GLENCORE

December 2015

Submission on the Draft Decision on the Queensland Rail 2015 Draft Access Undertaking

1 Background

Glencore's copper, zinc and lead businesses are one of the largest end users by volume of the Queensland Rail (***QR***) network on the Mount Isa – Townsville line (the ***Mount Isa line***).

Glencore made submissions to the Queensland Competition Authority (***QCA***) in June 2015 in respect of the QR 2015 Draft Access Undertaking (***2015 DAU***) and thanks the QCA for the opportunity to make further submissions in response to the QCA's draft decision of October 2015 (***Draft Decision***).

2 Executive Summary

Glencore acknowledges that the Draft Decision has returned much of the balance that was missing in the 2015 DAU, thereby addressing a significant number of the concerns raised by Glencore in its June 2015 submissions. Except as noted in this submission, Glencore is supportive of all parts of the Draft Decision, and therefore supports the QCA's draft decision to refuse to approve the 2015 DAU.

Glencore particularly notes its support for:

(a) separate reporting in respect of the Mount Isa line and an obligation to develop a new Mount Isa line Master Plan (as additional transparency should assist in future access negotiations and, where necessary, future access disputes);

(b) not prescribing an asset valuation methodology for non-reference tariff systems (noting the diverse nature of QR's network, the UNIQUEST report's conclusions that non-DORC methodologies satisfy the QCA's statutory requirements and Glencore's view that DORC is not appropriate to the aging and under maintained Mount Isa line);

(c) the obligations on QR in relation to consulting and minimising the effect of scheduling and other matters on through-running trains (noting Glencore already utilises a through-running train service for transportation of coal sourced from a mine or mines, in the Aurizon central Queensland coal region network, to its Mount Isa operations on QR's Mount Isa line; and

(d) rebalancing of the terms of the standard access agreements, its tripartite structure and its extension to bulk mineral services.

This submission is focused on those issues requiring further amendment for the 2015 DAU to be appropriate to approve under the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***).

3 Pricing

Services provided by QR on the Mount Isa line are not subject to a QCA approved reference tariff, with pricing individually negotiated with each user of the Mount Isa Line. Glencore has raised major concerns in previous submissions about the lack of transparency in relation to QR's pricing, and the excessively high prices that QR is able to achieve due to its monopoly power, a ceiling limit that cannot realistically be calculated and the timing likely to be taken in an access dispute challenging proposed pricing.

3.1 Renewal pricing (non-reference tariff services)

The Draft Decision seeks to require (through clause 3.3(f)) that for 'Renewals' the methodology, rates and other inputs for calculating Access Charges for the proposed train services in the renewed Access Agreement will be the same as the methodology, rates and other inputs for calculating Access Charges in the expiring Access Agreement, other than to reasonably reflect, on a unit rate basis, over the term of the renewed Access Agreement, differences in the cost or risk to QR of providing access to the proposed train service under the renewed Access Agreement.

As noted in our June 2015 submissions, Glencore considers it is possible that an appropriate control on QR's market power could occur by way of a reasonably calculated cap. Glencore has serious concerns with the approach of locking in the existing methodology, rates and inputs – when each of those:

(a) are not transparent to Glencore (or the QCA) – as they were negotiated in an environment where, QR did not have to justify how they were formulated;

(b) were derived from negotiations in which QR held substantial market power (as discussed above) and was not subject to any appropriate restrictions on pricing; and

(c) are currently often reflective of short term arrangements – where particular pricing outcomes (including higher prices) have been sought by QR on the basis of the contracted access rights only being extended for a shorter period, making them an inappropriate basis from which to develop future long term access pricing.

Glencore appreciates the difficulties involved in determining how to provide appropriate pricing regulation for non-reference services. However, difficulty does not justify adopting a simple but flawed regime.

Glencore submits that renewal pricing for non-reference services should be regulated as follows:

(d) The 'existing inputs' for clause 3.3(f) reflect the existing methodology, rates and other inputs from the last long term access arrangement (assuming such a long term arrangement has expired within the last 10 years);

(e) QR being required to disclose its existing methodology, rates and other inputs for calculating the existing pricing provided under the existing Access Agreement, including if assumptions were made (such as in relation to maintenance spending or capital investment) the extent to which those assumptions ended up being correct;

(f) The rate of return parameters forming part of the previous methodology being adjusted to reflect the WACC parameters applying under the new undertaking (rather than replicating the rate of return parameters which formed part of the 'existing inputs'); and

(g) It being made expressly clear, that the resulting price is a cap and if the access holder seeking to renew considers that pricing remains inappropriate, it is open to it to bring an access dispute in the usual manner.

To give some view of the magnitude of this issue, Glencore estimates it is currently paying access charges in the vicinity of [redacted] when on a roll forward from previous long term pricing from 2013 it should be paying approximately [redacted] Glencore would welcome the opportunity to discuss renewal pricing further with the QCA and potentially make a further submission on this issue.

3.2 Take or pay

Glencore is concerned that the QCA's decision not to predetermine a cap on the proportion of charges for non-reference train services that should be take or pay in nature will result in QR simply insisting on 100% take or pay arrangements. Access Seekers have no options other than to accept it or bring access disputes (with disputes often not being realistic alternatives due to the cost or time delays involved). 100% take or pay arrangements are not appropriate given that at least a proportion of the charges will be attributable to variable costs. At a very minimum, the QCA should impose a cap on take or pay arrangements for non-reference services which reflects the long run proportion of costs which are truly fixed in nature.

4 Access Renewal

Glencore acknowledges that clause 2.9.3(b) of the 2015 DAU is intended to provide a degree of protection for bulk mineral services (which it continues to strongly support). However those protections remain inadequate for access holders with substantial sunk costs in mining and processing operations.

4.1 Intermodal operations

The Draft Decision rejected Glencore's previous submissions that the renewal rights should extend to intermodal services, stating that 'stakeholders did not provide any compelling evidence of the asset stranding risks that they would be exposed to if those other train services' access rights were not renewed'. Glencore admits to being confused by that finding. Glencore acquires intermodal rail services to transport key inputs (such as fuel and consumables) to its mining and processing operations. If certainty regarding continuing transport of these mining inputs is not provided, that also creates asset stranding risks. Given the distances involved, there is no other economically feasible mode of transport for the full range of inputs involved which would mitigate the asset stranding risks.

4.2 Other requirements to qualify as a 'Renewal'

Glencore's principal concern regarding the protection for renewals is that clause 2.9.3(b) of the 2015 DAU is unduly narrow in its application, so that the vast majority of what would commercially be thought about as 'renewals' will not qualify for the protection of that clause.

Clearly it is necessary to change 'may' to 'will' as the QCA proposes to make it compulsory. However, the protection for renewals by customers with substantial sunk costs is being undermined by the restrictive definition of what constitutes a Renewal. 'Renewal' is defined to be limited to a renewal of access rights that are '*equivalent* to the relevant Access Holder's Access Rights immediately prior to their expiry (including with the same destination and origin)'. The existing access seeker that wishes to renew an access agreement has no flexibility at all for even small changes in volume, train service description (such as an operator using a different rolling stock configuration) or origin (say changing from Cloncurry to Mount Isa). That narrow definition is being proposed in a commercial context where access holders, such as Glencore, currently face significant uncertainty in relation to the commodity volumes for which they may require access to QR's rail network beyond the term of existing access agreements.

Glencore submits that to qualify as a 'Renewal' it should be sufficient if:

(a) the renewal relates to the same class of commodity as the existing access, (e.g. bulk minerals and metals should be treated as the same class for these purposes); and

(b) volumes under the renewal are:

  (i) equal to or less than the tonnage under the existing access agreement (there is no reason the protection should only apply to exactly the same number of train services); or

  (ii) where sufficient capacity exists on the relevant parts of QR's network, between 100% and 125% of the tonnage under the existing access agreement (acknowledging the prohibition on contracting in advance of knowing whether a renewal right should be exercised in clause 2.9.3(c) will only apply to the existing contracted access rights);

(c) either the origin or destination is the same, and the other is either the same or sufficiently similar that the change is not likely to adversely impact on other Access Holders or Access Seekers; and

(d) the Access Rights are otherwise substantially equivalent to the existing Access Rights.

Glencore considers that would provide the appropriate balance between protecting access holders from substantial asset stranding risk, and allowing QR to contract available capacity to other access seekers.

5 Standard Access Agreement (*SAA*)

5.1 Key Performance Indicators (*KPIs*)

The QCA has detailed a number of KPIs which must be included in the SAA. Glencore acknowledges that these KPIs will improve transparency and provide access holders with essential information on the performance levels of QR.

However, Glencore is concerned that reporting KPIs alone will not incentivise QR's performance, as there are no financial consequences for QR's failure to perform its obligations under the SAA. This is reinforced by QR's position of seeking 100% take or pay which significantly blunts QR's incentives to ensure customers are provided with their contract access rights.

Glencore notes that under clause 6.7 of the SAA the QCA has left it open to the parties to agree performance levels for inclusion in Schedule 5, which may involve 'financially based incentives and sanctions'. However, Glencore considers that it is inappropriate to leave these performance levels to be agreed by the parties, because as a monopoly provider, QR is highly unlikely to agree to a performance regime under which it is penalised for its own poor performance. In the event that the parties are unable to agree the performance regime, recourse to the dispute resolutions of the SAA is expressly precluded by clause 6.7(e).

If the approach of leaving matters to negotiation is adopted then clause 6.7(e) must be deleted. However, Glencore notes that recourse to the dispute resolution provisions of the SAA is a very inefficient way of resolving this type of issue, and that the preferred approach is for Schedule 5 of the SAA to be fully settled and approved by the QCA along with the remainder of the 2015 DAU.

However, in the interests of progressing the approval of the 2015 DAU in a timely way, Glencore submits that the Standard Access Agreement should provide for a KPI regime with financial outcomes as set out it in the access undertaking from time to time. That should then be coupled with QR being required to submit a performance regime for approval by the QCA within 3 months of the approval of the remainder of the 2015 DAU (and the QCA ultimately having power to determine an appropriate KPI regime if the regime proposed by QR is not appropriate).

5.2 Other issues in the SAA

Glencore is also concerned about the following issues in the SAA (after the amendments proposed by the QCA in the Draft Decision are taken into account):

SAA Clause	Issue	Suggested refinement
2.1	Scope of 'Access Rights'	The scope of what is contracted as Access Rights is currently defined too narrowly, creating uncertainty about whether QR will contract other related ancillary services which are necessary for normal operations. See the discussion of the definition of Access in section 10 of this submission below for more detail.
7.1	Maintenance	Glencore supports each of the improvements in the maintenance standard required. However, Glencore continues to consider it is appropriate to require maintenance of the network in accordance with a general threshold like good operating and maintenance practice, and that this is not onerous, but rather the only way future operation and maintenance costs and capital investment needs will be kept efficient.
13.6	Threshold for liability for non-provision of access	Clause 13.6(d) should be deleted. It is not appropriate for QR to avoid liability for non-provision of access unless it meets a specified threshold of 10%. Clause 13 already contains very significant protections for QR against liability – and it is not appropriate to simply pass the risk of QR non-performance to the party least able to control that risk (the access holder).
15.10(a)	Reference to 'substance or things' to be removed.	It is not at all clear what these substances are supposed to be. If QR has a particular concern with a substance of some kind being left on the network that should be a matter for negotiation in an individual access agreement – not a standardised provision which introduces significant uncertainty about what it covers.
21.2	Relinquishment Fee	It appears to Glencore that the previous position of refunding of all or a proportion of relinquishment fees which had been paid where QR subsequently contracts access rights which they would have otherwise been unable to contract but for the relinquishment has been removed. That should clearly be included as it encourages

		appropriate relinquishment to allow efficient use of the network and removes the potential for unjustified windfall gains to QR in the event of such recontracting.

6 Disclosure to Access Seekers (non-reference services)

Glencore strongly supports the reporting measures put in place by the QCA for systems without reference tariffs (such as the Mount Isa line), which reflect the requirements of the QCA Act and will hopefully enable access seekers/holders and QR to engage in more productive negotiations regarding new agreements and/or renewals. However, it should not be assumed that adopting the minimalist obligations required by statute is appropriate, given the inadequacy of what QR has provided in purported compliance with section 101 QCA in recent access negotiations.

Accordingly Glencore submits the 2015 DAU should also provide for QR to disclose:

(a) detailed information about how the Access Charges for the requested Access Rights have been calculated (including values of all inputs into any formula or methodology utilised, and where any price is said to be 'market based', how QR has determined the 'market price'). If the QCA was to implement its proposal for renewal access pricing, the access seeker would clearly need all of this to be disclosed, in addition to any differences between the proposed methodology and the methodology used to calculate the existing tariff for the services to be renewed;

(b) information about the aggregate current and projected future revenue streams arising from the relevant parts of the network (i.e. for Glencore services, the Mount Isa Line); and

(c) where information is provided about future matters (e.g. escalations, forecasts or estimates of future costs or revenue), the assumptions relied on and the basis for those assumptions.

Glencore continues to consider that the QCA should be given a clear power in the 2015 DAU to direct greater disclosure by QR where the QCA considers that disclosures made to an access seeker do not fully comply with these requirements, as information asymmetry is one of the largest threats to a negotiate-arbitrate model of regulating access negotiations.

7 Investment Framework, Planning and Coordination

The amendments to the 2015 DAU required by the QCA alleviate to some extent Glencore's concerns regarding the framework for negotiation of a network extension. However, the drafting of clause 1.4.2 and Schedule I still fall short of providing certainty regarding the circumstances in which Glencore (or another user) can require an extension. Schedule I gives QR a significant amount of discretion, and should be made mandatory in nature, with criteria to be satisfied being objective in nature. The current approach provides far too much scope for QR to frustrate access seekers seeking to progress an Extension of QR's network and/or to provide user funding for such an Extension. For non-reference services this can be a material issue, as delay provides the opportunity to seek a higher price for access.

Other issues the QCA should consider further are that:

(a) the criteria that need to be satisfied for an Extension to proceed are far better suited to an Extension being constructed or commissioned than the earlier study stages of an Extension;

(b) the 'Extension Costs' to be funded need to more clearly exclude any costs which would have been incurred by QR irrespective of whether the Extension proceeded; and

(c) it should not be open to QR to dispute whether a SUFA should be required where requested by an access seeker under clause 2.9.4(b).

8 Other lesser issues

In addition to the matters raised above, Glencore notes below a number of other lesser refinements that it suggests be adopted:

QCA Decision	Issue	Suggested refinement
1.5	Review during the Term	Review provision modelled on DBCT access undertaking wording to be inserted to ensure that the QCA has a way to deal with significant inequity or unfairness that was not anticipated. Glencore also considers it would be appropriate for the QCA to be able to require QR to submit appropriate amendments where part of the network was to be privatised, as the undertaking remains (particularly for non-reference services) inappropriate if it was to apply to a private owner.
2.1.1	Information to be provided by an End User Access Seeker	End User Access Seekers should not have to provide information that will only be known to haulage operators (e.g. sectional run times, dwell times and requirements for short term storage in 5.1, shunting/dwell times in 5.2(d) of Schedule B), including for renewals (so that the references to clause 5 in clause 8 will also need amending).
-	Definition of Useable Schedule Time	For the concept of QR being required to seek an 'Alternative Schedule Time' for an access holder adversely impacted by planning modifications to be effected, the definition of 'Useable Schedule Time' (which is referred to in the definition of 'Alternative Schedule Time') needs to be a time that the operator is able to utilise without incurring material additional costs and which is not materially disruptive to the end user's timing needs for receiving the product to be delivered.
-	Definition of Access	The definition of Access appears to be more limited than it is under the current access undertaking. Glencore considers it should be clarified to clearly include other ancillary aspects of normal access rights such as: • train queuing, staging, dwelling or marshalling related to mainline running; • shunting to the extent ordinarily required in connection with mainline running; • use of the network while loading and unloading of a train is conducted; • access to walkways adjacent to the network and crew changeover points connected to the network; and • entry upon land owned/leased by QR or to which QR has authority to authorise access, to the extent it is incidental and essential to use of the network.

9 Conclusions

As indicated in this submission, Glencore is generally supportive of the Draft Decision and supports the QCA's proposed decision to refuse to approve the 2015 DAU.

In order for the 2015 DAU to be appropriate to approve, in addition to the changes proposed by the QCA it would also be necessary to make the following changes outlined in this submission:

(a) introduce greater flexibility in relation to the requirement to qualify as a 'Renewal';

(b) increase the rigour of the renewal pricing regime – so that it is not such a direct adoption of the existing methodologies;

(c) prescribe a cap on the proportion of charges which can be take or pay for non-reference services;

(d) refining aspects of the Standard Access Agreement;

(e) increasing the level of disclosure required by QR to Access Seekers in access negotiations; and

(f) increasing the robustness of the investment framework.

Glencore looks forward to these points being duly considered by the QCA in the preparation of its final decision on the 2015 DAU.