style="list-style-type: none"> <li data-bbox="797 517 2004 584">• the service provider is obliged to negotiate with an access seeker for making an access agreement (s 99 of the QCA Act) and <li data-bbox="797 628 2004 727">• if, and only if, commercial agreement cannot be reached then an access dispute may be raised under s 112 of the QCA Act, and arbitration by the QCA will be available under Part 5, Division 5, Subdivision 3 of the QCA Act. <p data-bbox="743 772 2004 871">The service provider and access seeker must negotiate in good faith for reaching an access agreement and the service provider must make all reasonable efforts to try to satisfy the access seeker’s reasonable requirements (ss 100 and 101 of the QCA Act).</p> <p data-bbox="743 916 2004 983">The service provider must give the access seeker a range of information regarding the service (set out in s 101(2) of the QCA Act), subject to any relevant access code or approved access undertaking.</p> <p data-bbox="743 1027 2004 1126">Section 100(2) of the QCA Act provides that in negotiating access agreements (or amendments to access agreements) a service provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers.</p> <p data-bbox="743 1171 2004 1305">This prohibition is subject to the exceptions in s 100(3) which allow a service provider to treat access seekers differently if the different treatment is reasonably justified because of different circumstances or is expressly required or permitted by an access code, approved access undertaking or an access determination. However, these exceptions do not authorise a service provider to engage in conduct for the purpose of preventing or hindering a user’s access</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>to the declared service (s 100(4)), or to propose a price for access to the declared service that is inconsistent with the pricing principles in s 168A of the QCA Act.</p> <p>Provision for enforcing compliance with s 100(2) is made in Part 5, Division 8 of the QCA Act (Enforcement for Part 5) and particularly in s 153 (Orders to enforce prohibitions on hindering access and unfair differentiation).</p> <p>Negotiation framework under UT5 and AU2</p> <p>The primacy of contractual negotiations is recognised by AU2 and UT5 which both include:</p> <ul style="list-style-type: none"> (a) a detailed negotiation framework to facilitate commercial negotiation;²² (b) a dispute resolution process where commercial agreement cannot be reached;²³ and (c) an acknowledgement that the standard access agreements approved by the QCA (Standard Access Agreement) apply unless otherwise agreed between the access provider and access seeker. This acknowledges that parties are able to negotiate different terms and conditions of access.²⁴ <p>Enforcement Mechanisms</p> <p>If a dispute arises during access negotiations, a party can use the Queensland rail access regime’s dispute resolution process to enforce the right to negotiate and obtain a settlement to the dispute. This process is outlined in Part 5,</p>

²² Part 4 of UT5; Part 2 of AU2.

²³ Part 11 of UT5; Clause 6.1 of AU2.

²⁴ Clause 5.1(d) of UT5; clause 2.9.5 of AU2.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>Division 5 of the QCA Act. The regime provides enforcement mechanisms through civil penalties for breaches of certain requirements under the QCA Act. It also allows a party to obtain relief through the Supreme Court of Queensland to remedy certain conduct, such as hindering access, or contraventions of an access agreement or determination. Provisions relating to the enforcement of the regime are set out in Part 5, Division 8 of the QCA Act.</p>
<p>Clause 6(4)(e): The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(4)(e) principle as the regime imposes an explicit obligation upon the service provider to use all reasonable endeavours to accommodate the requirements of persons seeking access.</p> <p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cl 6(4)(e).</p> <p>Review of provisions in the QCA Act</p> <p>Section 101(1) of the QCA Act provides that the service provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker when negotiating an access agreement. Section 101(2) of the QCA Act lists the specific types of information that a service provider must give to an access seeker to facilitate the negotiations. In addition to the obligation to satisfy all reasonable requests, s 101(5) of the QCA Act allows the service provider or the access seeker to ask the QCA for advice or directions about a matter contained in s 101.</p> <p>Section 101(6) of the QCA Act protects against the disclosure of confidential information by mandating that the service provider or access seeker must not, without the giver's consent, disclose information provided under s 101 to another person. If the QCA reasonably considers that the disclosure of certain information may be likely to damage the commercial activities of a service provider or access seeker, s 101(3) allows the QCA to either aggregate</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>information, so that its disclosure is not unduly damaging, or authorise the service provider not to give the access seeker the confidential information.</p> <p>UT5 and AU2 support s 101 of the QCA Act by providing for a detailed negotiation process and information requirements.</p>
<p>Clause 6(4)(f): Access to a service for persons seeking access need not be on exactly the same terms and conditions.</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(4)(f) principle as the regime explicitly acknowledges that access agreements do not need to be on the same terms and conditions but also contains prohibitions on unfair discrimination between access seekers.</p> <p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cl 6(4)(f) as the regime expressly provides that a service provider is not required to provide access to a declared service on the same terms under each access agreement.</p> <p>Review of provisions in the QCA Act</p> <p>Section 102 of the QCA Act specifically provides that in relation to a declared service a service provider is not required to provide access on the same terms under each access agreement.</p> <p>The regime also contains a number of safeguards against a service provider unfairly differentiating between access seekers. Section 100(2) of the QCA Act provides that in negotiating access agreements (or amendments to access agreements) a service provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>The prohibition in s 100(2) is subject to the exceptions in s 100(3) which allow a service provider to treat access seekers differently if the different treatment is reasonably justified because of different circumstances or is expressly required or permitted by an access code, approved access undertaking or an access determination. However, these exceptions do not authorise a service provider to engage in conduct for the purpose of preventing or hindering a user's access to the declared service (s 100(4)), or to propose a price for access to the declared service that is inconsistent with the pricing principles in s 168A of the QCA Act.</p> <p>Section 168C(1) of the QCA Act contains a similar prohibition against service providers unfairly differentiating between users of a declared service. However, s 168C(2) provides that a service provider does not contravene s 168C(1) if the different treatment is expressly required or permitted by an access code, approved access undertaking, access agreement or access determination. The exception in s 168C(2) does not authorise a service provider to do anything that would contravene ss 104 or 125, or that is inconsistent with the pricing principles in s 168A (refer to s 168C(3)).</p> <p>Provision for enforcing compliance with ss 100(2) and 168C is made in Part 5, Division 8 of the QCA Act (Enforcement for Part 5) and particularly in s 153 (Orders to enforce prohibitions on hindering access and unfair differentiation).</p> <p>Section 168A of the QCA Act sets out the pricing principles that are to be taken into account by the QCA as arbitrator of any access dispute and in approving the terms of any access undertaking. This section applies to both declared and undeclared services. Section 168A(c) provides that the price of access to a service should not allow a related service provider to set terms and conditions that discriminate in favour of its downstream operations (or the operations of a related body corporate), except to the extent the cost of providing access to other operators is higher.</p> <p>Section 138A of the QCA Act provides that an approved access undertaking may require or permit the service provider to do the following, in the circumstances stated in the undertaking:</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>(a) treat access seekers differently in negotiating access agreements, or amendments to access agreements, relating to the service or</p> <p>(b) treat users differently in providing access to the service.</p> <p>However, this is subject to the pricing principles in s 168A.</p> <p>Section 137(1A) of the QCA Act requires an access undertaking to contain provisions to ensure that there is no unfair discrimination in favour of affiliated entities if the access provider provides (or proposes to provide) access to the declared service to itself or a related entity. Clause 6.2.1 of UT5 places limits on price differentiation, except as permitted by Part 6 of UT5. AU2 also places limits on price differentiation, prohibiting Queensland Rail from differentiating between access seekers and access holders in circumstances where the characteristics of the train services are alike and they are operating in the same end market. The relevant provisions in the undertakings which prevent unfair discrimination are discussed in more detail in respect of cl 6(4)(m).</p>
<p>Clause 6(4)(m): The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(4)(m) principle as the regime prohibits conduct hindering access and provides a number of protections to ensure that an access provider does not unfairly discriminate between access seekers.</p> <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(m) as it contains adequate prohibitions against a service provider or user of a declared service (or a related body corporate) from engaging in</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>conduct for the purposes of preventing or hindering a user’s access to a declared service. The prohibitions are supported by the enforcement provisions in s 153 of the QCA Act and compliance audit provisions in UT5 and AU2.</p> <p>Review of provisions in the QCA Act</p> <p>Section 104(1) of the QCA Act prohibits a service provider or user of a declared service (or a related body corporate) from engaging in conduct for the purposes of preventing or hindering a user’s access to a declared service under an access agreement. Section 104(2) of the QCA Act provides that a service provider engages in conduct for preventing or hindering access if the service provider provides (or proposes to provide) access to the declared service to itself or a related body corporate on more favourable terms than the terms on which the service provider provides (or proposes to provide) access to the declared service to a competitor.</p> <p>Section 104(3) of the QCA Act provides that the prohibition applies to unfair discrimination in respect of both:</p> <ul style="list-style-type: none"> (a) the fees, tariffs or other payments to be made for access to the declared service by the service provider and the competitor, and (b) the nature and quality of the declared service provided, or proposed to be provided, to the service provider and competitor. <p>The provisions in s 104 of the QCA Act that relate to access agreements are replicated in s 125 of the QCA Act in relation to access determinations. Sections 104 and 125(4) provide that a service provider or user, or a related body corporate of either party, may be held to have engaged in conduct for preventing or hindering access even if that purpose is only ascertainable by inference from their conduct.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>Provision for enforcing compliance with s 104 and s 125 is made in Part 5, Division 8 of the QCA Act (Enforcement for Part 5) and particularly in s 153 (Orders to enforce prohibitions on hindering access and unfair differentiation).</p> <p>As discussed above in respect of cl 6(4)(f), ss 100(2) and 168C of the QCA Act contain prohibitions on unfair differentiation by service providers in negotiating access agreements (and amendments to access agreements) and in the provision of access for users of declared services.</p> <p>The prohibitions on preventing or hindering access under ss 100(2), 104, 125 and 168C of the QCA Act can be enforced under s 153 of the QCA Act. The orders available to the Court are listed in s 153(2) and include:</p> <ul style="list-style-type: none"> (a) granting an injunction to restrain or compel the conduct of the obstructer (b) awarding compensation to the aggrieved party for loss or damage suffered because of the contravention, and (c) another order the Court considers appropriate. <p>Review of provisions under UT5 and AU2</p> <p>UT5</p> <p>Aurizon Network must make decisions in a manner that does not unfairly differentiate in a material way between access seekers and/or access holders in a way that has a material adverse effect on their ability to compete.²⁵ Further, the pricing principles in Part 6 of the UT5 protect access seekers and access holders against unfair price</p>

²⁵ Clause 3.20(a)(ii) of UT5.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>differentiation,²⁶ including the setting of prices in favour of Aurizon Network’s related entities and operators.²⁷ Aurizon Network also must not unfairly differentiate between access seekers, access holders or railway operators in relation to: expansion decisions; assessing, allocating and managing capacity; scheduling; assessing and selecting access seekers; and the provision of access to related parties.²⁸ An audit of Aurizon Network’s compliance with its obligations in Part 3 of the undertaking must be conducted annually.²⁹</p> <p>AU2</p> <p>AU2 provides that Queensland Rail will consistently apply AU2 to all access seekers and requests and negotiations for access.³⁰ In formulating access charges where there is no applicable reference tariff, Queensland Rail must not differentiate between access seekers and access holders in like circumstances.³¹ If the QCA believes, acting reasonably, that Queensland Rail may have failed to comply with the Undertaking, the QCA may instruct Queensland Rail to obtain an audit of compliance with the undertaking.³²</p>
<p>Clause 6(4)(n): Separate accounting arrangements should be required for the</p>	<p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(4)(n) principle as the regime provides for separate accounting arrangements supported by costing manuals approved by the QCA. Where appropriate, ring fencing arrangements are in place to protect confidential information and ensure that access is</p>

²⁶ Clause 6.2.1(a) of UT5.

²⁷ Clause 6.2.1(b) of UT5.

²⁸ Clause 2.3 of UT5.

²⁹ Clause 10.6.2(a)(i) of UT5.

³⁰ Clause 1.3 of AU2.

³¹ Clause 3.3(d) of AU2.

³² Clause 5.4.4(a) of AU2.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
elements of a business which are covered by the access regime.	<p>managed and supplied independently from related entities who compete in upstream and downstream markets that depend on access to the service utilising the rail infrastructure.</p> <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(n), as it imposes adequate separate accounting arrangements on railway owners for the elements of their business covered by the regime.</p> <p>Review of provisions in the QCA Act</p> <p>Part 5, Division 9 of the QCA Act sets out the regime to be applied in respect of accounting procedures for declared services. Section 159 of the QCA Act provides for the preparation of a cost allocation manual.</p> <p>Aurizon Network’s 2020 costing manual was approved by the QCA in May 2020. The costing manual sets out how Aurizon Network will prepare the annual below-rail financial statements for its regulated services to satisfy the accounting responsibilities under the Act.</p> <p>Queensland Rail’s costing manual for 2020–21 was approved by the QCA in October 2020, with an amendment approved on 22 April 2021. The costing manual sets out how Queensland Rail will prepare the annual below-rail financial statements for its regulated services.</p> <p>Section 162 of the QCA Act provides that a service provider of a declared service must keep the books of account and other records necessary to comply with the cost allocation manual. Section 163 of the QCA Act then provides that the service provider must keep, in a form approved by the QCA, accounting records for the service separately from accounting records relating to other operations of the service provider.</p> <p>Review of provisions of TI Act (applicable to Queensland Rail)</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>Section 438G of the TI Act ensures the independence of directors of a QR National Company that manages a Queensland railway. The majority of directors must not be employees or consultants of a QR National company or have a material contract or 5 per cent shareholding in a QR National company. Section 438H of the TI Act requires that a QR National company that manages a Queensland railway must not enter into an access agreement with another QR National company, unless approved by the board of directors of the first QR National company where they are reasonably satisfied the agreement is arm's length.</p> <p>Review of provisions under UT5 and AU2</p> <p>Section 137(2)(ea) of the QCA Act provides that an access undertaking may include details of the arrangements to be made by the owner or operator to separate the owner's, or operator's, operations concerning the service from other operations of the owner or operator concerning another commercial activity.</p> <p>UT5</p> <p>Part 3 of UT5 details a number of ring fencing measures relating to organisational structure, accounting and confidentiality arrangements. Specifically, the provisions of Part 3 ensure that access provided by Aurizon Network is managed and supplied independently from other members of the Aurizon Group who compete in upstream and downstream markets that depend on access to the service utilising the rail infrastructure.³³</p> <p>A complaints process for the investigation of potential breaches of Part 3 is also provided for in Section E of Part 3 of UT5.</p> <p>AU2</p>

³³ Part 3, Section B of UT5.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>Clause 2.2.3 of AU2 states that Queensland Rail does not presently have interests in markets upstream or downstream from the below rail services that are in competition with third parties in those markets. The clause then goes on to state that if such interests are likely to, or do, arise during the term, then Queensland Rail will inform the QCA as soon as reasonably practicable. If requested by the QCA, Queensland Rail will prepare and submit to the QCA a draft amending access undertaking setting out its ring fencing obligations.</p>

Dispute resolution

The Clause 6 principles below are designed to ensure the effectiveness of the dispute resolution regime while balancing the interests of all parties. The Clause 6 principles include clauses around how the independent arbitrator is appointed and funded; what the independent arbitrator must consider when making a decision; and the information the independent arbitrator can require from access providers.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>Clause 6(4)(g): Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.</p>	<p>Clause 6(4)(g) recognises the need for an independent arbitration mechanism to complement and encourage genuine negotiations. The principle requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes so promoting confidence among the parties.</p>

Application

The Queensland Government submits that the regime satisfies cl 6(4)(g) by providing for the appointment of the QCA as an independent dispute resolution body. It also submits the regime provides an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access.

Council's assessment

The Council's draft view is that the Queensland rail access regime satisfies cl 6(4)(g). The reasons are set out below in the discussion of the QCA Act and the undertakings subject to the regime. The dispute resolution provisions in UT5 and AU2 enhance the extent to which the Queensland rail access regime satisfies cl 6(4)(g) as both undertakings provide a mechanism to appoint and fund an independent body to resolve a dispute.

The QCA role in dispute resolution

Since the Council's previous consideration of the Queensland rail access regime there have been no changes to the QCA Act regarding dispute resolution and the following provisions remain relevant:

- Part 5, Division 5 of the QCA Act sets out an arbitration process for access disputes and will apply where an access provider or access seeker give the QCA a valid dispute notice.
- An access seeker or access provider can only notify the QCA of an access dispute if there is no access agreement in place between parties to the dispute (s 112(1)(b) of the QCA Act), or if there is an agreement and the aspect about access to the service concerning which the parties cannot agree is increased access to the service (s 112(3) of the QCA Act).

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<ul style="list-style-type: none"> • Where an access dispute is received, the QCA may initially refer the matter to mediation (s 115A of the QCA Act). Where the matter proceeds to arbitration, the QCA must make a written determination in an arbitration on access to the declared service (s 117 of the QCA Act). • Section 118 of the QCA Act sets out a list of examples of access determinations which can be made by the QCA. Section 119 of the QCA Act sets out restrictions on access determinations which can be made by the QCA. • Part 7, Division 3 of the QCA Act outlines provisions for the general conduct of arbitration hearings. In an arbitration, the QCA may make any order it considers appropriate in respect of the costs of the arbitration regarding both parties' costs and the QCA costs (s 208). <p>The scope for the QCA to determine appropriate costs in an arbitration provides a mechanism that allows the QCA to order that one or both parties to an arbitration pay the costs of the independent arbitrator. There have been no changes to the dispute resolution provisions under the QCA Act since it was initially certified. Taking all of these matters into account, the Council considers that cl 6(4)(g) is satisfied.</p> <p>Independence and transparency of the QCA</p> <p>The QCA is Queensland's independent regulator responsible for administering the Queensland rail access regime (among its other functions under the QCA Act). The independence of the QCA is protected under s 12(2)(c) of the QCA Act, which provides that, in relation to access to services, the QCA is not subject to directions from the Ministers. The Queensland rail access regime also includes a process to address any conflicts of interest that a QCA member may have in a matter under consideration, or about to be considered, by the QCA (s 219 of the QCA Act). The QCA also has investigative and information gathering powers to enable it to carry out its functions under the QCA Act.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>The transparency of the Queensland rail access regime’s regulatory arrangements is supported by the public consultation requirements contained in the regime. The QCA Act provides for public consultation in respect of:</p> <ul style="list-style-type: none"> (a) declaration recommendations (ss 79(2) and 81-83) (b) the revocation of a declaration (ss 89-91) (c) the public register of access determinations (s 127) (d) the making of an access code (s 128(2)), and (e) the approval of, and amendments to, an access undertaking (ss 144-146). <p>Accordingly, the Council’s view is that the QCA is vested with appropriate powers under the QCA Act to undertake its duties to resolve disputes in an independent and objective manner.</p> <p>UT5</p> <p>Where a dispute arises in relation to the negotiation or grant of access between Aurizon Network and a prospective access seeker it must be resolved in accordance with the dispute resolution process under Part 11 of UT5. The clauses in Part 11 of the UT5 establish a mechanism to fund and appoint an independent body to resolve a dispute.</p> <p>AU2</p> <p>Where a dispute arises in relation to the negotiation of an access agreement between Queensland Rail and a prospective access seeker, the dispute resolution process in Part 6 of AU2 will apply, unless parties agree to an</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	alternative dispute resolution process. Clauses in Part 6 of AU2 establish a mechanism to appoint and fund an independent body to resolve a dispute.
<p>Clause 6(4)(h): The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.</p>	<p>Application</p> <p>The Queensland Government submits that the regime satisfies cl 6(4)(h) as it provides for binding dispute resolution and judicial review of any decision of the QCA.</p> <p>Council’s assessment</p> <p>There have been no changes to the decision making power of the QCA regarding dispute resolution and the rights of appeal available. Considering this and the aspects of the regime noted below, the Council’s draft view is that cl 6(4)(h) is satisfied.</p> <p>Binding decisions of the QCA in dispute resolution</p> <p>Since the Council's previous consideration of the Queensland rail access regime there have been no changes to the QCA Act regarding the decision making power of the QCA. The following provisions under the QCA Act remain relevant:</p> <ul style="list-style-type: none"> • The QCA may make an access determination which includes a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA (s 118 of the QCA Act). • Parties to an access dispute are bound by an access determination (enforcement provisions set out in Part 5, Division 8 of the QCA Act).

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<ul style="list-style-type: none"> • Upon the application of a party to an access determination, the Queensland Supreme Court can make certain orders to enforce an access determination where it is satisfied that another party has engaged, is engaging, or proposes to engage in conduct constituting a contravention of the determination (s 152 of the QCA Act). • Enforcement orders that are available to the Queensland Supreme Court include the awarding of compensation for loss or damage suffered as a result of a contravention, as well as the granting of consent, interim, restraining and mandatory injunctions (ss 152 to 158A of the QCA Act). <p>Rights of appeal</p> <p>Decisions made by the QCA (including access determinations, decisions about access undertakings and rulings) are subject to judicial review in accordance with the <i>Judicial Review Act 1991</i> (Qld) (JR Act).</p> <p>Under the JR Act, any person aggrieved by a decision of the QCA may apply to the Queensland Supreme Court for a review in relation to the decision. The decision of the Queensland Supreme Court is binding.</p>
<p>Clause 6(4)(i): In deciding on the terms and conditions for access, the dispute resolution body should take into account:</p> <ul style="list-style-type: none"> (i) the owner’s legitimate business interests and investment in the facility; (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased 	<p>Application</p> <p>The Queensland Government submits that the regime satisfies cls 6(4)(i) as it provides principles of dispute resolution to guide the QCA that substantially mirror those principles set out in cl 6(4)(i).</p> <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(i).</p> <p>Incorporation of 6(4)(i) principles in the QCA Act</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?									
<p>competition in upstream or downstream markets;</p> <p>(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;</p> <p>(iv) the interests of all persons holding contracts for use of the facility;</p> <p>(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;</p> <p>(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility</p> <p>(vii) the economically efficient operation of the facility, and</p> <p>(viii) the benefit to the public from having competitive markets.</p>	<p>Sections 120 and 138(2) of the QCA Act list the matters that the QCA must consider in the making of an access determination and the approval of access undertakings. Section 137(2) sets out certain matters relating to terms of access that an access undertaking may contain.</p> <p>Table 1 below provided by the Queensland Government in its application sets out a comparison of these provisions of the QCA Act that correspond with the Clause 6 principles.</p> <p>The Council has assessed the sections of the QCA Act set out in Table 1 against the principles in cl 6(4)(i), and considers that they sufficiently reflect those principles.</p> <p style="text-align: center;">Table 1: Comparison of the QCA Act and cl 6(4)(i) principles</p> <table border="1" data-bbox="1037 715 1713 1294"> <thead> <tr> <th data-bbox="1037 715 1261 882">Clause 6(4)(i) principle</th> <th data-bbox="1267 715 1485 882">Making access determination under QCA Act</th> <th data-bbox="1491 715 1713 882">Approval of access undertaking under QCA Act</th> </tr> </thead> <tbody> <tr> <td data-bbox="1037 887 1261 1054">6(4)(i)(i) – Owner’s legitimate interests</td> <td data-bbox="1267 887 1485 1054">s 120(1)(b).</td> <td data-bbox="1491 887 1713 1054">s 138(2)(b).</td> </tr> <tr> <td data-bbox="1037 1059 1261 1294">6(4)(i)(ii) – costs to owner of providing access</td> <td data-bbox="1267 1059 1485 1294">s 120(1)(f).</td> <td data-bbox="1491 1059 1713 1294">s 138(2)(b), s 138(2)(h), s 168A and the pricing rules/principles in AU2 and UT5.</td> </tr> </tbody> </table>	Clause 6(4)(i) principle	Making access determination under QCA Act	Approval of access undertaking under QCA Act	6(4)(i)(i) – Owner’s legitimate interests	s 120(1)(b).	s 138(2)(b).	6(4)(i)(ii) – costs to owner of providing access	s 120(1)(f).	s 138(2)(b), s 138(2)(h), s 168A and the pricing rules/principles in AU2 and UT5.
Clause 6(4)(i) principle	Making access determination under QCA Act	Approval of access undertaking under QCA Act								
6(4)(i)(i) – Owner’s legitimate interests	s 120(1)(b).	s 138(2)(b).								
6(4)(i)(ii) – costs to owner of providing access	s 120(1)(f).	s 138(2)(b), s 138(2)(h), s 168A and the pricing rules/principles in AU2 and UT5.								

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?			
	6(4)(i)(iii) – value to the owner of additional investment	S 120(1)(g).	s 138(2)(h) s 137(2)(i), s 69E and s 168A.	
	6(4)(i)(iv) – interests of users with contracts	S 120(1)(c).	S 138(2)(e).	
	6(4)(i)(v) – firm and binding contractual obligations	s 119(2)(a), s 120(1)(b) and s 120(1)(c).	s 138(2)(b) and s 138(2)(e).	
	6(4)(i)(vi) – safe operation	s 120(1)(i).	s 137(2)(h).	
	6(4)(i)(vii) – economically efficient operation of the facility	s 120(1)(j) and s 69E.	s 69E and s168A and UT5 and AU2.	

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?				
		6(4)(i)(viii) – public benefit in competition	s 120(1)(d) and s 69E.	s 138(2)(d) and s 69E.	
<p>Clause 6(4)(j): The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:</p> <p>(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;</p> <p>(ii) the owner’s legitimate business interests in the facility being protected, and</p> <p>(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.</p>	<p>In some situations the needs of the access seeker can be met only by an extension of the facility’s geographic range or expansion of its capacity. These matters should be subject, in the first instance to negotiation between the parties. When parties cannot reach an agreement, however, the arbitrator should be empowered to determine, subject to the cl 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility.</p> <p>Application</p> <p>The Queensland Government submits that the regime satisfies cl 6(4)(j) of the CPA as it:</p> <ul style="list-style-type: none"> provides that the owner of a facility may be required to extend or permit the extension of a facility where it satisfies the threshold described in cl 6(4)(j) sub-cl (i) requires the owner’s legitimate interests must be taken into account in any access determination of this nature requires the terms and conditions of access must take into account the parties’ costs to the extension and the benefits to the parties resulting from the extension and, where the access undertaking is a mandatory access undertaking, the access provider cannot be made to pay the costs of extending the facility. <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(j). The reasons are set out below in the discussion of the QCA Act and the undertakings subject to the regime. The provisions regarding extensions in</p>				

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>UT5 and AU2 enhance the extent to which the Queensland rail access regime satisfies cl 6(4)(j) as both undertakings provide a mechanism to consider extensions against criteria reflective of cl 6(4)(j).</p> <p>QCA Act provisions on extensions</p> <p>The provisions of the QCA Act set out below are relevant to the requirements of cl 6(4)(j) relating to the extension of facilities.</p> <ul style="list-style-type: none"> • Section 118 of the QCA Act provides that an access determination may require the access provider to extend or permit the extension of the facility or require the access provider to permit another facility to be connected to the facility. • Section 137 of the QCA Act provides that an access undertaking may include terms relating to extending the facility. <p>Section 119(4) of the QCA Act provides that the QCA may make an access determination requiring an access provider to extend, or permit the extension of, a facility if either:</p> <p>(a) the requirement is consistent with an approved access undertaking in response to the submission of a voluntary access undertaking³⁴ and the QCA is satisfied that:</p> <ul style="list-style-type: none"> (i) the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility; and

³⁴ QCA Act, s 119 (4)(a).

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>(ii) the legitimate business interests of the owner and operator of the facility are protected;³⁵ or</p> <p>(b) the access provider is the owner or operator of the facility and the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility, the legitimate business interests of the owner are protected and that the access provider does not pay the costs of extending the facility.³⁶</p> <p>Since the Council’s previous consideration of the Queensland rail access regime, s 119 of the QCA Act was amended to allow the QCA, when making an access determination requiring an access provider to extend (or permit the extension of) a facility, to require the access provider to pay all or part of the cost of that extension. As set out above, this determination can only be made when it is consistent with a requirement imposed under a voluntary access undertaking approved by the QCA, and the QCA is satisfied about specified matters, as described in cl 6(4)(j).</p> <p>This change in the QCA Act provides further clarity on costs of extending the facility and is consistent with the principles in 6(4)(j). As such the Council’s draft view is that cl 6(4)(j) is satisfied.</p> <p>UT5</p> <p>Part 8 of UT5 provides a mechanism under which Aurizon Network may be obliged to construct or permit an expansion. The criteria that are required to be met are reflective of cl 6(4)(j).³⁷ It also includes a mechanism for</p>

³⁵ QCA Act, s 119(4)(a) and s 119(4B).

³⁶ QCA Act, s 119(4)(b) and s119(5).

³⁷ Clause 8.2.1(c) of UT5.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>funding the expansion.³⁸ Where parties cannot agree on the terms of the user funding agreement, then UT5 provides for the resolution of these disputes under Part 8.³⁹</p> <p>AU2</p> <p>AU2 provides that either Queensland rail or an access seeker can elect to fund a required extension.⁴⁰ Extensions required under the undertaking must satisfy certain conditions.⁴¹ These conditions are reflective of criteria under cl 6(4)(j). Where an access seeker notifies Queensland Rail that it is willing to fund an extension (or extension stage), it must execute a funding agreement.⁴² Where parties cannot agree on the terms of a funding agreement, AU2 provides for the resolution of these disputes by referral to the QCA under Part 6.⁴³</p>
<p>Clause 6(4)(k): If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.</p>	<p>Application</p> <p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(4)(k) principle as the regime provides mechanisms to deal with a material change in circumstances.</p> <p>Council’s assessment</p>

³⁸ Clause 8.7.1 of UT5.

³⁹ Clause 8.2.2 of UT5

⁴⁰ Clause 2.7.2 of AU2.

⁴¹ Clause 1.4.2(d) of AU2.

⁴² Clauses 1.4.1(b)(ii) and 1.4.3 of AU2.

⁴³ Clause 1.4.7 of AU2.

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>The Council's draft view is that the Queensland rail access regime satisfies the cl 6(4)(k) principle.</p> <p>Review of provisions in the QCA Act</p> <p>The Queensland rail access regime relevantly provides that:</p> <ul style="list-style-type: none"> • a declaration may be revoked where there is a material change in circumstances, such that the access criteria are no longer satisfied (Part 5, Division 2, Subdivision 5 of the QCA Act). • an access determination may be varied or revoked where there is a material change in circumstances (ss 127A to 127D of the QCA Act). • undertakings may be amended with the approval of the QCA to deal with a material change in circumstance (Part 5, Division 7, Subdivision 2 of the QCA Act). <p>Further, the standard access agreement contains terms, such as for force majeure events that deal with some material changes in circumstances.</p> <p>Where a declaration is revoked, existing contractual rights and obligations are not automatically revoked (s 95 of the QCA Act).</p>
<p>Clause 6(4)(l): The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and,</p>	<p>Clause 6(4)(l) does not mean that an access regime need allow a dispute resolution body to impede existing rights but, where a dispute resolution body can do this, it must also be empowered to consider and determine compensation, if appropriate.</p> <p>Application</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>if appropriate, determined such compensation.</p>	<p>The Queensland Government submits that the regime satisfies cl 6(4)(l) as it provides mechanisms for the consideration and award of compensation if the existing rights of an access provider or user are impeded.</p> <p>Council’s assessment</p> <p>The Council’s draft view is that the Queensland rail access regime satisfies cl 6(4)(l).</p> <p>QCA Act provisions on protecting existing rights</p> <p>Sections 119(2)(a) and 119(3) of the QCA Act provide that the QCA may not make an access determination which reduces the amount of the service able to be obtained by an access provider unless the QCA considers and, if appropriate, makes an award of compensation that is factored into the price of access.</p> <p>Section 138(2)(e) of the QCA Act provides that the QCA in approving a draft access undertaking must take into account 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.</p> <p>These provisions of the QCA Act make appropriate allowance for compensation to be required in the circumstances set out in cl 6(4)(d). Accordingly, the Council’s draft view is that cl 6(4)(d) is satisfied.</p>
<p>Clause 6(4)(o): The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.</p>	<p>An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service. Clause 6(4)(o) seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access</p> <p>Application</p> <p>The Queensland Government submits that the regime satisfies cl 6(4)(o) of the CPA as it provides for the QCA to obtain all relevant financial information and also provides protection for confidential information.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cl 6(4)(o).</p> <p>QCA Act provisions related to access to information</p> <p>The QCA Act gives the QCA information gathering powers listed below for when it is conducting investigations. Since the Council's previous consideration of the Queensland rail access regime, there have been no changes to these powers.</p> <ul style="list-style-type: none"> • The QCA may give written notice to a person requiring that they provide to the QCA a statement setting out stated information or produce stated documents to the QCA by a reasonable date (s 185 of the QCA Act). • During investigation hearings conducted by the QCA, the QCA may give written notice to a person to appear at the hearing and give evidence or produce a stated document (s 181 of the QCA Act). • A failure to comply with the notice provisions without a reasonable excuse carries a maximum penalty of 1000 penalty units or 1 year's imprisonment (ss 183–185 of the QCA Act). • When a document is produced to the QCA, the QCA may inspect and make copies of the document or take possession of the document as necessary for the investigation (section 186 of the QCA Act). <p>The QCA Act also makes provision for protecting confidential information supplied to the QCA during an investigation (s 187 of the QCA Act).</p> <p>The QCA Act also includes information gathering powers at the arbitration stage, which substantially reflect that of the investigation stage. These include that:</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
	<ul style="list-style-type: none"> • the QCA can give written notice to a person requiring stated information or documents to be produced to the QCA (s 205 of the QCA Act). • during arbitration hearings conducted by the QCA, a person may be summoned to appear before the QCA as a witness and give evidence or produce stated documents (s 200 of the QCA Act). • when a document is provided to the QCA, the QCA may inspect and make copies of the document or take possession of it while it is necessary for the arbitration (s 206 of the QCA Act). • penalties of up to 1000 penalty units or 1 year’s imprisonment apply for failures to produce information without a reasonable excuse (ss 202, 203 and 205 of the QCA Act). <p>There is also a process for the protection of confidential information that is made available during the arbitration process.</p> <p>The Council considers that these provisions give the QCA appropriate ability to gather financial information as described in cl 6(4)(o). Accordingly, the Council’s draft view is that cl 6(4)(o) is satisfied.</p>
<p>Clause 6(5)(c): A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:</p>	<p>Clause 6(5)(c) recognises that an important element of an access regime is the independent review of any access decisions. Clause 6(5)(c) provides that where merits review is provided, the review should be limited to information submitted to the original decision-maker</p> <p>Application</p> <p>The Queensland Government submits that because merits review is not provided for, the Queensland rail Access Regime’s compliance with cl 6(5)(c) is unnecessary.</p>

Competition Principles Agreement Principle /Part IIIA objective	Does the Queensland rail access regime meet the relevant CPA Principle/Part IIIA objective?
<p>Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:</p> <ul style="list-style-type: none"> (i) may request new information where it considers that it would be assisted by the introduction of such information; (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker, and <p>should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.</p>	<p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies cl 6(5)(c).</p> <p>While the Queensland rail access regime does not provide for merits review, an aggrieved party may seek judicial review of an arbitration determination in the Supreme Court of Queensland (see cl 6(4)(h) in the dispute resolution assessment above).</p>

Efficiency promoting terms and conditions of access

An effective access regime must enable outcomes that achieve the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition.

Clauses 6(4)(a)-(c),(e),(f) and (n) discussed in the negotiation framework assessment are also relevant here. Refer to the discussion above.

Clauses 6(4)(i) and 6(4)(k) discussed in the dispute resolution framework assessment are also relevant here. Refer to the discussion above.

Clause 6(5)(a)-(b): A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

(b) Regulated access prices should be set so as to:

(i) generate expected revenue for a regulated service or services that is at least sufficient to

Clause 6(5)(a)

Application

The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(5)(a) principle as the regime includes an objects clause that provides a clear statement that the purpose of regulating third party access is to promote the economically efficient operation of, use of and investment in infrastructure, with the effect of promoting effective competition in upstream and downstream markets.

Council's assessment

The Council's draft view is that the objects clause in s 69E of the QCA Act satisfies cl 6(5)(a). Section 69E of the QCA Act states that the object of Part 5 of the QCA Act 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.

Clause 6(5)(b)

Application

<p>meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;</p> <p>(ii) allow multi-part pricing and price discrimination when it aids efficiency;</p> <p>(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and</p> <p>(iv) provide incentives to reduce costs or otherwise improve productivity.</p>	<p>The Queensland Government submits that the Queensland rail access regime satisfies the cl 6(5)(b) principle as the regime reflects the pricing principles as required by cl 6(5)(b).</p> <p>Council's assessment</p> <p>The Council's draft view is that the Queensland rail access regime satisfies the cl 6(5)(b) principle, as the pricing principles in s 168A of the QCA Act mirror the principles in cl 6(5)(b).</p> <p>The QCA must consider the pricing principles when it makes an access determination and when it approves access undertakings for declared services (refer to ss 120 and 138 of the QCA Act).</p> <p>The pricing principles are set out in s 168A of the QCA Act, namely that the price of access to both a declared or undeclared service should:</p> <ul style="list-style-type: none"> (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 (b) allow for multi-part pricing and price discrimination when it aids efficiency (c) not allow a related service provider to set terms and conditions that discriminate in favour of the downstream operations of the service provider (or a related body corporate), 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.
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Part IIIA Objectives

Part IIIA objective

How does the Queensland rail access regime have regard to the objectives of Part IIIA of the *Competition and Consumer Act 2010*?

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets

The Queensland Government submits that the Queensland rail access regime reflects the efficiency objectives of Part IIIA through s 69E of the QCA Act. The Clause 6 principles provide the framework for a consistent approach to access regulation, and the consistent application of the Clause 6 principles by the Council and the Minister will satisfy the object of s 44AA(b).

Council's assessment

The objects clause in s 69E of the QCA Act states that the object of the Queensland rail access regime 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 Council acknowledges that the stated object of the regime in s 69E of the QCA Act substantially reflects the object of Part IIIA of the CCA. However, the Council does not consider the objects clause in s 69E of the QCA Act in isolation from the regime itself. Rather, the Council considers whether the intent and operation of the Regime as a whole, guided by its stated object, is such that it accords with the objects of Part IIIA.

As well as aligning the broad objectives of the regime with those applicable in Part IIIA, importantly these objectives also inform and guide the QCA's application of the regime.

In the Council's draft view the assessment of the effectiveness of an access regime against the objects of Part IIIA must be a pragmatic one. The CPA anticipates that there will be a range of approaches for addressing third party access issues.

Part IIIA objective	How does the Queensland rail access regime have regard to the objectives of Part IIIA of the <i>Competition and Consumer Act 2010</i> ?
	<p>In this regard, the Council refers to its discussion above in which it concludes that the regime satisfactorily incorporates efficiency promoting terms and conditions of access.</p>
<p>(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.</p>	<p>Section 44AA(b) of Part IIIA also requires the Council to give consideration to the objective of providing a framework and guiding principles to encourage a consistent approach to access regulation.</p> <p>Application</p> <p>The Queensland Government submits that the object contained in s 44AA(b) of the CCA is achieved through the structure of the CCA and the Clause 6 principles themselves. The fundamental purpose of the Clause 6 principles is to foster a consistent approach to access regulation between the Commonwealth and State access regimes. In practice, this is achieved through the effective and consistent application of the Clause 6 principles by the Council and the Commonwealth Minister.</p> <p>Council's assessment</p> <p>In deciding whether an access regime submitted to it is effective, the Council must assess it against the relevant principles set out in the CPA. Therefore all access regimes the Council have recommended as effective should be consistent with these principles. Consequently, there should be a consistent approach to access regulation across each industry that the Council recommends is an effective access regime. The Council regards that the Queensland rail access regime substantially reflects object (b) of Part IIIA of the CCA.</p>

Appendix 1: Aurizon CQC diagram



Source: Aurizon Network, 2020 Sustainability Report, p. 5.

Appendix 2: Queensland Rail systems diagram



Source: Queensland Rail website

Appendix 3: Summary of Submissions

1. Herbert Smith Freehills made its submission on behalf of a number of companies that hold coal-producing assets in Central Queensland (**the Producers**). The Producers support the Queensland government's application to extend the certification of the Queensland rail access regime, particularly as it relates to Aurizon Network's rail access undertaking (**UT5**). The Producers contend this aspect of the regime is currently an effective and appropriate access regime; and will continue to be so until 8 September 2040.
2. The Producers submit that the legal requirements for certification are satisfied, including that the network services are significant infrastructure; that the network would not be economically feasible to duplicate; and that the network occupies a strategic position in the service delivery chain. The Producers also consider that these regimes provide for appropriate negotiation processes as required by the Clause 6 principles of the CPA.
3. The Producers submit that the Council should recommend that the certification of the Queensland rail access regime, inclusive of UT5, be extended for a further 20 year period until 8 September 2040.
4. Aurizon Network, in its submission, expressed support for the application made by the Queensland Government for the extension of the certification for an additional 20 year period, and the submission made by Herbert Smith Freehills on behalf of the Producers.