

# Queensland Competition Authority

Final decision

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## Aurizon Network's Amended 2014 draft access undertaking

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October 2016

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## OVERVIEW

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### Aurizon Network's Amended 2014 DAU

On 7 July 2016, Aurizon Network submitted an amended 2014 draft access undertaking ('Amended 2014 DAU') to the QCA under section 136 of the *Queensland Competition Authority Act 1997* (QCA Act). The Amended 2014 DAU was provided in response to the QCA's final decision in relation to Aurizon Network's 2014 draft access undertaking (2014 DAU) that was published on 28 April 2016 (April 2016 Decision).

Aurizon Network said that it developed the Amended 2014 DAU with the intention of aligning with the policy positions outlined in the QCA's April 2016 Decision. Aurizon Network acknowledged that it has proposed changes within the Amended 2014 DAU to clarify drafting, address workability issues, or achieve alignment with the QCA's April 2016 Decision.

### Stakeholder submissions in response to Aurizon Network's Amended 2014 DAU

The QCA sought stakeholder comments on Aurizon Network's Amended 2014 DAU and received five submissions by the due date of 29 July 2016. Submissions were received from the Queensland Resources Council (QRC), Asciano, Glencore, Aurizon Operations and BMA.

The QCA considered the Amended 2014 DAU afresh. However, given that the Amended 2014 DAU incorporates many of the principles, drafting and policy intent of our April 2016 Decision and that the QCA extensively and comprehensively canvassed these, or very similar, issues in reaching that decision, the draft decision focused primarily on:

- whether the Amended 2014 DAU is consistent with the policy intent of our April 2016 Decision, particularly where Aurizon Network has proposed alternative drafting; and
- new issues identified in stakeholder submissions that have not been considered previously by the QCA.

### Stakeholder submissions in response to the QCA draft decision on the Amended 2014 DAU

On 1 September 2016, we released a draft decision proposing to approve Aurizon Network's Amended 2014 DAU. We received submissions from Aurizon Network, BMA, Glencore and the QRC in response to our draft decision.

### QCA's assessment process

Section 136(4) of the QCA Act requires the QCA to consider the Amended 2014 DAU and either approve or refuse to approve it. In doing so, the QCA may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the factors set out in section 138(2) of the QCA Act. We identified the QCA's approach to section 138(2) in the April 2016 Decision.

### Final decision on the Amended 2014 DAU

The QCA has made this final decision after giving due consideration to stakeholder submissions received and having regard to each of the section 138(2) factors.

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# 1 QCA ASSESSMENT OF THE AMENDED 2014 DAU

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## 1.1 Aurizon Network proposal

Aurizon Network said changes have been made to the 2014 DAU to:

*address issues of drafting, clarity, workability and alignment with the text of the QCA's Final Decision. In making these changes, Aurizon Network has been careful to ensure that it has not departed from the policy position set out in the QCA's Final Decision.<sup>1</sup>*

Aurizon Network provided explanatory notes outlining the reasons for changes incorporated into the Amended 2014 DAU in comparison to the April 2016 Decision.<sup>2</sup>

The Amended 2014 DAU also includes corrections to typographical or transpositional errors contained in the April 2016 Decision. Minor adjustments have also been made to the reference tariffs, as outlined in the explanatory notes provided by Aurizon Network.

## 1.2 Overview of stakeholder submissions on the Amended 2014 DAU

Stakeholder submissions that expressed support for approval of the Amended 2014 DAU essentially focused on particular aspects of the drafting, including:

- seeking clarification that a particular change made by Aurizon Network is consistent with the policy intent of the April 2016 Decision
- raising 'workability' issues with particular clauses
- indicating parts of the Amended 2014 DAU which should be re-examined as part of the next regulatory period assessment process.

We also noted the QRC's submission indicates that agreement has been reached with Aurizon Network to make particular amendments to the DAU, which would be made through a draft amending access undertaking (DAAU) in the event the Amended 2014 DAU is approved.

In contrast, Glencore opposed the approval of the Amended 2014 DAU, specifically in respect of the treatment of certain pricing matters for the Wiggins Island Rail Project (WIRP) and the application of access conditions applying to WIRP Users that were approved by the QCA in 2012. Glencore indicated it otherwise supports the QRC's submission (except to the extent that the QRC supported approval of the Amended 2014 DAU).

## 1.3 Draft decision

We considered the Amended 2014 DAU afresh. Having considered stakeholder submissions and having regard to each of the section 138(2) factors affecting our consideration whether the approval of that draft access undertaking is appropriate, our draft decision was to approve the Amended 2014 DAU.

We noted that the Amended 2014 DAU is a product of an extensive and comprehensive consultation process involving interested parties over a substantial period of time during which time the QCA's policy intent has been formed and articulated in various decisions, including:

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<sup>1</sup> Aurizon Network, sub. no. 1: 8.

<sup>2</sup> Aurizon Network, sub. no. 1.

- Draft Decision on Maximum Allowable Revenue (October 2014)
- the Initial Draft Decision (January 2015)
- the WIRP Draft Decision (July 2015)
- the Consolidated Draft Decision (December 2015)
- April 2016 Decision (April 2016).

We did not re-state the QCA's policy intent in the August 2016 draft decision but instead referred interested parties to our April 2016 Decision for our policy intent and analysis of the 2014 DAU.

In our April 2016 Decision, we identified the way in which we considered it appropriate that the 2014 DAU should be amended with regard to that policy intent and our analysis. To the extent that Aurizon Network has adopted our proposed drafting, we consider that drafting remains appropriate and we refer to the analysis supporting our 2016 Decision.

Aurizon Network does not have a statutory obligation to submit the Amended 2014 DAU to contain all of the amendments that we identified in our April 2016 Decision. The Amended 2014 DAU submitted by Aurizon Network continues to be a draft access undertaking that has been submitted voluntarily by Aurizon Network. To the extent that Aurizon Network has not adopted our proposed drafting, we considered the implications of the different drafting in light of our policy intent and analysis as outlined in our April 2016 Decision, noting this policy intent and analysis expressed our considered views on the application of each of the section 138(2) factors.

Ultimately, we considered the Amended 2014 DAU is consistent with the way in which the QCA considered it appropriate for the 2014 DAU to be amended, as set out in our April 2016 Decision. Aurizon Network proposed some amendments to the DAU drafting that appropriately reflect the relevant policy intent and underlying analysis set out in our April 2016 Decision. Having regard to each of the factors set out in section 138(2), we considered that the Amended 2014 DAU is appropriate for us to approve.

Our draft decision was to not accept Glencore's submission in respect of access conditions and pricing matters for WIRP. We also addressed specific clauses of the Amended 2014 DAU that were raised by QRC, Asciano, Aurizon Operations and BMA.

### Overview of stakeholder submissions on the draft decision

Glencore reiterated its proposal that the WIRP reference tariffs should be reduced to reflect the return Aurizon Network receives from the WIRP fee.

Aurizon Network agreed with the QCA's draft decision in respect of Glencore's proposal. Aurizon Network said that Glencore's proposal, if acted on, would over-ride a long term commercial agreement struck between sophisticated counterparties and previously approved by the QCA.

Other stakeholders (QRC, Pacific National and BMA) supported the approval of the 2014 Amended DAU.

### QCA analysis and final decision

Our final decision is to not accept Glencore's proposal in regard to the WIRP reference tariffs.

### Final decision

- (1) After considering the Amended 2014 DAU, and having considered stakeholder submissions, our final decision is to approve Aurizon Network's Amended 2014 DAU.**

## 2 PROPOSAL TO REVIEW WIRP ACCESS CONDITIONS AND WIRP PRICING

### 2.1 Background

Our 2016 April Decision set out in detail the background to WIRP, so we do not repeat that background again for the purposes of this decision. Glencore's submission on the Amended 2014 DAU raised concerns regarding the manner in which WIRP access conditions that were approved by QCA under UT3 should be considered by the QCA in the context of the QCA's decision whether to approve UT4, as further explained below.

The table below outlines the processes leading up to the QCA's 2012 approval of the WIRP access conditions.

**Table 1. WIRP Access Conditions - Background**

<i>Date / Clause</i>	<i>Details</i>
15 April 2010	Aurizon Network (formerly known as QR Network) submitted a voluntary draft access undertaking (the April 2010 DAU).
1 October 2010	The QCA released its final decision approving the 2010 DAU, thereby approving the operation of the 2010 Undertaking. <sup>3</sup> Relevantly, the approved 2010 Undertaking provided for QCA approval for proposed access conditions intended to apply to provision of access which requires a significant investment to expand rail infrastructure. <sup>4</sup>
Late 2010	Aurizon Network was in discussions with stage 1 users regarding the Wiggins Island Rail Project (WIRP Users).
Between 2011 and 2012	During this period WIRP Users negotiated with Aurizon Network. The conditions that Aurizon Network negotiated in order to proceed with the funding and construction of WIRP were agreed with all parties and submitted to the QCA pursuant to the 2010 Undertaking framework. QCA then considered proposed access conditions for the WIRP Users within the 2010 Undertaking framework; this included the submission of proposed access conditions (including an access conditions report), consultation and submissions from interested parties, and ultimately a QCA assessment process. <sup>5</sup>
15 September 2011	Aurizon Network formally submitted the access conditions for the QCA's approval. The detailed terms of the agreed access conditions were contained in individual agreements (WIRP deeds) as between Aurizon Network and each of the WIRP users. The primary access condition being a WIRP fee, a monthly payment made to Aurizon Network in addition to revenue from access.
25 May 2012	The QCA approved Aurizon Networks' proposed access conditions for WIRP users (WIRP access conditions).

<sup>3</sup> QCA, 2010.

<sup>4</sup> Refer to the 2010 Undertaking, clause 6.5 "Structure of Access Charges and Access Conditions" for detail as the processes, information requirements and approval processes.

<sup>5</sup> Further details as to the QCA's Decision 2012 approval of the access conditions for the Wiggins Island Rail Project (QCA's 2012 Decision) are at <http://www.qca.org.au/getattachment/b32f2297-32fc-4433-84c8-9ed954d23031/QCA-Final-Decision-Access-Conditions.aspx>

## 2.2 Glencore's July 2016 submission on the Amended 2014 DAU

Glencore supported the QRC submission, except to the extent that the QRC supported approval of the Amended 2014 DAU. Glencore's submission related to the Wiggins Island Rail Project (WIRP), specifically relating to access conditions applying to WIRP Users that were approved by the QCA in 2012 and the proposed WIRP pricing arrangements.

Glencore's submission essentially focused on a number of key threshold contentions, namely that:

- (a) the QCA should subject the WIRP access conditions to a new review as part of UT4, as no approval of the imposition of such access conditions has been given for the UT4 regulatory period
- (b) the QCA's 2012 Decision to approve the WIRP access conditions was made under the provisions of the 2010 Undertaking with limited merits review based on the circumstances prevailing at the time
- (c) circumstances are now different compared to when the WIRP access conditions were approved by the QCA in 2012 under UT3<sup>6</sup>
- (d) the QCA's 2012 Decision to approve the WIRP access conditions is not binding on the QCA in terms of the UT4 regulatory period
- (e) the WIRP Deed is itself an access agreement for the purposes of the UT4 undertaking and the WIRP fee is an access charge, as such any revenue should be used to lower reference tariffs (Glencore proposed that WIRP reference tariffs should be lowered for WIRP users)
- (f) by reference to the section 138(2) factors of the QCA Act it would not be appropriate to approve the Amended 2014 DAU without the adjustments to the reference tariffs applicable to WIRP users as proposed by Glencore
- (g) the WIRP Deed terms should be taken into account in the QCA's assessment of the Amended 2014 DAU, with the revenue from the WIRP fees being included in the application of the System Allowable Revenue and reference tariffs adjusted for WIRP Users.

On this basis, Glencore said that the QCA should consider whether the total return which Aurizon Network is able to receive, including the WIRP fee, is appropriate pursuant to section 138(2). Glencore submitted that the QCA should refuse to approve Aurizon's Amended 2014 DAU (unless it is amended in the manner proposed by Glencore). Glencore's key contentions are discussed below.

### (a) Appropriateness of reviewing QCA approved access conditions

Glencore submitted that it did not accept that setting reference tariffs taking into account the appropriateness of the WIRP Deed access conditions as part of the UT4 regulatory period would have any retrospective effect, any more than the review of the appropriate regulatory WACC would have a retrospective effect. Glencore did not see any strong justification to treat the provisions of the WIRP Deed in a different manner to any other part of the regulated business.

Glencore did not accept that the WIRP Deed should not ever be again subject to regulatory review, as it said the WIRP Deed is not independent of regulatory access arrangements. Glencore said that no application was made by Aurizon Network in respect of the approval of

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<sup>6</sup> UT3 refers to the approved 2010 Access Undertaking.

the WIRP Deed as access conditions for the UT4 regulatory period, and nothing in the Amended 2014 DAU appears to exclude requirement for such approval.

Glencore then cited the fundamental requirements for the access conditions report as set out in clause 6.13.1 of the Amended 2014 DAU - which are that access conditions may be imposed 'to the extent reasonably required in order to mitigate Aurizon Network's or the Access Seeker's exposure to any additional costs or risks associated with providing Access for the Access Seeker's proposed Train Service and which are not, or would not, be included in the calculation of the Reference Tariff based on the Approved WACC'.<sup>7</sup>

Glencore said the QCA is not obliged to consider any access conditions or any proposed agreement between an access seeker and Aurizon Network without enquiry as to whether it satisfies this fundamental requirement.

#### (b) 2012 WIRP access conditions were approved with limited merits review

Glencore acknowledged the decision of the QCA to approve the WIRP Deed access conditions for the purpose of the 2010 Undertaking. Glencore said that it did not dispute the appropriateness of the decision as the QCA was faced with the choice of either approving the access conditions or accepting that Aurizon Network would not proceed with the funding and construction of WIRP.<sup>8</sup>

Glencore's concern was that under the 2010 Undertaking, Aurizon Network was not obliged to fund the WIRP infrastructure and no user funding option was available. Glencore submitted that Aurizon Network as a monopoly provider was in a position to extract an above-regulated rate of return as a pre-condition of its agreement to construct WIRP infrastructure.<sup>9</sup>

Glencore considered that since the funding and construction of WIRP was at the discretion of Aurizon Network, if WIRP Users had not agreed to the requirements of the WIRP Deed, WIRP infrastructure would not have proceeded in a timeframe required by WIRP Users at the time. Glencore said that on the basis of this endorsement, the QCA approved the terms of the WIRP Deed with only a limited merits review.

Glencore added that it did not believe that the QCA's approval of the WIRP Deed access conditions was intended to have the effect of excluding future re-examination of the matter.

Glencore submitted that while the QCA cannot repudiate its approval of the WIRP Deed, it needs to ensure that the balance of costs and risks is appropriate and make adjustments in future undertakings to prevent over-compensation to the access provider.<sup>10</sup>

#### (c) Binding decision

Glencore submitted legal advice that 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.<sup>11</sup>

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<sup>7</sup> Glencore, sub. no. 5: 5.

<sup>8</sup> Glencore, sub. no. 5: 2.

<sup>9</sup> The WIRP access conditions included a WIRP fee that is a payment in addition to regulated access charges to compensate Aurizon Network for various additional costs and risks.

<sup>10</sup> Glencore, sub no 6: 1-2

<sup>11</sup> Glencore, sub. no. 5: 2-3.

#### (d) Changed circumstances

Glencore cited that circumstances are now different (when compared to the time of signing under UT3).<sup>12</sup> Glencore indicated that a user funding arrangement is now to be available under UT4 that would give more countervailing power to users in negotiating access conditions. Glencore also noted that the QCA had in UT4 rejected the approach that the legitimate business interests of the access provider have primacy in balancing the section 138(2) factors.<sup>13</sup>

#### (e) Access conditions are access agreements

Glencore said that the WIRP Deed is itself an Access Agreement for the purposes of the UT4 regulatory period, and that it is hard to find any real difference between the incidence of the WIRP fee and the incidence of a charge for access rights.

Glencore then submitted: "...because the WIRP Fees have been found to be providing Aurizon Network with a return in excess of what is permitted by the regulatory regime, Glencore submitted that these sums should be included as "Access Charges" when determining whether Aurizon has earned in excess of the System Allowable Revenue in the relevant systems."<sup>14</sup>

#### (f) Section 138 of the QCA Act

Glencore's view was that section 138 of the QCA Act requires the QCA to only approve a new draft access undertaking, such as the Amended 2014 DAU, if it considers it appropriate to do so on its own merits.

In relation to the section 138(2) factors:

- Section 138(2)(a)—object of Part 5—Glencore submitted that the WIRP Deed access conditions provided monopoly profits reflecting Aurizon Network's market power at the time of negotiations and resulted in inefficient access pricing which cannot be consistent with the object of Part 5.
- Section 138(2)(b)—legitimate business interests of the owner or operator—Glencore said that Aurizon Network does not have a legitimate interest in earning monopoly profits that are not commensurate with the regulatory and commercial risks involved.
- Section 138(2)(d)—the public interest—Glencore said that the WIRP fee reflects additional and inefficient costs which adversely impacts on rail operators and coal producers.
- Section 138(2)(g)—the pricing principles in section 168A—Glencore submitted that the WIRP fee is a return that is additional to the revenue that the QCA determined was appropriate in respect of efficient costs and risks.
- Section 138(2)(h)—any other issues considered relevant—Glencore noted that the extent to which a regulated entity earns windfall gains and monopoly profits is relevant. Glencore also said that a relevant issue for the purposes of 138(2)(h) is the treatment of access conditions under UT4 principles.<sup>15</sup>

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<sup>12</sup> Glencore, sub. no. 5: 3.

<sup>13</sup> Glencore, sub. no. 6: 9-11.

<sup>14</sup> Glencore, sub no 5. 8

<sup>15</sup> Glencore, sub. no. 5: 5.

### (g) Pricing implications

Glencore proposed that the QCA should not be bound by its previous decisions in respect of WIRP access conditions, and on the basis that risks are equalised across WIRP and non-WIRP users alike, we should reduce Aurizon Network's approved regulated revenue by the quantum of the WIRP fee. Glencore said this could be achieved by setting a discounted regulated access charge for WIRP users equivalent to the WIRP revenue. That is, while the WIRP fee revenue should be included in System Allowable Revenue, the amounts should be deducted from the reference tariff applicable to WIRP Users.<sup>16</sup>

## 2.3 QCA draft decision

Having regard to Glencore's submission and taking into account the factors in section 138(2), the QCA's draft decision was that:

- it is not appropriate to refuse to approve Aurizon's Amended 2014 DAU for the reason that the WIRP fee was not deducted from the reference tariff applicable to WIRP Users (as proposed by Glencore)
- it is appropriate to approve the Amended 2014 DAU proposed by Aurizon Network, including specifically the proposed UT3 transitional provisions.

Our draft decision summarised the application of each of the factors in section 138(2) as set out below and as identified in the table in Section 2.3 of our draft decision (which is replicated in Table 2 at the end of this Section).

### Certainty

We considered that, among other things, Glencore's proposal would have a deleterious impact on future regulatory certainty as it would have the practical effect of overturning the intent and purpose of commercially negotiated access conditions that were subject to a QCA approval process.

To the extent that Glencore sought that the WIRP fee be taken into account by the QCA in respect of the treatment of reference tariffs in the UT4 period, the QCA considered that the practical effect is the same as if it were to re-assess the WIRP access conditions that had been negotiated and agreed by the relevant parties and reach a new and different conclusion. In practical effect, Glencore is requesting that the QCA adopt a different regulatory treatment of the WIRP access conditions under UT4 than the QCA had previously determined was appropriate under UT3.

The QCA's draft view was that Glencore is seeking to use the current regulatory process to revisit the appropriate regulatory treatment of a previously executed commercial agreement that it entered into in 2012, thereby in part negating the intended commercial effect of that agreement. The impacts of this are a relevant consideration in the context of s. 138(2) of the QCA Act, particularly promoting future efficient use and investment in the network and dependent markets.

The access conditions were developed partly in recognition of the need to provide greater certainty to stakeholders regarding the regulatory treatment of commercial arrangements that extended beyond the term of a particular access undertaking that was in place at the time. We were not aware of any suggestion that the regulatory treatment of the WIRP access conditions

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<sup>16</sup> Glencore, sub. no. 5: 12.

by the QCA was to be subject to any future re-examination by the QCA as part of consideration of subsequent draft access undertakings.

We asked stakeholders to provide evidence on whether or not Aurizon Network and access holders executed WIRP Deeds with the expectation that the access conditions would be subject to future reassessment in a subsequent draft access undertaking, that is, whether the WIRP access conditions as approved by QCA under UT3 were not intended to survive the expiry of UT3 or have any long-term effect beyond UT3.

Subject to receipt and consideration of any such stakeholder evidence, the QCA's draft position was that Glencore's proposal would not be consistent with the object of Part 5 or the public interest (s 138(2)(a) and (d)), or be in the legitimate business interests of the access provider (s 138(2)(b)), given the regulatory uncertainty it would create. Similarly, the same reasoning applies in respect of access holders that execute agreements with access conditions and access seekers (s. 138(2) (e) and (h)), that is neither party would anticipate that a future regulatory decision would have the practical effect of unwinding a negotiated commercial outcome.

The QCA was of the view that in considering and balancing the various factors in s. 138(2), in its judgement, it would not be appropriate to accept Glencore's proposal.

#### (a) The 2012 WIRP access conditions were approved with limited merits review

In our 2012 Decision, we assessed the WIRP access conditions against criteria set out in 2010 Undertaking in light of all access seekers (that is, all WIRP Users) agreeing to the access conditions sought by Aurizon Network.<sup>17</sup> Under the criteria the QCA must approve the proposed access conditions *unless* we were satisfied:

- it would be contrary to the public interest, including the public interest in having competition in markets
- it is reasonably expected to disadvantage future access seekers, existing access holders, customers and other stakeholders not parties to the access agreements containing access conditions
- Aurizon Network failed to provide the required access conditions report
- it would contravene a provision of the 2010 Undertaking or QCA Act.<sup>18</sup>

Our 2012 Decision assessed the application against the relevant criteria where the WIRP Users agreed to the proposed access conditions, concluding that:

- the access conditions were not contrary to the public interest, including the public interest in competition in markets—with relevant factors including transparency of access conditions, whether they reflected an exercise of monopoly power by Aurizon Network enabling them to extract monopoly rents, and whether stakeholders had an alternative to agreeing to the access conditions
- stakeholders would not be disadvantaged by the access conditions—with relevant factors including whether the WIRP fee or aspects of the WIRP enhancement are recovered from non-WIRP Users and whether the WIRP fee may have an impact on Aurizon Network's incentives to schedule or reschedule trains in a particular way to advantage the WIRP Users

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<sup>17</sup> Clause 6.5.4(e) of the 2010 Undertaking.

<sup>18</sup> QCA, 2012:8.

- Aurizon Network's agreed access conditions were submitted for approval in accordance with cl. 6.5.4(e) of the 2010 Undertaking, and as such, does not contravene a provision of the undertaking.
- It was also not evident to the QCA that the agreed access conditions contravened any other provision of the undertaking or the QCA Act.<sup>19</sup>

In light of the above, the QCA's 2012 Decision was that there was a clear public interest in the project proceeding and that the WIRP access conditions would not reasonably be expected to disadvantage stakeholders.<sup>20</sup>

As outlined in our 2012 Decision approving the WIRP access conditions, we considered stakeholder views that Aurizon Network had used its monopoly position to negotiate access conditions that over-compensated it for the risks it faced. However, we noted that:

*the approval criteria do not provide for the Authority to consider the reasonableness of the access conditions directly as they have been submitted with the support of all of the stage 1 users (cl. 6.5.4(e)). In contrast, if only some or none of the stage 1 users had supported the access conditions, the Authority would have been required to look at a range of factors, including whether the access conditions are required to mitigate QR Network's exposure to the financial risks and whether these risks are not currently covered by existing arrangements (cl. 6.5.4(f)). The Authority's assessment of these risks would have necessitated the Authority explicitly considering the reasonableness of the access conditions.<sup>21</sup>*

Accordingly, the QCA conducted the assessment required under the 2010 Undertaking, an assessment which took into account the fact that at the time none of the WIRP Users opposed the proposed access conditions. We noted that Glencore accepts that the 2012 Decision made by the QCA was appropriate taking account of the circumstances of the time.

The QCA's 2012 decision, including the QCA's analysis at the time and the context to that decision, has been considered by QCA under section 138(2)(h) of the QCA Act as another issue that the QCA considers to be relevant.

### (b) Appropriateness of reviewing QCA approved access conditions

In our draft decision, we noted that if, as Glencore proposes, the QCA should refuse to approve the Amended 2014 DAU on the basis of a fundamentally amended view as to the appropriate regulatory treatment of the WIRP access conditions, the issue arises as to whether QCA should propose amendments to the Amended 2014 DAU to make changes to WIRP reference tariffs to offset the effect of the WIRP Deed terms. We observed that the WIRP access conditions were agreed upon by the relevant parties, assessed and approved by the QCA under UT3 and signed into a 20-year agreement.

In this respect, the changes to the Amended 2014 DAU proposed by Glencore have the practical effect of overturning a commercially negotiated agreement. Generally, this harms:

- certainty and predictability—a person making a decision based on justified expectations in regard to a regulatory decision may be disadvantaged if the regulatory decision is subsequently changed.
- efficiency—if a regulator revisits past regulatory decisions this will lead to increased regulatory complexity and cost. As a result, regulation can become less efficient.

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<sup>19</sup> QCA, 2012: 8.

<sup>20</sup> QCA, 2012: 11.

<sup>21</sup> QCA, 2012: 9.

In our view, the importance of regulatory certainty in the context of the application of the various factors in section 138(2) outweighs the various competing interests identified by Glencore in the context of the application of those various factors.

In respect of Glencore's arguments, we considered that:

- Access conditions for WIRP were negotiated and intended to apply for 20 years, and therefore clearly were intended to apply across successive regulatory periods, that is, we did not agree that the WIRP Deed is part of access regulatory arrangements to be considered as part of our consideration of the Amended 2014 DAU.
- It is not appropriate by reference to the s138(2) factors to make adjustments to the undertaking that would have the effect of offsetting previously accepted contractual arrangements and access conditions. We acknowledged this will lead to different contracts and agreements signed at different times and reflecting different regulatory arrangements, as occurs already with access agreements. However, such matters are provided for by the transitional arrangements set out in clause 12.4, of which clause 12.4(a) deems a range of activities done under the 2010 Undertaking to continue under the new undertaking.
- The QCA took into account regulatory certainty in the context of the application of the various statutory factors. We considered the proposal by Glencore will result in disincentives to invest in access infrastructure, which is contrary to the object of Part 5 (section 138(2)(a)), that is, to promote the economically efficient investment in significant infrastructure. It is also not in the legitimate business interests of the access provider (s 138(2)(b) and, by creating disincentives to invest, the interests of access seekers (s 138(2)(e)). This provided in our view a very strong economic justification to reject Glencore's proposal.
- Making a decision that has the practical effect of bypassing negotiated and previously approved access conditions may benefit WIRP access holders in this instance, but could be a disadvantage for access holders and access seekers in other circumstances. For example, following such a precedent, Aurizon Network could request the QCA review other negotiated access conditions as part of a future draft access undertaking to allow it to practically bypass these to benefit itself at the expense of access holders. The approach proposed by Glencore, if accepted by the QCA, would create future uncertainty for access holders and access seekers, and therefore would not be consistent with section 138(2) (e) and (h) of the QCA Act.
- The UT4 guidelines are drafted in terms of reviewing new access conditions, and the access conditions report should be provided at the start of the negotiation period (for new access conditions). This would not be the case for the WIRP access conditions which are already negotiated and in place. To do otherwise would essentially seek to re-open a previously executed commercial agreement.

Irrespective of whether, in a legal sense, we may not be prevented from taking into account's Glencore's proposal, it is a matter that requires the QCA to exercise its judgement in considering the factors set out in section 138(2). We considered that the efficacy of the access conditions arrangements should be maintained, as set out in Part 6 of the undertaking.

### (c) The importance of previous regulatory decisions

We noted the views expressed by Glencore that the previous decision is not binding on the QCA. Irrespective of this, the existence of a previous decision on the matter is a material and relevant consideration that the QCA takes into account under s. 138(2)(h).

#### (d) Changed circumstances

At the time, the access conditions were to address such risks as negotiated by the parties. Indeed, the WIRP access conditions required payment of the WIRP fee over the agreed 20 years to provide this compensation for assessed risks. We noted that the role of access conditions was to enable Aurizon Network to supplement the standard terms and conditions of access with additional requirements to address particular costs and risks associated with a particular investment. A subsequent change in circumstances or a change in the balance of costs and risks did not in our view advance Glencore's submission.

#### (e) Access conditions are access agreements

We considered that Glencore's comments in relation to whether access conditions are similar to an access agreement, or whether the WIRP fee is an access charge or not, is largely irrelevant. The key issue is not the form, but the purpose of access conditions.

The purpose of the WIRP access conditions was to include an additional payment to the reference tariff to provide compensation for costs and risks that were considered not to be covered by the reference tariff. This was assessed based on the best available information at the time by all parties and agreed to by the WIRP Users and Aurizon Network at the time.

We considered that there was and is no expectation that WIRP access conditions would be updated as part of a future undertaking.

#### (f) Section 138 of the QCA Act

In respect of the specific arguments raised by Glencore regarding the application of the section 138(2) factors, our response to Glencore was as follows:

- Section 138(2)(a)—object of Part 5—we considered that unwinding agreed commercial arrangements would undermine future confidence in the regulatory process, increase future uncertainty for all parties, and create a disincentive for future investment. In our view, to accept Glencore's proposal would result in outcomes contrary to the Part 5 objective, that is, to promote the efficient operation, use and investment in infrastructure with the effect of promoting effective competition in upstream and downstream markets.
- Section 138(2)(b)—legitimate business interests of the owner or operator—It was the QCA's understanding that the parties agreed and signed on to the access conditions which were subsequently approved by the QCA. It would clearly be against the legitimate business interests of Aurizon Network if the regulatory process could be used to practically circumvent commercially negotiated arrangements and adjust an access seeker's position relative to Aurizon Network.
- Section 138(2)(d)—the public interest—Again, we considered it would not be in the public interest to make a decision that caused stakeholders to lack confidence in the QCA regulatory framework and processes. As noted above, it was considered that the public interest in having the investment proceed in a timely manner was a key factor in the QCA's decision to approve the access conditions in 2012.
- Section 138(2)(g)—the pricing principles in section 168A—We noted that the WIRP fee was set to cover additional costs and risks incurred in the infrastructure development as agreed by WIRP users. This is consistent with allowing a return on investment commensurate with the regulatory and commercial risks involved.

- Section 138(2)(h)—any other issues considered relevant—the QCA in 2012 made a decision based on the information available at the time, and based on the fact the WIRP users agreed to the proposed WIRP conditions. The fact that the QCA made a well informed decision within the agreed framework at the time, a decision in respect of which Glencore states "we do not dispute the appropriateness of this decision for UT3," is a material and relevant consideration for the QCA under 138(2)(h).

#### (g) Pricing implications

As the WIRP fee reflects a separate commercially negotiated charge for additional risk, our April 2016 Decision excluded this revenue from our proposed reference tariffs. The option of a discounted reference tariff could be incorporated into the undertaking potentially without affecting the unfair differentiation requirements of the QCA Act. However, given our conclusions that it would not be appropriate to refuse to approve Aurizon Network's Amended 2014 DAU for the reason that the WIRP fee was not discounted for WIRP users, it was not necessary to reach a view on whether a discounted tariff would otherwise satisfy the requirements of the QCA Act.

We considered that the Amended 2014 DAU should not include adjustments for reference tariffs to offset the WIRP fee for WIRP Deed access holders.

## 2.4 Stakeholder submissions on the draft decision

### Glencore

Glencore expressed 'genuine concern' that the draft decision reflects an absolute adherence to the 2012 WIRP Deed access conditions decision and a deep reluctance to change previous draft decisions the QCA has made in respect of UT4. It considered that there will have been a denial of procedural fairness if the proposed changes are not properly considered.<sup>22</sup>

Glencore reiterated its view that the WIRP reference tariffs be reduced to reflect the entirety of the return Aurizon Network receives under the WIRP Deed, which it considers is beyond the return on investment commensurate with the regulatory and commercial risk involved in providing access to WIRP users. However, it did acknowledge that a partial reduction may also be appropriate, to the extent the QCA considers that the additional revenue under the WIRP Deed was partially justified by additional risks borne by Aurizon Network.<sup>23</sup>

Glencore suggested that, to the extent the QCA has concerns with an ability to make a decision of this complexity in the time remaining prior to approval of the remainder of UT4, consideration should be given to including clauses which provide for a decision on the WIRP matter to be made in the next undertaking with an appropriate adjustment mechanism.<sup>24</sup>

We have split Glencore's submission into the following two areas:

- relevance of regulatory certainty
- contractual arrangements and the expectations of parties.

Glencore also commented on the QCA's analysis against the section 138(2) factors, which are noted in our final conclusions section below.

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<sup>22</sup> Glencore, sub no 12: 3.

<sup>23</sup> Glencore, sub no 12: 11.

<sup>24</sup> Glencore, sub no 12: 4.

### Relevance of regulatory certainty

Glencore considered the draft decision is 'fundamentally flawed' in respect of the WIRP issue, principally due to the inappropriate emphasis placed on, and misplaced assertions of the relevance of, regulatory certainty.<sup>25</sup>

While Glencore acknowledged that regulatory certainty is broadly desirable, it said that regulatory certainty does not require that a regulator should never alter its view in relation to any particular subject. It considered that the QCA Act requires the QCA to consider the merits of a new draft access undertaking afresh and, in doing so, there will be circumstances where it will be appropriate for the QCA to make a decision that may be different from a previous decision. As such, it considered a strict deference to previous decisions, without due regard to whether that remains appropriate, is a failure to comply with the QCA's statutory obligations.<sup>26</sup>

Glencore also discussed the appropriate weight that should be given to regulatory certainty. It said that there is a clear expectation that tariffs will be adjusted with each new undertaking and noted the availability of the binding rulings process under the QCA Act should an access provider wish to obtain a once and for all binding determination. It said that it would be a misinterpretation of the QCA's statutory powers and obligations for the QCA to regard itself as bound by its previous decision in respect of the WIRP Deed access conditions or to give such weight to regulatory certainty that even clear monopoly pricing is approved as appropriate on the basis of providing such regulatory certainty.<sup>27</sup>

Glencore also said it is clear from the draft decision on the Amended 2014 DAU that the QCA appreciates the WIRP Deed results in Aurizon Network earning above the return contemplated by the pricing principles. However, it considered that that significant departure from previous regulatory practice has seemingly been given little or no weight.<sup>28</sup>

### Contractual arrangements and expectations of parties

In reference to our request for evidence on whether or not Aurizon Network and access holders executed the WIRP access conditions with the expectation that the access conditions would be subject to future reassessment, Glencore said it was not clear why the subjective intent of the parties to the WIRP Deeds is relevant, rather than the objective requirements of the regulatory framework. Glencore expressed concern with the suggestion that the interpretation of how a previous regulatory decision under the undertaking should operate can somehow be impacted by the subjective views of individual stakeholders. It also considered it was practically difficult at this point in time to produce clear evidence of the subjective intent of the stakeholders in respect of future regulatory treatment.<sup>29</sup>

Glencore said the contractual arrangements between stakeholders are a separate matter from the appropriate regulatory treatment, which it said Aurizon Network and the WIRP Users knew was the case when the WIRP Deed was negotiated. It considered the fact that the WIRP Deed does not expressly state it was subject to regulatory review is not evidence that the parties intended to immunise the WIRP Deed from regulatory consideration forever.<sup>30</sup>

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<sup>25</sup> Glencore, sub no XX: 11.

<sup>26</sup> Glencore, sub no 12: 2-3.

<sup>27</sup> Glencore, sub no 12: 5-6.

<sup>28</sup> Glencore, sub no 12: 3.

<sup>29</sup> Glencore, sub no 12: 4-5.

<sup>30</sup> Glencore, sub no 12: 4.

Glencore also referred to the returns under rebate deeds as an example of contractual arrangements that are an adjustment to system allowable revenue. It said it was unclear why the QCA considers it is appropriate to make adjustments for that form of contractual arrangement but not the WIRP Deed.<sup>31</sup>

### Aurizon Network

Aurizon Network's response to the QCA's draft decision primarily focuses on Glencore's submission regarding WIRP pricing and its relationship with the WIRP Deed and Fee. Aurizon Network said it agreed with the QCA's analysis of Glencore's submission and the decision to reject it. Aurizon Network also said that while it had many concerns with Glencore's submission, it has dealt with fundamental issues. We have split Aurizon Network's submission into the following areas:

- the WIRP Deed, WIRP Fee and access charges
- the WIRP Deed, WIRP Fee and regulatory certainty
- WIRP pricing and regulatory process.

#### The WIRP deed, WIRP fee and access charges

Aurizon Network said the scale of the proposed WIRP expansion exposed it to significant financial risks with respect to the delivery of the expansion. The WIRP User Group (including Glencore) acknowledged these risks and agreed terms with Aurizon Network, which included the payment of the WIRP Fee over a 20-year period. Aurizon Network stated payment of the WIRP Fee over the full 20-year period provided the agreed compensation for financial risks entailed by the expansion and its ongoing operation.<sup>32</sup>

Aurizon Network stated the WIRP Deed approved by the QCA made clear the WIRP Fee payable was in addition to, and separate from, access charges, and that would be so for the 20-year life of the WIRP Deed. Aurizon Network said this was because the fees are in respect of the delivery by Aurizon Network of different benefits and the assumption of different risks.<sup>33</sup>

Aurizon Network said that while the WIRP Fee is structured such that there is symmetry between a users' access rights and their individual WIRP Fee liability, this does not mean the WIRP Fee (or any Optimisation Fee) comprises, or should be treated as, an access charge.<sup>34</sup>

Against this background Aurizon Network said Glencore now submits the WIRP fee should be included in the application of the System Allowable Revenue test<sup>35</sup>. Aurizon Network said that by making this submission Glencore is effectively proposing the QCA use its regulatory powers to deprive Aurizon of the benefit of the further payments that Glencore (and other WIRP users) agreed to provide to Aurizon over the remainder of the 20-year period.<sup>36</sup>

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<sup>31</sup> Glencore, sub no 12: 4.

<sup>32</sup> Aurizon Network, sub no. 9: 4

<sup>33</sup> Aurizon Network, sub no. 9: 4

<sup>34</sup> Aurizon Network, sub no. 9: 5

<sup>35</sup> The proposed inclusion of the WIRP Fee in the System Allowable Revenue test links it to access charges, rather than it being separable from access charges.

<sup>36</sup> Aurizon Network, sub no. 9: 6

Aurizon Network suggested Glencore's current submission in this regard was inconsistent with views expressed in previous UT4 submissions regarding the relationship between the WIRP Fee and access charges, as well as Glencore's view expressed in other forums/proceedings.<sup>37</sup>

#### The WIRP deed, WIRP fee and regulatory certainty

Aurizon Network stated the WIRP Deed(s) were fundamental to its decision to invest in WIRP infrastructure and to expand the rail network. It said it was concerned that:

- (a) Glencore is seeking to further its commercial objectives by seeking to unwind the effect of the WIRP Deed(s) in a manner that fundamentally alters the financial basis of the transaction
- (b) Glencore's proposal would result in there being no regulatory certainty for any access agreement, user funding agreement or any other regulated contract (including contracts which will only be effective if approved by the QCA).<sup>38</sup>

Aurizon Network stated the QCA's approval of the WIRP Deed(s) allows it to recover the WIRP Fee in addition to access charges over the term of the WIRP Deed(s). Aurizon Network said the QCA cannot ignore or re-characterise the WIRP Deed or Fee, as suggested by Glencore. Aurizon Network stated the WIRP Deed and Fee are the things the QCA has approved and they are contained in an existing, binding contractual agreement.<sup>39</sup>

Aurizon Network said it was unaware of any evidence suggesting the regulatory treatment of the WIRP access conditions was not intended to survive the expiry of UT3 or have a long-term effect beyond UT3. Aurizon Network stated the contrary intention is expressed in the WIRP Deed(s) and access agreements entered into by each of the WIRP customers, including Glencore. Aurizon Network said previous submissions made to the QCA by Glencore and the WIRP User Group exemplify not only that the access conditions would survive the expiry of UT3, but would also continue, together with the regulatory treatment of WIRP infrastructure, for future regulatory periods. Aurizon Network provided a number of previous statements from Glencore and the WIRP User Group to support this view.<sup>40</sup>

Further, Aurizon Network noted Glencore submitted that a previous decision under the UT3 Access Undertaking did not legally fetter the QCA's ability to decide how to treat this issue in UT4. Aurizon Network said it agreed, as a general principle, that the QCA has relatively broad regulatory discretion. However, Aurizon Network stated such discretion should never be exercised to fundamentally alter the legal and financial effect of a fully negotiated and otherwise binding contractual agreement, especially one subject of an approval by the QCA.<sup>41</sup>

Aurizon Network said if the QCA exercised discretion in the manner proposed by Glencore, it would have far reaching consequences in relation to any QCA regulated contract and every approval given by the QCA. Aurizon Network stated parties could never rely on contracts or approvals entered into in accordance with the regulatory regime to justify investment decisions. Aurizon Network said such regulatory uncertainty would be inconsistent with the object of Part 5 of the QCA Act.<sup>42</sup>

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<sup>37</sup> Aurizon Network, sub no. 9: 5-6

<sup>38</sup> Aurizon Network, sub no. 9:6

<sup>39</sup> Aurizon Network, sub no. 9: 9-10

<sup>40</sup> Aurizon Network, sub no. 9: 7-8

<sup>41</sup> Aurizon Network, sub no. 9: 10

<sup>42</sup> Aurizon Network, sub no. 9:10

### WIRP pricing and regulatory process

Aurizon Network stated Glencore's submission incorrectly proceeds on the implication that the QCA did not have regard to the WIRP Deed(s) and Fee when making its reference tariff decisions for UT4. Aurizon Network said the QCA clearly gave consideration to the full effect and meaning of the WIRP Deed(s) and Fee in its supplementary draft decision on "Reference Tariffs for Wiggins Island Rail Project Train Services", the consolidated draft decision and final decision on UT4.

Aurizon Network said Glencore, either independently or through the WIRP User Group, made various submissions in relation to the reference tariffs that should apply under UT4. Aurizon Network stated Glencore did not raise any of the matters it is now raising during the UT4 regulatory process. Aurizon Network said Glencore made supportive submissions which it now seeks to contradict.<sup>43</sup>

Further, Aurizon Network stated Glencore's analysis of the WIRP Deed terms under the UT4 access condition provisions was irrelevant. Aurizon Network said the QCA was asked to approve the WIRP Deed as an access condition under UT3, not UT4 (which has yet to be approved). Aurizon Network stated the QCA approval under UT3 was an approval to enter into a binding, long term contractual arrangement that went beyond the regulatory period for UT3.<sup>44</sup>

Finally, Aurizon Network said the QCA should have regard to the fact the QCA has already made a final decision in respect of UT4, which accounted for WIRP Deed issues in determining the reference tariff applicable. Aurizon Network stated the QCA should also have regard for the fact Aurizon Network has already submitted for approval a draft access undertaking which is consistent in all material respects with the requirements of the QCA's final decision.<sup>45</sup>

### Other stakeholders

Pacific National said it strongly supported the need for regulatory certainty and therefore supported a timely approval of Aurizon Network's 2014 Amended DAU.<sup>46</sup> QRC did not take a position on Glencore's proposal.

BMA supported the QCA's decision noting that:<sup>47</sup>

- (a) Careful consideration should be given to amendments that have the potential to reduce certainty for access holders and increase cost and risk
- (b) It supported arrangements that place primacy on commercial arrangements agreed to between parties and provide mechanisms for resolving disputes.

## 2.5 QCA analysis and final decision

In response to Glencore's submission, we have given careful consideration to the issues raised by Glencore and its proposal that the QCA amends Aurizon Network's 2014 Amended DAU. We have: considered the matters raised against the section 138(2) factors; sought and received stakeholder submissions; provided a draft decision; sought and received further stakeholder submissions and allowed an appropriate period for consultation. We have met our obligations in regard to procedural fairness.

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<sup>43</sup> Aurizon Network, sub no. 9:9

<sup>44</sup> Aurizon Network, sub no 9: 8

<sup>45</sup> Aurizon Network, sub no 9: 10

<sup>46</sup> Pacific National, sub no. 10: 1

<sup>47</sup> BMA, sub no 11:2.

In relation to the main issues raised by Glencore:

- (a) We agree that the QCA Act requires the QCA to consider the merits of a new draft access undertaking afresh and, in doing so, there will be circumstances where it will be appropriate for the QCA to make a decision that may be different to a previous decision. However, for the QCA to make such a decision, it must determine whether doing so is appropriate having regard to each of the factors in s. 138(2). Accordingly, the QCA exercised careful judgment, weighing and balancing competing considerations raised by Glencore and other stakeholders.
- (b) We disagree with Glencore that there is no clear evidence of the subjective intent of the stakeholders in respect of future regulatory treatment. We have reviewed the WIRP deed and Aurizon's representations on this matter. It is clear that both Aurizon Network and WIRP users, including Glencore, intended for the WIRP fee to extend beyond the expiry of UT3. Relevantly, this is consistent with the life of the WIRP assets extending beyond the term of UT3. We consider that both Aurizon Network and the WIRP users can be characterised as sophisticated parties that voluntarily agreed to the arrangements at the time (which include the arrangements extending beyond UT3).
- (c) In the QCA's judgement, if the QCA adopted Glencore's proposal and practically negated the effect of commercially agreed arrangement between sophisticated and equally well represented parties, this would negatively impact future incentives for access providers and users to invest in, use and operate infrastructure, with negative consequences for effective competition in upstream and downstream markets (consistent with s. 69E of the QCA Act). Future downstream investment in the Central Queensland Coal Network could be detrimentally affected as parties may no longer be prepared to enter into commercial agreements for extensions and expansions because of the risk of later regulatory intervention. Such outcomes would be inconsistent with the objective of Part 5 of the QCA Act.
- (d) WIRP users agreed to provide Aurizon Network with compensation to cover the additional costs and risks incurred by Aurizon Network. It is not appropriate for the QCA to negate the effect of commercially agreed access conditions that WIRP users had agreed to accept. In considering Glencore's proposal, it is appropriate for the QCA to take these matters into account as they impact the public interest, the legitimate business interests of Aurizon Network, and the interests of other access seekers using the declared service. The QCA is also concerned that what Glencore proposes will create an incentive to use the regulatory process under the QCA Act with the object of manipulating contracts agreed between access providers and seekers.
- (e) In our draft decision, we said that the WIRP fee was set to cover additional costs and risks incurred in the infrastructure development as agreed by WIRP users. This is consistent with allowing a return on investment commensurate with the regulatory and commercial risks involved, on the basis that access seekers evaluated these costs and risks and agreed to pay a WIRP fee, on a regular basis rather than up-front, to meet these costs and risks.
- (f) As noted by Glencore, Aurizon Network did not seek a binding ruling in respect of the WIRP access conditions negotiated with access seekers. But the absence of a request for a binding ruling is not evidence that the WIRP access conditions were not meant to extend beyond UT3. A contractual agreement was executed and the terms and conditions, including payment of a WIRP fee, were agreed to by all parties, and approved by the QCA in accordance with the relevant process under the 2010 AU.

- (g) We maintain our view that while there is an expectation that the access undertaking, MAR and reference tariffs are reconsidered at each regulatory period, no such position was specifically provided for in the approved WIRP access conditions. We note Aurizon Network's submission expresses a similar view, while Glencore has not been able to provide any indication that the WIRP access conditions approved under the 2010 AU were intended to be subject to further consideration under UT4.
- (h) Unlike access conditions, provisions for rebates for capital components of access charges are set out in the undertaking (Schedule F).

Having had careful regard to the matters raised by all stakeholders and to the factors under s. 138(2), we consider that the Aurizon Network's 2014 Amended DAU, without the amendment sought by Glencore, is appropriate to approve (see Final Decision 1). The merits of approving the Amended DAU and not accepting Glencore's position (which has the practical effect of reopening the WIRP arrangements) outweighs the merits of doing so.

In reaching this decision, we do not consider it would be appropriate to reduce the reference tariff as submitted by Glencore. For the same reasons, we also do not consider it appropriate to consider a partial reduction to the reference tariffs or to require amendments to the Amended 2014 DAU to include a process (with an adjustment mechanism) for further considering Glencore's proposal under UT5.

Our responses on the specific issues raised on the section 138(2) factors are set out in the table below.

**Table 2 Comments on the section 138(2) statutory factors**

<i>Statutory factor in section 138(2)</i>	<i>QCA draft decision</i>	<i>Glencore submission<sup>48</sup></i>	<i>QCA final response</i>
the object of this part - namely 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	We considered that if we undermined the effect of the approval of the access conditions in UT3, as effectively proposed by Glencore, this would undermine regulatory certainty. In turn, this would increase investment risk and would not promote future economically efficient investment in significant infrastructure by Aurizon Network. Under-investment by Aurizon Network would not be conducive to promoting effective competition in upstream and downstream markets. At the same time, we need to balance this consideration against the need for economically efficient operation of, and use of, such infrastructure. Further detail on this point is set out below.	Glencore argued that its proposal does not undermine prior approval as any change would only apply to future WIRP reference tariffs. Glencore acknowledged that regulatory certainty may have an impact on future investment but does not support the conclusions reached by the QCA.  Glencore submitted that the WIRP fee is a clear example of monopoly profits - if regulatory certainty is to be relied on, the QCA needs to demonstrate why regulatory certainty does not support the prevention of windfall gains or monopoly profits.	We maintain the view set out in the QCA draft decision (see column to the left). This view is supported by Aurizon Network and BMA.  We have no evidence that the WIRP fee is a clear example of windfall gains or monopoly profits. At the time the access conditions were negotiated, Aurizon Network listed the additional costs and risks it would bear as a result of the investment. By agreeing to meet the WIRP fee, and by not referring to the dispute resolution processes available at the time, WIRP users accepted that the additional costs and risks were reasonable. We note that the underlying reference tariffs remain subject to regulatory oversight.
the legitimate business interests of the owner or operator of the service	We noted that the access conditions were intended to facilitate rapid completion of WIRP and to compensate Aurizon Network for additional risk. These factors were considered in our original decision in 2012 and reflect legitimate business interests of Aurizon Network.  We also considered that Aurizon Network has a legitimate business interest arising from the long-term investment certainty intended to be provided by QCA's decision in 2012, hence it would not be in Aurizon's legitimate business interests for QCA to make a decision in relation to UT4 that undermined the intent of decisions made by the QCA in the context of UT3 that were	Glencore submitted that it is clear that the 2012 decision did not reflect a decision by the QCA that WIRP access conditions were reasonable or appropriate.  Glencore submitted that Aurizon Network does not have a <i>legitimate</i> interest in earning monopoly profits which is what the WIRP fee does.  That Aurizon Network chose to make the investment in WIRP without knowledge of future reference tariffs is a consequence of the regulatory framework.  Glencore argued that it is not clear how the QCA concluded that WIRP access conditions were intended to provide longer-term	The QCA's 2012 decision was made fully in accordance with the relevant 2010 AU provisions on access conditions. Specifically, where all access seekers have agreed to the access conditions, the QCA will approve the access conditions unless certain criteria are not met. We assessed the proposal against those criteria (as noted above).  In essence, the WIRP users themselves decided to accept the WIRP fee as representing the additional costs and risks of WIRP.  We reviewed the WIRP deed signed by all parties including Glencore. In regard to longer term certainty, we consider that it is clear that

<sup>48</sup> Glencore, sub no, 12: 6-11

<i>Statutory factor in section 138(2)</i>	<i>QCA draft decision</i>	<i>Glencore submission<sup>48</sup></i>	<i>QCA final response</i>
	intended to provide longer-term certainty.	certainty when there is no express statement in UT3 or the final WIRP decision.	the WIRP arrangements would extend beyond one access undertaking. WIRP users expressly agreed to meet the WIRP fee over the contract period (e.g. approximately 20 years).
if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected	Not applicable	Not applicable	Not applicable
the public interest, including the public interest in having competition in markets (whether or not in Australia);	We canvassed the public interest at length in our original decision to approve the access conditions. We did not disagree with our previous reasoning. We also considered that absent evidence that the previous process was deficient in a material regard, the public interest in ensuring regulatory continuity and certainty outweighs the need to take into account any changes in circumstances.	Glencore said that the assessment of the public interest in the WIRP access conditions was to determine whether the conditions would be <b>contrary to</b> rather than <b>in</b> the public interest. Regulatory certainty as a factor in the public interest only applies where the existing position is appropriate and there has been no change in circumstances. This is not the case. Glencore submitted that the WIRP fee adversely impacts on rail operators and coal producers with flow-on impacts on the public interest.	As noted above, where all access seekers agree to proposed access conditions, the QCA assessed the conditions against specific criteria (clause 6.5.4(e) of the 2010 AU. The QCA was not in a position to change the criteria.  That there are changes in circumstances since the access conditions were agreed to is not strictly relevant. Sophisticated access seekers were in a position to assess the risks of changes to their own circumstances.  On balance, in regard to public interest, were the QCA to accept Glencore's proposal, there would be impacts on the confidence of the industry to invest in infrastructure.
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;	We recognised the various concerns expressed by Glencore regarding the adverse impact of the WIRP Deed. However, we noted that one of the interests of WIRP users at the time these arrangements were negotiated was to facilitate the timely completion of WIRP. Absent the access conditions, it is unclear whether this would have occurred.  We were particularly concerned by any suggestion that access seekers can enter into a binding commercial agreement at 'Time X' to enable construction of a facility and	Glencore said it is not seeking to revisit the WIRP deed approval.  Any concern the QCA has about future use of the regulatory process is irrelevant as the QCA has the clear power to refuse or approve DAUs as appropriate. The binding ruling process is available to provide certainty for infrastructure providers.  Glencore submitted that the QCA acknowledged that the 2012 WIRP decision did not involve a full merits review and the outcome of that historical constrained process	The 2012 decision was made under UT3 provisions that provided a specific process to apply where all access seekers agreed to access conditions.  We accept that Glencore is not seeking to revisit the WIRP deed. However, the practical effect of Glencore's proposal to adjust reference tariffs to offset WIRP revenue would be the same.  A binding ruling process was not applied to the WIRP decision. However, the absence of a request for a binding ruling is not evidence

<b><i>Statutory factor in section 138(2)</i></b>	<b><i>QCA draft decision</i></b>	<b><i>Glencore submission<sup>48</sup></i></b>	<b><i>QCA final response</i></b>
	receive from the QCA a decision regarding the appropriate regulatory treatment of that commercial arrangement, then revisit the appropriate regulatory treatment of that arrangement with the QCA at later 'Time Y' when the infrastructure has already been completed. The QCA was concerned regarding the scope for future opportunistic use of regulatory processes by access seekers when adequate provision has already been made historically to balance the interests of access seekers with those of access providers.	should be critically considered afresh based on the section 138(2) criteria.	that the WIRP access conditions were not meant to extend beyond UT3.  On balance, we do not consider that it is appropriate for the QCA to re-consider a signed agreement ex post for the various reasons cited in our analysis.
the effect of excluding existing assets for pricing purposes	Not applicable	Not applicable	Not applicable
the pricing principles mentioned in section 168A	We noted Glencore's concerns that the pricing contemplated by the WIRP arrangements could lead to over-recovery by Aurizon.  We noted that the WIRP users did make submissions on the pricing at the time and these submissions were considered by QCA.  Moreover, the pricing was justified by Aurizon Network at the time on the basis of various matters such as the need for timely completion of the WIRP infrastructure and the additional risks to Aurizon Network. These matters were also canvassed in detail at the time	Glencore restated that the reasonableness of Aurizon Network earning a monopoly rate of return was not considered by the QCA.  The WIRP fee is by definition additional to the revenue that the QCA determined was appropriate in respect of efficient costs and risks under UT3. Regulatory certainty suggests that the QCA's practice to include measures to prevent monopoly profits should be extended to WIRP access arrangements.	Determining whether Aurizon Network's 2014 Amended DAU is appropriate involved a fresh and careful review of the relevant facts and factors in s 138(2).  The relevant facts include those pointed out by Glencore and were taken into account. We particularly note that WIRP users accepted the access conditions and agreed that the fee would be paid in instalments over a 20-year period.  We maintain the view set out in our draft decision.
any other issues the authority considers relevant	Another issue we considered relevant is the need for long-term regulatory consistency and certainty in regulatory decisions made by QCA in relation to successive undertakings made by Aurizon Network.  One of the purposes of an access undertaking is to provide greater certainty	Glencore said that an approach of seeking consistency across successive undertakings has the potential for the QCA to fail to satisfy the requirement to only approve a DAU if it is appropriate.	The QCA seeks to apply regulatory principles consistently across successive undertakings. We only approve a DAU if we consider it appropriate. This is why reference tariffs could change across successive undertakings.  As noted by Aurizon Network in its submission, if the QCA exercised discretion in

<b><i>Statutory factor in section 138(2)</i></b>	<b><i>QCA draft decision</i></b>	<b><i>Glencore submission<sup>48</sup></i></b>	<b><i>QCA final response</i></b>
	<p>for all stakeholders regarding the terms and conditions on which access is provided.</p>		<p>the manner proposed by Glencore, it would have far reaching consequences in relation to any QCA regulated contract and every approval given by the QCA. Parties could never rely on contracts or approvals entered into in accordance with the regulatory regime to justify investment decisions.</p> <p>It is not appropriate that the regulatory framework be used to mitigate the effect of the WIRP negotiated agreement.</p>

In general, and in relation to the WIRP Deed and fee, we have reviewed and agree with the comments made by Aurizon Network on the Glencore proposal. In particular, we note the following observations made by Aurizon Network:

- (a) Glencore's current submission was inconsistent with views expressed in its previous UT4 submissions regarding the relationship between the WIRP Fee and access charges, as well as Glencore's view expressed in other forums/proceedings
- (b) the WIRP Deed and Fee are the things the QCA has approved and they are contained in an existing, binding contractual agreement
- (c) if the QCA exercised discretion in the manner proposed by Glencore, it would have far reaching consequences in relation to any QCA regulated contract and every approval given by the QCA. Parties could never rely on contracts or approvals entered into in accordance with the regulatory regime to justify investment decisions
- (d) the QCA was asked to approve the WIRP Deed as an access condition under UT3, not UT4.

In conclusion, having regard to Aurizon Network's comments, and noting that Glencore has not provided any additional or new information, we propose no change to our draft decision in respect of Glencore's proposal.

## 3 OTHER ISSUES RAISED BY STAKEHOLDERS

Other stakeholders also provided comment on Aurizon Network's Amended 2014 DAU.

The QCA considered each matter raised by stakeholders in light of our obligations under section 138(2) of the QCA Act. In doing so, the QCA had regard to:

- the April 2016 Decision which considered many of the below issues in detail (s. 138(2)(h))
- whether stakeholders were amenable to the issues being addressed through future regulatory processes (s. 138(2)(h)).

The QCA formed the view that the above considerations collectively, or in part, outweigh the need to make a final decision to reject Aurizon Network's Amended 2014 DAU on the basis of the specific matters raised below.

### 3.1 Submissions on the Amended 2014 DAU

#### QRC submission

The QRC was involved in consultation with Aurizon Network on the Amended 2014 DAU. However, the QRC raised specific concerns about five amendments made by Aurizon Network that differ from the drafting proposed in the QCA's April 2016 Decision.

QRC said that its concerns for three of the amendments could be dealt with by means of a draft amending access undertaking (DAAU) from Aurizon Network after UT4 is approved.

In the case of two of the amendments, relating to Part 8 capacity shortfalls and the definition of consequential loss in the Standard Access Agreement, QRC sought clarification from the QCA on whether the amendments were consistent with our April 2016 Decision policy intent.

#### QCA's draft decision

Aurizon Network confirmed its intention to submit a DAAU to implement the three amendments with the QRC, as per its agreement with QRC.

**Table 3 QRC comments and QCA draft decision**

<i>Clause</i>	<i>QRC position</i>	<i>QCA draft decision</i>
8.9.4 Capacity shortfalls	<p>QRC submitted that the amendment to clause 8.9.4 limits Aurizon Network's obligation to fund shortfall expansions arising for expansions commencing after the approval date. This means that capacity shortfalls arising from previous projects are not addressed under Part 8.</p> <p>However, QRC said it would accept the amendment if it was considered by the QCA to be consistent with its April 2016 Decision, although it indicated it will revisit this issue during the UT5 process.<sup>49</sup></p>	<p>The April 2016 Decision was not explicit on this issue as the issue has only arisen due to the lateness of UT4. In these circumstances, we considered that it would be unreasonable to apply this funding obligation prior to the approval date and create regulatory uncertainty. Accordingly, we did not accept QRC's position.</p>

<sup>49</sup> QRC, sub. no. 8: 2-3.

<b>Clause</b>	<b>QRC position</b>	<b>QCA draft decision</b>
11.1.5 Determination of disputes by the QCA	<p>QRC was concerned that under the amended drafting, if a party to a dispute (i.e. Aurizon Network or any number of access seekers that could be involved in a dispute) chose not to agree to be bound by the determination of the dispute, the QCA would not be able to commence the determination. As such, one party could delay or prevent the dispute being considered.</p> <p>QRC proposed alternative drafting, which it indicated had been agreed with Aurizon Network.<sup>50</sup></p>	<p>QRC's proposed drafting change provides clarification to ensure that Aurizon Network or any other party (such as an access seeker) cannot prevent dispute resolution proceedings by not agreeing to be bound by the outcome of the dispute. We agreed with the suggested change.</p> <p>We noted Aurizon Network and QRC have agreed to resolve the issue by means of a DAAU, if the Amended 2014 DAU is approved.</p> <p>We did not consider that the absence of this amendment provides a sufficient basis for us to refuse to approve the Amended 2014 DAU.</p>
Schedule E, 4.1	<p>QRC proposed clarified drafting to ensure that this clause does not affect Aurizon Network's obligations under clause 2.1(f) of Schedule E are not affected (i.e. Aurizon Network remains obligated to seek approval of capital expenditure following acceptance of a voting proposal).</p> <p>QRC indicated this drafting was agreed with Aurizon Network.<sup>51</sup></p>	<p>We agreed this amendment is appropriate.</p> <p>We noted Aurizon Network and QRC have agreed to resolve the issue by means of a DAAU, if the Amended 2014 DAU is approved.</p> <p>We did not consider that the absence of this amendment provides a sufficient basis for us to refuse to approve the Amended 2014 DAU.</p>
Definition of consequential loss. SAA	<p>The QRC said that there did not appear to be sufficient justification to amend the definition, and considered this amendment serves to make the definition more ambiguous.<sup>52</sup></p>	<p>We noted the amended drafting is intended to ensure that the definition of consequential loss extends to third party claims that themselves fall within that definition. We considered this is appropriate and did not consider this to be inconsistent with the April 2016 Decision.</p>
Inclusion of certain warranties in Part 3 of the Access Interface Deed	<p>While the QRC indicated it understood the purpose of the inclusion of these warranties, it raised concerns that it may not be possible for the customer to provide these warranties in all circumstances. The QRC proposed including a drafting note to clarify that Aurizon Network could accept warranties from a party which is able to give them, rather than only from the customer. It indicated Aurizon Network supported the inclusion of this note.<sup>53</sup></p>	<p>This approach was considered more flexible and was in our view appropriate.</p> <p>We noted the QRC has indicated Aurizon Network's agreement to clarify the intended operation of this clause through the insertion of a drafting note by means of a DAAU (if the Amended 2014 DAU is approved).</p> <p>Nonetheless, we did not consider that the absence of this amendment provides a sufficient basis for us to refuse to approve the Amended 2014 DAU.</p>

<sup>50</sup> QRC, sub. no. 8: 3.

<sup>51</sup> QRC, sub. no. 8: 3-4.

<sup>52</sup> QRC, sub. no. 8: 4.

<sup>53</sup> QRC, sub. no. 8: 4-5.

### QRC submission on the draft decision

QRC submitted that it supported the draft decision to approve the 2014 Amended DAU.<sup>54</sup> It noted that some items would be addressed in a DAAU as agreed with Aurizon Network.

### QCA final decision

We note QRC support for approval of the 2014 Amended DAU.

### Asciano/Pacific National submission

Asciano<sup>55</sup> considered that while some of the amendments facilitate improved clarity and workability, other changes introduce new or amended concepts (e.g. changing definitions or inserting or deleting clauses and sub-clauses), which it considered are best considered as part of UT5.<sup>56</sup> Asciano made a number of specific comments about changes made in the Amended 2014 DAU.

### QCA's draft decision

We addressed the specific comments raised by Asciano in the table below.

**Table 4 Asciano comments and QCA draft response**

<i>Clause</i>	<i>Asciano position</i>	<i>QCA draft decision</i>
3.13 (c)	The original wording should remain. The new wording places a reduced obligation on Aurizon Network to enforce the confidentiality provisions. <sup>57</sup>	We accepted that this change reduces Aurizon Network's obligations but considered that it remains consistent with the policy intent of our April 2016 Decision. It retains a best endeavours obligation to protect confidential information and results in a workable solution for Aurizon Network.
3.13 (h)	Asciano remains concerned that employees of a related operator may receive Confidential Information regardless of whether they have the right to receive it or not and regardless of whether they are required to have the information to perform these activities. The activities specified are too broad. <sup>58</sup>	We considered that the recipient will be trained in handling confidential information and will treat broader information received in a manner consistent with the protections in Part 3. This change was within the policy intent of our April 2016 Decision.
6.4.1 (d)(ii)	Asciano is concerned that existing users not subject to a Reference Tariff could be subject to a material increase. Asciano believes all existing users, regardless of the charges they are subject to should not experience any material increases.  Asciano also noted that the terms material increase and differences are not adopted consistently throughout	We considered that clause 6.4.1(d)(ii) of the 2014 Amended DAU is appropriate and consistent with our April 2016 Decision. In regards to Asciano's concerns, clause 6.4.1(d)(i) states that expanding users should generally pay an access charge that reflects at least the full incremental costs (capital and operating) of providing additional capacity. If the expanding users bear at least all

<sup>54</sup> QRC, sub no 13.

<sup>55</sup> Asciano, sub. no. 2.

<sup>56</sup> Asciano, sub. no. 2: 5.

<sup>57</sup> Asciano, sub. no. 2: 6.

<sup>58</sup> Asciano, sub. no. 2: 6.

<b>Clause</b>	<b>Asciano position</b>	<b>QCA draft decision</b>
	Part 6. For example, in clause 6.2.3 (a) and clauses 6.2.4 (a) and (c) Aurizon Network has removed the words "material increase" and "material" to permit the QCA to consider price discrimination simply on differences. Under clause 6.4.1 (d)(ii) Aurizon Network has chosen to keep the words "material increase". The concern is that the term "material increase" is subjective. <sup>59</sup>	additional costs associated with their access, existing users not subject to a reference tariff will not be subject to a material increase in access charges as a result of the expansion.  As noted in our April 2016 Decision, we considered that the principle that existing users should not experience a material increase in tariffs due to an expansion triggered by access seekers is appropriate and should not be strengthened. An expansion tariff cannot necessarily ensure that a non-expansion user's tariff will not increase in all circumstances (e.g. expansions with substitutable train services), given the current tariff and take-or-pay arrangements.
6.4.8 (b)	Asciano's concern is that the term 'Cost Allocation Proposal' is not referred to in clause 6.4.3. The only place the term Cost Allocation Proposal appears in the 2014 DAU is in clause 6.4.8(b). On this basis, Asciano questioned whether this clause 6.4.8 (b) is referring to the wrong cross-reference. <sup>60</sup>	We agreed with Asciano that there is a drafting inconsistency in clause 6.4.8(b) of the 2014 Amended DAU. We considered that the clause should be amended to refer to clause 6.4.4.  Nonetheless, we considered this to be a minor and inconsequential amendment that does not preclude us from approving the Amended 2014 DAU.
7.2.1 (a)(vi)	Asciano is concerned that this new clause inserted by Aurizon Network is subjective.  Asciano said that it recognised that this clause is intended to address instances where a party seeks to sit in the queue rather than execute an access agreement, however Asciano believes that clause 7.2.2 (c) already provides Aurizon Network with an ability to review an access seeker's position in a queue every six months and therefore the insertion of clause 7.2.1 (a)(vi) is unnecessary. <sup>61</sup>	We considered that the amendment made by Aurizon Network assists in clarifying the management of the queue, and better informs Aurizon Network at the six-monthly review. We did not consider that it is subjective.
7.4.2 (b)(i)(C)	Asciano said it believes that drafting changes in this clause relating to submitting transfers within a certain timeframe prior to the next train ordering week will reduce the number of short term transfers that could otherwise occur. <sup>62</sup>	We acknowledged Asciano's comment but the change was made to be consistent with operational processes. We accepted Aurizon Network's view that the proposed change is more workable. We agreed that there is potential for transfers to be discouraged. However, the register of transfers required under clause 10.5.2 should provide the necessary information to further consider the operation of short-term transfers in

<sup>59</sup> Asciano, sub. no. 2: 6.

<sup>60</sup> Asciano, sub. no. 2: 6.

<sup>61</sup> Asciano, sub. no. 2: 6-7.

<sup>62</sup> Asciano, sub. no. 2: 7.

<b>Clause</b>	<b>Asciano position</b>	<b>QCA draft decision</b>
		UT5. We considered that the amendment is appropriate.
7.4.2 (e)(ii)(E)	Asciano seeks clarification as to whether this original clause refers to above rail haulage agreements or below rail access agreements. If the intention is to refer to above rail haulage agreements (which the original clause seems to imply) than the removal of this clause may have impacts on above rail haulage agreements signed prior to 1 March 2002 that may still be on foot. <sup>63</sup>	We confirmed that the original clause refers to above rail haulage agreements. We confirmed with Aurizon Network that as there are no rail haulage agreements that satisfy the exception the deleted clause addressed, deletion of this clause does not affect any existing rail haulage agreements.  Further evidence would be required to be provided by Asciano. In the meantime, we considered the amendment appropriate.
7.4.2 (h)	Asciano said it believed all transfers (regardless of type) should be addressed in section 7.4.2.  Asciano said that the QCA should assess whether such transfers are better managed under the access application in Part 4. If the QCA assess that these transfers are better managed under Part 4 than the transfer process in 7.4.2 should at least state that the access application process under Part 4 is to be applied for transfers that require additional access rights and detailed assessment.  Otherwise, a transfer of this type is not covered in the transfer process under clause 7.4.2. <sup>64</sup>	Clause 7.4.2(d) clearly states that Part 4 will apply where clause 7.4.2(f) or (g) does not apply.  Accordingly, we considered deletion of clause 7.4.2(h) to be reasonable in reducing process in the undertaking and improving workability.  We considered this clause is appropriate. However, we proposed to further review and streamline the transfers arrangements to the extent possible as better information becomes available in future undertakings.
7.5.3 (b)	Asciano is concerned that the 20 day timeframe between the period when an access seeker intends to take up the offer of access rights and for them to execute an access agreement is too short in practical terms. For example, the internal governance process for an access seeker may take longer than 20 days.  Asciano is also concerned that if an access seeker cannot meet this 20 day period their opportunity to gain access rights lapses and clause 7.5.3 (c) applies where negotiations are suspended as per clause 4.8. The suspension process under clause 4.8 does not give any indication of what position in a queue the suspended access application retains under such a scenario. <sup>65</sup>	We agreed with this amendment because it promotes the efficient use of capacity where there is a queue.  We considered the queue should not be held up for lengthy periods. 20 business days should be sufficient for internal processes, given that participants are in a queue and should be able to plan ahead to some extent.  We therefore considered the clause to be appropriate.

<sup>63</sup> Asciano, sub. no. 2: 7.

<sup>64</sup> Asciano, sub. no. 2: 7.

<sup>65</sup> Asciano, sub. no. 2: 8.

<b>Clause</b>	<b>Asciano position</b>	<b>QCA draft decision</b>
Definition of Expansion	If the projects being undertaken for safety and operational performance reasons are being undertaken as the direct result of an expansion then these projects should be considered as an expansion project. <sup>66</sup>	We considered that safety and operational projects that result from an expansion should be considered as part of the expansion. Hence such an expansion would not have as a primary objective safety and operational performance.  We therefore considered the clause to be appropriate.
Schedule E 1.1(e)	Asciano said its concern is that if assets which have been replaced by newer works remain in the asset base then this may artificially inflate the value of the asset base. If an asset has been replaced its value should be removed from the asset base. <sup>67</sup>	We considered this change consistent with the policy position of our April 2016 Decision.  The issue may warrant further consideration as part of UT5.
Schedule E 1.2(c)(iii)	Asciano said its concern is that this new clause constrains the QCA. Asciano believes that all parties recognise that the RAB will only be reduced if no other reasonable options are available.  Asciano said it believes that this matter is better considered as part of UT5. <sup>68</sup>	We considered that the amendment does not constrain the QCA given that all reasonable options would be considered. The approach remains consistent with the policy position of our April 2016 Decision. However, we agreed that it may warrant ongoing consideration in UT5.
Schedule G 2(d) and (e)	Asciano said its concern is that the Capacity Assessment Report as contemplated by clause 7A.4.2 (h) does not yet exist. Until the Capacity Assessment Report exists then the wording in Schedule G, clause 2(d) and (e) of the Amended 2014 DAU should be retained.  Following the development of the Capacity Assessment Report this matter should be reviewed. Asciano believes that this matter is better considered as part of UT5.  Furthermore, Asciano notes that clause 7A.4.2(h) requires Aurizon Network to publish the Strategic Train Plan on its website for each coal system to the QCA and stakeholders, whereas the intent of the obligations under clauses 2(d) and (e) of Schedule G is to provide the Strategic Train Plan to individual access holders and access seekers.  Asciano suggests that the amended clause 2(c) of Schedule G should also make references to the obligations under clause 7A.4.2(g) to ensure that access holders, access seekers,	We noted the issues raised by Asciano and agree they could be reviewed as part of UT5.  The amendments need to be tested for workability, but for UT4, we considered the amendments appropriate.

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<sup>66</sup> Asciano, sub.no. 2: 8.

<sup>67</sup> Asciano, sub. no. 2: 8.

<sup>68</sup> Asciano, sub. no. 2: 8.

<b>Clause</b>	<b>Asciano position</b>	<b>QCA draft decision</b>
	customers and train operators are recipients of the Strategic Train Plan. <sup>69</sup>	
Schedule G 2 (j) and (k)	<p>Asciano said its concern is that the Capacity Assessment Report as contemplated by 7A.4.2(h) does not yet exist. Until the Capacity Assessment Report exists then the wording in Schedule G, clause 2 (j) and (k) should be retained.</p> <p>Following the development of the Capacity Assessment Report this matter should be reviewed. Asciano believes that this matter is better considered as part of UT5.<sup>70</sup></p>	<p>We noted the issues raised by Asciano and agreed they could be reviewed as part of UT5.</p> <p>The amendments need to be tested for workability, but for UT4, we considered the amendments appropriate.</p>
Schedule G 3.1 (d), (f) and (g)	<p>Asciano said it is concerned that this changed wording would only obligate Aurizon Network to include in the Master Train Plan those train service entitlements (TSEs) contained in agreements entered into after the approval date of UT4. Asciano is seeking confirmation that the Master Train Plan will include all TSEs.</p> <p>Asciano also notes that Schedule G clause 3.1 (b) specifies that the Master Train Plan must be published covering a period of at least one month and up to three months. On this basis, Asciano believes that the time period obligations under Schedule G clause 3.1 (b) may limit Aurizon Network exposure as they only publishing an access holder's future contracted paths for a maximum of three months. The QCA should consider whether the amendments to clause 3.1 (f)(A) and (B) are necessary on this basis.<sup>71</sup></p>	<p>Aurizon Network subsequently indicated that the Master Train Plan would include TSEs as proposed by Asciano. However, whether this information can be made public is a matter for the parties concerned.</p> <p>We considered this clause is appropriate.</p>
Schedule G 8.3 (a)(i)	Asciano said that in order to ensure all transfers are considered in this process the amended clause should refer to all transfers, not just short term transfers. <sup>72</sup>	<p>We considered that the drafting is not limiting, that is, it is including short-term transfers.</p> <p>We considered that this clause is appropriate.</p>
Standard access agreement Clause 6.2(a)	Asciano noted the different timeframes in clause 6.2(a) and considered the access holder should be provided with 10 business days to provide security under this clause. <sup>73</sup>	This clause provides for security to be provided by an access holder within 10 business days after being required to do so by Aurizon Network. We noted the shorter timeframe in this clause relates to one of the circumstances in which Aurizon Network may require security

<sup>69</sup> Asciano, sub. no. 2: 8-9.

<sup>70</sup> Asciano, sub. no. 2: 9.

<sup>71</sup> Asciano, sub. no. 2: 9.

<sup>72</sup> Asciano, sub. no. 2: 9.

<sup>73</sup> Asciano, sub. no. 2: 10.

<i>Clause</i>	<i>Asciano position</i>	<i>QCA draft decision</i>
		(i.e. failure to pay amount payable under the agreement where there is no due date for payment), not the timeframe in which security must be provided.  We noted Aurizon Network's amendment clarifies the operation of this clause and does not change the relevant timeframes from the April 2016 Decision.
Standard access agreement / standard rail connection agreement / standard studies funding agreement  Definition of Consequential loss	Asciano expressed concern at amendments being made to this definition at this stage and said this matter is better considered as part of UT5. <sup>74</sup>	It was noted the amendment is intended to ensure that the definition of consequential loss extends to third party claims that themselves fall within that definition. We considered this is appropriate and do not consider this to be inconsistent with the April 2016 Decision.

#### Pacific National submission on the draft decision

Pacific National continued to have concerns about some of the changes made by Aurizon Network in its 2014 Amended DAU.

These issues were, as noted also in the table above:<sup>75</sup>

- (a) Clauses 3.1.3(c) and (h) - Pacific National submitted that the changes reduce the protections on confidential information that third party users provide to Aurizon Network
- (b) Clause 7.4.2 and Schedule G - Pacific National considered that the drafting changes may impact on the number and type of capacity transfers undertaken
- (c) Schedule E - Pacific National continued to hold a view that the changes have the potential to inflate the asset base
- (d) Schedule G - the deletion of clauses relating to the capacity assessment report should be reversed until the capacity assessment report is developed
- (e) Consequential loss - Pacific National considered that there was no justification to amend the definition of consequential loss at the late stage of the UT4 process.

Pacific National expects to further address the above concerns in the UT5 process and is not seeking to delay the implementation of UT4.

#### QCA final decision

We note that while Pacific National proposes to raise the above matters under the UT5 process, it supports approval of the 2014 Amended DAU in its present form.

#### Aurizon Operations submission

Aurizon Operations<sup>76</sup> recommended that the QCA accept the amended 2014 DAU to bring the UT4 regulatory process to a close. However, Aurizon Operations raised a concern about the

<sup>74</sup> Asciano, sub. no. 2: 10-11.

<sup>75</sup> Pacific National, sub no 10, 1-2

<sup>76</sup> Aurizon Operations, sub. no. 3.

treatment of relinquishment fees for a reduction in train paths resulting from an increase in train payloads - noting that there was a different approach used by the QCA in the Aurizon Network and Queensland Rail decisions. It sought the issue to be on the public record to be addressed as part of UT5.<sup>77</sup>

#### QCA's draft decision

We accepted that there is a difference between the treatment of relinquishment fees. The QCA's decisions rest on applying the section 138(2) factors to specific factual circumstances for each declared service, and this could be expected to result in different outcomes. However, we noted it is open for this issue to be further considered as part of UT5, as proposed by Aurizon Operations.

In light of the above, we considered that Aurizon Operations' submission did not raise sufficiently material concerns regarding the appropriateness of the Amended 2014 DAU to preclude us from approving the Amended 2014 DAU.

#### QCA final decision

Aurizon Operations did not make a submission in response to the QCA's draft decision.

#### BMA submission

BMA<sup>78</sup> supported the Amended 2014 DAU as submitted by Aurizon Network, but reserved the right to reconsider specific aspects in the future. BMA agreed with QRC's concerns, but to avoid delays, agreed the matters can be revisited as part of UT5.

#### QCA's draft decision

In light of the above, we considered that BMA's submission did not raise sufficiently material concerns regarding the appropriateness of the Amended 2014 DAU to preclude us from approving the Amended 2014 DAU. We noted it is open for BMA to raise issues for further consideration as part of UT5.

#### BMA submission on draft decision

BMA supported approval of the drafting amendments but noted that some outstanding concerns may be dealt with via a separate amendment to the undertaking once approved, or be revisited in the upcoming UT5 process.

BMA submitted that having the current process occur at the late stage of the 2014 DAU assessment provides evidence and impetus for improving DAU processes in the future.<sup>79</sup>

#### QCA final decision

We note that BMA may revisit some issues as part of UT5, but supports approval of the 2014 Amended DAU.

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<sup>77</sup> Aurizon Operations, sub. no. 3: 1-2.

<sup>78</sup> BMA, sub. no. 4.

<sup>79</sup> BMA, sub no 11

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## REFERENCES

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QCA (2012), Final Decision, Wiggins Island Rail Project Stage 1 - Rail Infrastructure Access Conditions, May.

QCA (2010), Final Decision, QR Network's DAU, September.

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## SUBMISSIONS

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### Aurizon Network's submissions

- July 2016, Amended 2014 Draft Access Undertaking Cover letter and explanatory notes (sub. no. 1)
- September 2016, Submission on the QCA draft decision (sub no 9)

### Stakeholders' submissions

#### Asciano/ Pacific National

- July 2016, Submission on the Amended 2014 Draft Access Undertaking (sub. no. 2)
- September 2016, Submission on the QCA draft decision (sub no 10)

#### Aurizon Operations

- July 2016, Submission on the Amended 2014 Draft Access Undertaking (sub. no. 3)

#### BHP Billiton Mitsubishi Alliance (BMA)

- July 2016, Submission on the Amended 2014 Draft Access Undertaking (sub. no. 4)
- September 2016, Submission on the QCA draft decision (sub no 11)

#### Glencore Xstrata (Glencore)

- July 2016, Submission on the Amended 2014 Draft Access Undertaking (sub. no. 5)
- July 2016, Castalia, Required Adjustment to the Access Undertaking in the Context of the Wiggins Island Rail Project Deed (sub. no. 6)
- July 2016, Allens, QCA Powers in response to WIRP Access Conditions (sub. no. 7)
- September 2016, Submission on the QCA draft decision (sub no 12)

#### Queensland Resources Council (QRC)

- July 2016, Submission on the Amended 2014 Draft Access Undertaking (sub. no. 8)
- September 2016, Submission on the QCA draft decision (sub no 13)