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Frank Coldwell
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Dear Frank

QCA Powers in response to WIRP Access Conditions

1 Background

We understand that:

- (a) Glencore and a number of other access holders (the **WIRP Users**) are parties to a Wiggins Island Rail Project Deed (**WIRP Deed**) under which access conditions are imposed on the WIRP Users including the payment of the 'WIRP Fee';
- (b) on 25 May 2012, the Queensland Competition Authority (**QCA**) made a final decision to approve proposed access conditions in respect of the Wiggins Island Rail Project (stage 1) in accordance with the then-current access undertaking (**UT3**); and
- (c) the QCA is currently considering Aurizon Network's proposed replacement draft access undertaking (**UT4**).

You have sought our advice as to the QCA's powers in relation to the WIRP Fees payable under the WIRP Deed in the context of the past approval under UT3 of the WIRP Deed access conditions. Specifically, you have asked us to consider whether the QCA has the power to set the reference tariffs payable by WIRP Users under UT4 by applying the WIRP Fees as a discount to the reference tariffs that would otherwise apply to the WIRP Users.

2 Requirements of the QCA Act

2.1 A new consideration of the merits

Under section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**):

The authority may approve a draft access undertaking only if it considers it appropriate to do so

It is clear from section 138(2) QCA Act that the QCA is required to exercise its discretion and judgement to determine whether the draft access undertaking under consideration (i.e. UT4) is appropriate *on its own merits*.

The reference tariffs form part of that decision. The QCA is only empowered to approve the UT4 draft access undertaking if it considers that the undertaking as a whole (including the proposed reference tariffs) is appropriate.

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The QCA's discretion in relation to whether UT4 is appropriate is not in any way legally fettered by decisions made by the QCA in the past under past access undertakings (including UT3).

To the extent past decisions under UT3 are considered relevant, the QCA may, of course, have regard to them (see section 138(2)(h) QCA Act). Even if the QCA did, however, consider such a decision relevant, it would only be *one* of the factors to have regard to, and would not be determinative (or required to be given any greater weight than other factors considered by the QCA).

In addition, we note that the criteria applied under UT3 for approving the WIRP Deed access conditions are different to the criteria for approving an access undertaking under section 138(2) QCA Act. This means that such that the earlier decision is not reasonably comparable to the decision the QCA must now make about appropriateness.

2.2 The UT3 WIRP access conditions approval was not a binding ruling

The clear meaning of section 138(2) QCA Act has been reinforced by the inclusion of a specific mechanism in the QCA Act (see the rulings powers in Part 5 Division 7A) under which the QCA may bind itself in respect of future decisions regarding draft access undertakings.

In particular, under section 138(3)(b) the QCA may only approve a draft access undertaking if:

it is satisfied the undertaking is not inconsistent with a ruling relating to the service that is in effect under division 7A.

The presence of a very specific regime under which the QCA can bind itself in advance of considering an access undertaking under the QCA Act clearly indicates that the legislative intention of the QCA Act is for the QCA to not otherwise be bound by its previous decisions.

That regime was introduced in 2008 by the *Queensland Competition Authority Amendment Act 2008* (Qld), well before the consideration under UT3 of the WIRP Deed access conditions.

The request submitted to the QCA by Aurizon Network for approval of the WIRP Deed access conditions was not an application for a binding ruling. There continues to be no binding ruling on this point, as no subsequent binding ruling applications have been made to the QCA by Aurizon Network in respect of the WIRP access conditions.

3 Conclusions

It follows from the above analysis that:

- (a) the QCA is not bound, in its assessment of UT4, by the outcome of any decision it made under UT3 in respect of the WIRP Deed access conditions; and
- (b) whether the reference tariffs of WIRP Users should be set in the way proposed is a matter that is wholly within the QCA's discretion in relation to determining whether UT4 (including the proposed reference tariffs) is appropriate and can therefore be approved under section 138 QCA Act.

Yours sincerely



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