Submission to the Queensland Competition Authority in response to the submission provided by Queensland Rail Limited dated 30 May 2018

16 July 2018

GLENCORE

1 Introduction

This submission is made on behalf of Glencore in response to:

(a) the submission opposing declaration of the use of Queensland Rail's rail transport infrastructure, lodged with the Queensland Competition Authority (the ***QCA***) by Queensland Rail Limited (***QR***) on 30 May 2018 (***QR's Initial Submission***); and

(b) the further submission from QR dated 18 June 2018 (***QR's Further Submission***) and the draft 'Queensland Rail Access Framework' which formed part of that submission (the ***Access Framework***).

This submission is entirely consistent with Glencore's previous submission to the QCA, dated 30 May 2018 (the ***Glencore's Initial Submission***) and should be read together with it.

Glencore has sought to respond to as much as possible of QR's Further Submission in the time available, but may provide a supplementary submission in respect of QR's proposed Access Framework within the extended submission period of 30 July 2018 provided by the QCA.

2 Executive Summary

2.1 Declaration should be continued

Glencore remains of the view that each of the access criteria set out in section 76 of the *Queensland Competition Authority Act* (Qld) (the ***QCA Act***) are clearly satisfied in respect of either:

(a) the declared service, as defined by the QCA Act as:

the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager (the ***Declared Service***); or

(b) the part of the Declared Service involving the use of the Mount Isa Line rail transportation infrastructure for providing transportation for bulk minerals to the Port of Townsville by rail (referred to in this submission (and Glencore's Initial Submission) as the ***Mount Isa Rail Access Service***).

Glencore also consider it remains clear that:

(a) it is open to the QCA to declare the Mount Isa Rail Access Service (as part of the Declared Service) if it has any doubt about whether the access criteria are satisfied in respect of the broader Declared Service; and

(b) it is clearly appropriate for the QCA to recommend that the Declared Service or the Mount Isa Rail Access Service continue to be declared for at least a further 15 year period in accordance with section 87A and 87C of the QCA Act.

2.2 Criterion (a) – promotion of competition

QR's arguments in respect of criterion (a) are fundamentally flawed as they rely on:

(a) an inappropriate interpretation of what is required for there to be a 'promotion of competition' that is inconsistent with the well settled meaning of that terminology;

(b) assertions about QR's incentives and the extent of constraints it would face in the absence of declaration that do not stand up to scrutiny; and

(c) an Access Framework:

(i) that is not an appropriate counterfactual for the purposes of criterion (a), given that it is clearly contrived solely to try to defeat the declaration continuing;

(ii) which is so easy for QR to amend that the QCA cannot be satisfied that the initially proposed terms present a likely future state of the market without declaration; and

(iii) which, even if it was assumed to provide a counterfactual, completely removes the principal protections provided to Glencore by declaration under the QCA Act (particularly in relation to pricing) and creates such uncertainty in relation to access and pricing of access that it will have a substantial detrimental impact on investment and competition in a number of dependent markets,

demonstrating that declaration will promote a material increase in competition in those markets and criterion (a) is satisfied

2.3 Criterion (b) – foreseeable demand at least cost

While QR may be correct that for some rail access services, road haulage is in the same market, that is demonstrably not true in respect of the Mount Isa Rail Access Service given the costs of long distance road haulage for products like bulk minerals and the government policy, environmental, safety and community issues that would arise from trucking of large volumes of bulk minerals.

On the basis of the demand and capacity information provided in Glencore's Initial Submission and this submission, it is clear that foreseeable demand is met at least cost by the Mount Isa rail corridor infrastructure and criterion (b) is satisfied.

2.4 Criterion (c) – the facility is significant

For all of the reasons noted in Glencore's Initial Submission, Glencore consider it remains clear that the Mount Isa Line is significant, having regard to its size and importance to the Queensland economy.

Glencore notes that QR has submitted that the Mount Isa Line is a rail system of sufficient size and sufficient importance to the Queensland economy such that criterion (c) is satisfied. Consequently, Glencore consider it is beyond doubt that on the evidence provided to the QCA, criterion (c) is satisfied.

2.5 Criterion (d) – promotion of the public interest

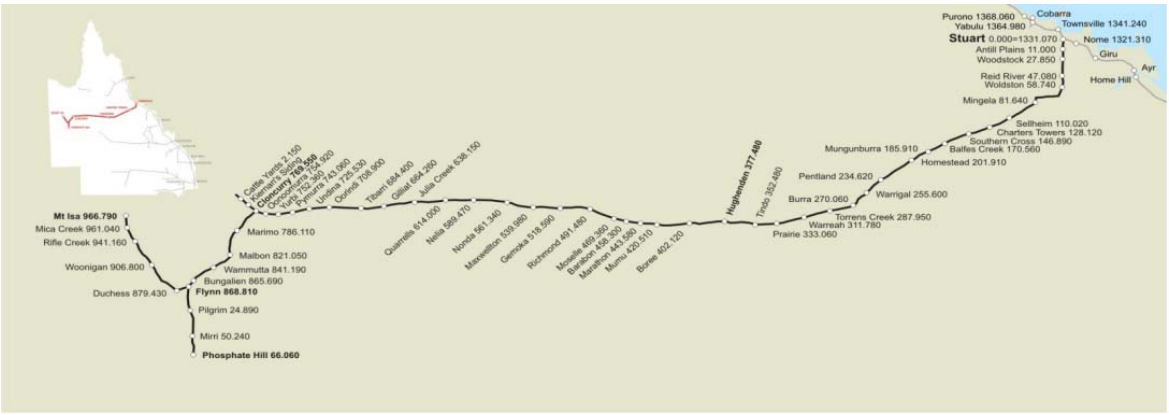
The reasons provided by QR in respect of criterion (d) are a list of unsubstantiated assertions, that do not stand up to scrutiny.

On the basis of the information provided in Glencore's Initial Submission and this submission (particularly in relation to the effect of declaration on investment), it is clear that, at least in respect of the Mount Isa Rail Access Service, declaration promotes the public interest and criterion (d) is satisfied.

3 The Mount Isa Rail Access Service

As identified above, where this submission refers to the Mount Isa Rail Access Service it is referring to the part of the Declared Service involving the use of the Mount Isa Line rail transportation infrastructure for providing transportation for bulk minerals to the Port of Townsville by rail.

For the avoidance of any doubt, Glencore notes that that is different to how QR describes 'the Mount Isa Line' as *'that part of the network bounded to the east by (and including) Stuart and to the west by (and including) Mount Isa*' – shown as the bolded black rail lines below:



QR asserts that assessment against the access criteria should be performed on a 'rail system by rail system basis'.[1]

However, that would effectively exclude a critical part of the Mount Isa Rail Access Service (as can be seen on the map above), being the rail link from Stuart (which is about 10 kilometres South of Townsville) to the Port of Townsville via the Jetty branch line. QR classifies that rail for its purposes as part of the North Coast Line.

The vast majority of rail services utilising the Mount Isa Line do so in order to take products to or from the Port of Townsville. Consequently it is the Mount Isa Rail Access Service) including the Stuart – Port of Townsville rail link and Jetty branch line which forms a usable service and in relation to which the access criterion should be considered.

Glencore has no issue with QR's classification of its various systems in an environment (where all of the Declared Service remains declared or access to both the Mount Isa Line and North Coast Line remain declared), but if the QCA determined to only recommend declaration of the Mount Isa Rail Access Service it is critical that the declaration covers the entirety of that service as described in this submission (not artificial boundaries drawn on QR's network map which do not of themselves constitute a service).

[1] QR Initial Submission at [19]

4 Criterion (a) – Promotion of competition

4.1 What is required for there to be a promotion of competition

QR argues in the QR Initial Submission that the test of 'promoting a materially more competitive environment' (as set out in the QCA Staff Issues Paper, and case law):

> *is too low and is contrary to the stated legislative intention of increasing the threshold to ensure that declarations are only sought when increases in competition are not trivial in amending criterion (a).*

QR states [at 24] that the QCA must be affirmatively satisfied that declaration would result in a *'significant and non-trivial increase in competition'*.

However, QR's interpretation is completely inconsistent with the legal and regulatory precedent which exists in relation to the interpretation of this wording.

In particular, QR's interpretation is:

(a) inconsistent with the Australian Competition Tribunal's decision in *Sydney Airport*[2] (as upheld in the Federal Court) that what a promotion of competition requires is that:

> *if the [service] is declared* ***there would be a significant, finite probability that an enhanced environment for competition and greater opportunities for competitive behaviour – in a non-trivial sense – would arise in the dependent market***

(noting that the promote competition part of the language in the section has not changed since that decision was handed down);

(b) inconsistent with the Australian Competition Tribunal's latest consideration of the criteria in *Application by Glencore Coal Pty Ltd*[3]:

> *In identifying dependent markets for the purposes of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market.* ***This includes considering whether access will create or improve the environment in which competition may then flourish****: see Sydney Airport FC at [107].*

(c) inconsistent with the National Competition Council's (***NCC***) Guide to Declaration of Services – which was updated following the recently enacted change to the wording of criterion (a) and continues to state the following[4]:

> ***The promotion of a material increase in competition involved an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur****.*

The legislature must be assumed to know and understand how that wording had been interpreted, such that where it has seen fit to change other aspects of criterion (a), but not the promotion of competition wording – it is clear that there was no intention to change how the

[2] [2005] A Comp T 5 at [162]

[3] [2016] ACompT 6 at [107]

[4] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010* (Cth), April 2018 at [3.23]

reference to promotion of competition was interpreted. All that has changed is what is required to produce that promotion of competition (previously access, now declaration).

It is also notable that there was no discussion in the Productivity Commission review of the national access regime report or the Harper Review report about seeking to change what promotion of competition meant under criterion (a) – such that there is no reason to suggest that the Sydney Airport decision's interpretation of this wording is no longer valid.

Accordingly, Glencore confirms that it considers the QCA is correct in its interpretation of the meaning of promotion of competition in the context of criterion (a) (and would be acting consistently with all judicial and regulatory precedent, and legislative intention, by maintaining that position).

4.2 QR's Alleged Incentives

QR claims that it has *'incentives to maximise demand for its below rail services due to significant spare capacity on its systems'* and not being '*vertically integrated in a relevant respect*' (QR's Initial Submission at 4).

However, that broad statement about QR's incentives in respect of its network generally should not be assumed to be the case in respect of the Mount Isa Line. QR itself, stated in its submissions that the Mount Isa Line is (as an exception to the rest of QR's network) commercially viable in the absence of transport service payments under the Transport Service Contract it holds with the State of Queensland (QR's Initial Submission at 25(a)(i)).

On that basis alone, QR is clearly incentivised to charge monopoly prices and increase prices to the point at which it maximises profits (which is unlikely to be the equivalent of maximising throughput).

Glencore considers that QR has always conducted itself in previous pricing negotiations in a manner suggesting that its intent is to maximise profits.

It is basic economics that traditional monopoly behaviour is to raise prices to the point that maximises profit even though that results in a lower volume of supply. No evidence has been provided by QR to substantiate that that would not be the case in respect of the Mount Isa Rail Access Service.

As discussed further below, the declaration has effectively placed some real limits on that. For example, in respect of pricing alone a declaration has provided for:

(a) information disclosure requirements (both in section 101 of the QCA Act and through the required reporting and master planning under the access undertaking);

(b) the right to seek arbitration of an access dispute by the QCA (Division 5 of Part 5 of the QCA Act); and

(c) the threat of a potential reference tariff being introduced as part of the QCA's next consideration of a QR access undertaking.

Too aggressive a push by QR towards monopoly pricing previously has, to date, run the risk of pricing being far more directly regulated.

However, without those arrangements, it seems clear that QR will be incentivised to maximise profits, which will likely be achieved by higher prices even though that will cause a reduction in throughput.

4.3 QR's Alleged 'Constraints'

QR also claims that it would be 'materially constrained' by a number of other factors, including:

(a) competition from road operators;

(b) customer's ability to pay;

(c) QR's statutory obligations, position as a statutory authority and transport services contract obligations;

(d) the threat of regulation or declaration under Parts 3 or 5 of the QCA Act; and

(e) regulation of passenger services.

Most of the 'constraints' don't apply to the Mount Isa Rail Access Service

The vast majority of those constraints may impact on QR's behaviour in respect of other services – but will not provide any constraints in respect of the Mount Isa Rail Access Service.

For all of the bulk minerals services contracted by Glencore, rail transport is the only economic mode of transport. Comments in the QR submission that QR competes with road haulage providers may apply to some traffic on QR's Network, but road haulage does not provide any competitive constraint on rail costs for bulk minerals or most of the bulk materials transported in connection with Glencore's minerals businesses through intermodal services.

QR effectively admits as much in the QR Initial Submission by noting that road transportation does not offer an effective substitute for *'some bulk commodities being transported over long distances'*. The lack of substitutability between road and rail transport is discussed in more detail in respect of criterion (b) below.

Similarly, regulation of passenger services, and QR's statutory obligations, position as a statutory authority and transport services contract obligations impose no evident constraints on QR in respect of the Mount Isa Rail Access Service.

Ability to pay

It is theoretically true that Glencore's ability to pay means there is a limit to the prices which QR can charge for provision of the Mount Isa Rail Access Service before mines in the North West Queensland region become economically unviable and close.

However, that limit will not prevent an impact on competition given that the principal users are large mining or process facilities with significant sunk costs, such that it is theoretically possible for QR to raise its prices to the point at which such mining or industrial users will continue to operate provided they can meet their marginal costs of doing so. QR doing so would involve very substantial price rises and materially distort and damage competition in a number of dependent markets.

In addition, it is not clear that QR would have any way of accurately assessing an access seeker's ability to pay. In particular, while infrastructure costs are a very significant and material cost to producers, the maximum price a producer has capacity to pay is influenced by factors such as commodity prices and mining or processing facility operating costs.

Glencore's experience in previous access negotiations is that QR either does not appreciate user's capacity to pay or does not feel particularly constrained by it.

Threat of regulation or declaration

Glencore consider that in the circumstances in which QR asserts these constraints apply (in the absence of declaration) the 'threat of declaration' under Part 5 of the QCA Act will not be a credible or real threat that in any way constrains QR's behaviour.

That is the case because in those circumstances the Minister has already determined that the Declared Service (or relevant part thereof) does not satisfy the access criteria. It is hard to see why QR would then feel constrained in its behaviour where it had the benefit of such a decision. In fact QR would presumably perceive there to be far less risk than an infrastructure provider who had never previously been regulated – as it would have a clear written decision describing why it would not be declared. As such, Glencore considers that Part 5 of the QCA Act will not (in these circumstances) provide a meaningful constraint on QR's behaviour.

Glencore also consider the 'threat of regulation' under Part 3 of the QCA Act will not be a material constraint on QR's behaviour. While it is possible that QR would be a 'monopoly business activity' which could be regulated under Part 3 of the QCA Act:

(a) whether a monopoly business activity is declared under Part 3 of the QCA Act – is a matter of discretion for the government (see sections 19 and 20 QCA Act). Unlike Part 5 of the QCA Act, Part 3 does not provide objective criteria which, if met, must result in regulation; and

(b) Part 3 does not enable the QCA to directly regulate a business or the terms on which it provides goods or services – it merely allows the QCA to report on pricing practices – whether any recommendations of the QCA are ultimately implemented is then a matter for government.

It seems to Glencore that where QR is a statutory authority and presumably aware of the government's wishes, Part 3 of the QCA Act will not provide a meaningful constraint on QR's behaviour.

4.4 The Access Framework is not an appropriate counterfactual

Based on the above analysis, it appears clear that:

(a) the alleged incentives and constraints raised by QR are either substantially overstated or do not exist; and

(b) consequently, QR's position on criterion (a) effectively relies on:

  (i) the counterfactual (the likely state of dependent markets without declaration) being assessed on the basis of their proposed Access Framework; and

  (ii) their proposed Access Framework terms being on such reasonable terms that it would be concluded that declaration would not promote competition in such dependent markets.

Starting with the first of those issues, Glencore considers that the Access Framework is not an appropriate counterfactual and should not be taken into account by the QCA in assessing the likely state of dependent markets in the absence of declaration.

That is the case for a series of reasons.

Principally, the Access Framework is clearly designed with the cynical and sole purpose in mind of trying to artificially establish that criterion (a) is not satisfied.

The ACCC notes in its merger guidelines:[5]

> *the ACCC will not take into account counterfactuals it considers have been manipulated for the purposes of making clearance more likely. Signs that a counterfactual may have been manipulated include:*

[5] ACCC Merger Guidelines, November 2008 (as updated in November 2017) at [3.19]

- *a change of policy or intention by the merger parties that occur after the merger is proposed*

It is hard to understand why criterion (a) should be treated any differently.

It is clear that the Access Framework:

(a) has been designed to make a determination that the access criterion are not met more likely (being the equivalent of clearance, i.e. the mergers prohibition in the CCA not being met, in the quote above); and

(b) represents manipulation, given that the first time it has ever been proposed is after the declaration review has commenced (being the equivalent of a change in policy after a merger is proposed in the quote above).

To accept that the operation of the Access Framework is an appropriate counterfactual is to effectively accept the absurd result that an infrastructure provider, when faced with a declaration application, can arguably prevent access regulation by proposing an entirely new set of access arrangements that have never been implemented and for which the likely outcomes are entirely speculative given there is no evidence or experience with how they would operate.

This situation is clearly distinct from the position of an infrastructure owner who has for many years operated a voluntary access regime – such that the infrastructure provider's past behaviour under those existing access arrangements might provide a reasonable basis for the QCA being satisfied as to the likely state of competition in dependent markets without declaration.

It cannot be the legislature's intention in respect of the revised criterion (a), that it is now merely a safe harbour for this sort of cynical attempt at permitting unregulated monopoly pricing. Glencore cannot see how such an interpretation can be consistent with the object of Part 5 of the QCA Act as it clearly does not:

> *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.*

4.5 The Access Framework terms are not likely to stay the same

The deed poll provides that QR can amend the Access Framework at any time subject only to consent of the State (which seems likely to be forthcoming relatively easily for a government owned and controlled statutory authority) and the amendments being 'not inconsistent' with the Framework Objective.

QR is required to 'have regard' to a number of factors under the deed poll (clause 7.5 of the deed poll) when making amendments. However, 'having regard' to a matter solely requires giving consideration to it. It does not require that such factors are given a particular significance or weight or that an amendment is consistent with the factors to be considered or that is appropriate having had regard to such factors – all of which would be a materially higher threshold.

In understanding the potential for amendments, it is important to also recognise that the Framework Objective is a very high level principle of:

> *To promote the economically efficient operation of, use of an investment in, the Network, with the effect of promoting effect competition in upstream and downstream markets*

(and that even that Framework Objective itself can be amended with the State's consent – see clause 5.1 deed poll).

It is one thing to do as the QCA is generally required to and make a decision about whether an access undertaking is 'appropriate' by weighing a number of relevant factors including such a high level objective.

However a negative 'not inconsistent' test measured solely by reference to such a high level objective provides an extremely low threshold for an amendment to be permitted.

For example, an amendment could be 'not inconsistent' where it did not promote the objective.

Seemingly, the only way that an access holder or seeker could challenge such an amendment would be to take expensive or protracted court proceedings (and given that QR has no liability under clause 8 of the deed poll for breaches of the access framework it is hard to see what stops QR from simply proposing further amendments even if an initial amendment was defeated).

In addition, the deed poll prevents (by clause 10) any such dispute unless it is commenced within 90 days of the amendments being published – creating a substantial risk of amendments (including those that are in fact inconsistent with the Framework Objective) being slipped through without access holders or seekers realising the detriments they will cause. Given the liability position noted above, QR is in fact incentivised to do this.

Given the ease of amending the proposed terms of the Access Framework, it seems absolutely clear to Glencore that the application of QR's initially proposed terms cannot be considered likely and cannot be a counterfactual that the QCA would be satisfied of.

4.6 The Access Framework terms are not reasonable

Even if the QCA determined that the appropriate counterfactual reflects the operation of the Access Framework, Glencore still consider that it is clear that declaration will promote competition in dependent markets.

QR asserts that the Access Framework is based on the 2016 Access Undertaking (***AU1***) with *'amendments made primarily to allow for administrative or process changes to improve efficiency for access seekers, access holders and [QR]*' (QR's Further Submission at 2). However, that is not a true reflection of the extent of changes proposed.

A detailed summary of the differences between AU1 and the Access Framework is included in Schedule 1 to demonstrate the extent of the differences involved.

However, some important differences which the QCA should carefully consider include the Access Framework:

(a) being able to be very easily amended by QR (see the discussion above);

(b) unlike an access undertaking, not providing an opportunity for an independent review of the appropriateness of its terms. Importantly that takes away a critical opportunity for Glencore to seek changes – such as, for example, seeking a reference tariff for Mount Isa Rail Access Services (which it has considered doing previously);

(c) in accordance with the related deed poll, having a term of only 10 years without any certainty as to the position on access beyond that period;

(d) deleting the requirements to provide certain cost information to non-reference tariff services (which is all Mount Isa Rail Access Services);

(e) making the limits on price differentiation subject to a very broad discretion to set prices differently (see clause 3.3.2 being expressed as 'subject to clause 3.3.1');

(f) deleting most of the reporting obligations;

(g) including new provisions (which are mirrored in the deed poll) which provide for QR to have no liability for breach of the Access Framework (which as discussed differs

substantially from the position under the QCA Act for breaches of an approved access undertaking); and

(h) removing details around the network management principles.

Those are significant departures which diminish the certainty the approved access undertaking otherwise provides.

4.7 Removal of the QCA Act protections

For an access seeker or holder such as Glencore, some of the most important protections arising from declaration actually arise under the QCA Act (not the undertaking).

Those protections have no real equivalents in QR's proposed deed poll and access framework.

In particular each of the following material arrangements will be removed if the Declared Service was to cease to be declared:

(a) QR will cease to be obliged to negotiate an access agreement when requested (section 99 QCA Act);

(b) QR will cease to be obliged to conduct such negotiations in good faith (section 100 QCA Act);

(c) QR will cease to be prohibited from unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of an access seeker to compete with other access seekers (section 100 QCA Act);

(d) QR will cease to be prohibited from engaging in conduct for the purpose of preventing or hinder a user's access under an access agreement (section 104 QCA Act) or access determination (section 125 QCA Act);

(e) the rights of a user to transfer access rights will be removed (section 106 QCA Act);

(f) the right of a user to refer access disputes to the QCA for arbitration (Division 5 of Part 5 QCA Act) – which critically can require QR to provide access on determined terms including price and require extensions or expansions of the facility (sections 117 and 118 QCA Act);

(g) there will cease to be a regulator who has the power to require information about compliance with the access arrangements (section 150AA QCA Act); and

(h) the QCA and stakeholders will cease to have rights to enforce the undertaking and be awarded compensation for loss or damages caused by QR breaches (section 158A QCA Act).

The loss of these protections are clearly the very antithesis of the certainty of access, efficient access pricing and reasonable access terms that are needed in order for businesses to continue to make long term investments in dependent markets (such as new mineral mine developments or mine expansions, or investments in refining or smelting facilities related to such mineral extraction).

In particular, in the absence of these protections (and the related provisions of the approved access undertaking), Glencore and all other access seekers are completely exposed to QR's monopoly position.

4.8 Illustrative example – future pricing negotiation

To take the example of pricing, in the absence of declaration:

(a) the negotiation of access terms will occur in an environment of clear information asymmetry:

(i) QR will have no obligation to inform an access seeker about how it has calculated the price, how it compares to its costs or the profit or margin it is seeking; and

(ii) QR will know the prices it has agreed with access holders, but that will not be known to the access seeker,

such that access seekers will have extremely limited prospects of being able to determine how reasonable the price is;

(b) this is even worse for access seekers given the information asymmetry that exists (such that access seekers are likely to have very limited ability to assess whether an arbitration should be commenced);

(c) the Access Framework will only provide a completely uncertain pricing position with:

(i) a floor price based on incremental cost and a ceiling price based on standalone cost with the ceiling price (at least for a multi-user line as long as the Mount Isa Line) being so much higher than any economically viable price that it provides no useful protection at all; and

(ii) a list of factors to have regard to that are unbalanced and favour QR's commercial interest – without any regard to efficiency, reasonableness, interests of the access seeker or ability to pay (see clause 3.3.1 of the Access Framework);

(d) existing access holders will be likely to have high sunk costs in long term mines or industrial processing facilities, such that the existing users will be economically incentivised to continue to operate if they cover their marginal costs by doing so;

(e) the issues that restrain or blunt QR's incentives to engage in monopoly pricing to the greatest extent profitable will be removed (particularly the potential for a QCA arbitration of pricing and a potential future reference tariff) such that QR's economic incentives will be to maximise profit;

(f) the only real right that an access seeker will have is to commence an arbitration under the Access Framework, however:

(i) it is not even clear in the dispute provisions of the Access Framework that a failure to reach agreement on the terms of an access agreement does enable a dispute to be brought;

(ii) any arbitration will be protracted and expensive – QR will have strong economic incentives to ensure it gets the highest possible price and will be expected to incur significant costs to defend any such dispute;

(iii) any arbitration will have a very high uncertainty of outcome given the very limited direction provided by the Access Framework – in particular:

(A) the floor and ceiling prices will be a considerable range apart;

(B) the arbitrator will not have the deep economic experience and resources of the QCA and past experience with determining tariffs and terms of access;

(C) the principles provided in the Access Framework are extremely high level;

(D) there will be no likely consistency in approach or methodology given that there is likely to be different arbitrators for different access disputes and the decisions in previous arbitrations will not be publicly available (so it

will not be evidence if the limited differential pricing protections have been breached);

(iv) any arbitration will be confidential – such that the outcomes will (completely unlike a QCA decision) not be available to other access seekers as a transparent guide to likely outcomes; and

(g) the issues will be exacerbated when an expansion is required given there is no longer any regulator with the ability to require QR to expand capacity and information asymmetry about the costs and need for such an expansion.

The outcomes of this are clear – in the absence of declaration there will be:

(a) a significant increase in prices to existing users;

(b) a much higher likelihood of differential pricing with a high prospect of favouring some users over others – not justified on the basis of efficiency, but rather based on commercial negotiations and/or the uncertainty of different arbitral outcomes; and

(c) a dramatic chilling effect on investment in mines or industrial facilities reliant on use of the rail. In particular, it is difficult to see why an investor would incur considerable amounts in exploration and development (and obtaining related regulatory approvals), if the investor is ultimately faced with an access negotiation where QR is economically incentivised to charge the producer an access price which would leave the producer only covering marginal costs (and not being able to recover the sunk costs expended to that point).

4.9 Impact on dependents markets

The chilling impact on future investment created by the completely uncertain pricing position which will apply in the absence of declaration will have adverse implications across a number of dependent markets which are dependent on new and continuing investment.

In particular, turning to the individual dependent markets identified in Glencore's Initial Submission:

North West Queensland mineral tenements market

The clearest outcome of the deep uncertainty and monopoly pricing that the Access Framework will produce is deterring future investment in this tenements market.

There is, in fact, a real prospect that the Access Framework will in effect completely eliminate this market (which must evidence that declaration would promote a material increase in competition).

That follows because, as described above, it is impossible to see how investors would incur costs in exploration and development when there is such limited certainty of costs of a Mount Isa Rail Access Service and the knowledge that they can be held hostage to monopoly pricing at the time of seeking access.

It is highly likely that the prospect of new entry will be eliminated.

Even if Glencore was incentivised to continue to participate in the market due to its existing portfolio of Mount Isa mines and existing take or pay rail haulage or port commitments, that will forever entrench a position of there being few possible acquirers in the market (being the existing incumbents). This is particularly so as most (if not all) other producers in the region are producers of a single project such that once the life of those projects had expired (or prices had been increased to such a point that producers could not feasibly operate a single project in the region) they would not be incentivised to reinvest in further tenements.

Again that would demonstrate that declaration would promote a material increase in competition in this tenements market.

Rail haulage

As discussed in Glencore's Initial Submission, there is a separate market for rail haulage.

Notwithstanding that Glencore encourages the QCA to seek information from rail haulage providers to determine the geographic scope of the relevant rail haulage markets, Glencore considers it is possible that there is a separate rail haulage market for the Mount Isa Line.

This is evidenced by the need for operators to invest in specific adjustments to rolling stock in order to service the bulk minerals demand on the Mount Isa Line.

With Aurizon's threatened sale or withdrawal from the intermodal business (including presumably on the Mount Isa line) there is likely to be a single monopoly provider of haulage services on the Mount Isa Line in the near future.

Consequently, competition in the rail haulage market will clearly be promoted by any circumstances which promote the prospect of new entry.

For new entry to be possible, a haulage provider would need major users to be willing to commit to long term haulage contracts to sponsor or underwrite that entry (so the haulage provider would have some certainty it could obtain a return on its investment in 20 year+ life rolling stock and a maintenance and provision facility) – see for example the way Pacific National was able to enter the Queensland coal haulage industry through a contract underwritten by volumes from Glencore and Rio Tinto.

However, it is immensely difficult to see where that volume of demand to sponsor new entry comes from in circumstances where the uncertainty of pricing created has fundamentally damaged the prospects of new investment occurring.

Consequently it is clear that declaration also promotes a material increase in competition in the rail haulage market.

North West Queensland Mining Inputs

The very significant freight costs implicit with operations in such a remote location demonstrates that a geographically distinct market for the provision of mining inputs (such as explosives, chemicals, gas and thermal coal for power generation at mining facilities) exists.

The damage that the removal of the undertaking will do to investment in the North West Queensland minerals industry will, over the declaration period be likely to result in significantly lower (if any) future investment in the industry and will in turn damage the market for the supply of numerous mining inputs in North West Queensland.

Other relevant markets

As noted in Glencore's Initial Submission, as a result of significant operations in the North Queensland region, the resources industry (inclusive of minerals operations specifically) make substantial contributions to the regional employment and local business markets through business expenditure for sourcing operations (such as catering and food supply services) and through employees' expenditure within the regions.

The impact of mineral operations on employment within the region has arguably been amplified recently due to new legislative restrictions relating to the employment of fly-in fly-out workers. This legislative intervention indicates that regional employment markets (such as that in North West Queensland) are closely bounded to their locations suggesting that employees will not readily relocate to pursue alternative employment.

Glencore employs a substantial number of people at its Glencore, Cloncurry and Townsville operations which are reliant on the Mount Isa Rail Access Service.

Accordingly, there is a clear correlation between the future success of mineral operations and the employment market within North West Queensland.

In addition, Glencore notes the existence of a number of downstream markets dependent on mining in the North West minerals province – ie, Glencore operates both a copper smelter and refinery in the region in addition to significant zinc assets. Similarly, Incitec Pivot Limited operates one of its manufacturing plants in Mount Isa, which is directly supplied by its Phosphate Hill mine.

If the QCA is not convinced that criterion (a) would be satisfied on the basis of those markets, Glencore would appreciate the opportunity to provide submissions on further dependent markets in which it considers declaration would promoted a material increase in competition (particularly in North West Queensland regional areas).

4.10 Existing access agreements do not provide protection over the declaration period

QR indicates that existing access arrangements will remain in effect after expiry of the declaration.

Even if existing access agreements were to remain on foot post declaration, because they do not contain any renewal or extension rights they cannot actually protect current users (or competition in dependent markets) from the adverse impacts which will be caused by the absence of declaration over the declaration period.

Further, the protections offered under the QCA Act are vital to operations that rely on the Mount Isa Rail Access Service (not just those in the access agreement). As discussed above at 4.2, Glencore has demonstrated dependence on the protections provided by the QCA Act (including considering QCA arbitration to resolve pricing for new access rights) such that to be without those protections Glencore is likely to have far less incentive for future investment in operations in the North West Queensland minerals province.

4.11 Dependent markets being 'workably competitive' is a result of declaration not proof that declaration will not promote competition

QR simply asserts that *'key relevant dependent markets are effectively competitive and would be with and without declaration'*. And *'It is well established that if a dependent market is already workably or effectively competitive, improved access is unlikely to promote a material increase in competition and declaration of the service is therefore unlikely to satisfy criterion (a)*'.

What QR completely fails to recognise is that the context of this declaration review is an entirely different position to where no declaration currently exists. In that position (which is what would more typically exist when an application for declaration occurs) if a market is already workably or effectively competitive it is necessarily the case that that position has arisen without declaration.

However, here the very reason that certain dependent markets are workably competitive is that the declaration (and as a result the approved access undertaking) exist.

Consequently it is misconceived to take the pro-competitive outcomes of declaration and then seek to use them as evidence that declaration is not required to achieve those outcomes (which is effectively what QR's position boils down to).

4.12 Conclusion

Based on the above analysis, Glencore considers it is clear that declaration produces a material increase in competition in multiple dependent markets (including at least the North West Queensland mineral tenements market, Mount Isa Line rail haulage market and the North West Queensland Mining Inputs market) such that criterion (a) is satisfied.

5 Criterion (b) – Foreseeable demand at least cost

5.1 Road is not substitutable for rail for Mount Isa rail corridor transportation

The only argument that appears to have been presented by QR in respect of criterion (b) is *'whether the product dimension for the market for the relevant services includes road haulage services*'.

That issue was addressed in Glencore's Initial Submission, where it was explained that road haulage was clearly not in the same market as the Mount Isa Rail Access Service because:

(a) trucking/road haulage is deeply uncompetitive and completely uneconomic for transport of bulk minerals from Mount Isa system mines – being a far greater cost than a significant non transitory increase in price (***SSNIP***); and

(b) there are numerous other non-price constraints on utilising road haulage including government policy, environmental, safety and social licence to operate issues, which would make a large volume of trucking practically impossible, even if it was remotely economically feasible.

That is also consistent with a number of regulatory decisions which have each found that trucking is not likely to be viable for bulk products over long distances and/or large volumes, including the commentary of the Australian Competition Tribunal in *Re Fortescue Metals Group Limited* in respect of iron ore transportation.[6]

For the reasons set out in Glencore's Initial Submission and summarised above, Glencore continue to consider the appropriate market definition is the market for the Mount Isa Rail Access Service.

5.2 Foreseeable demand at least cost

QR has not provided any projection of foreseeable demand or the costs of meeting such demand to support its position in respect of criterion (b).

As discussed in Glencore's Initial Submission:

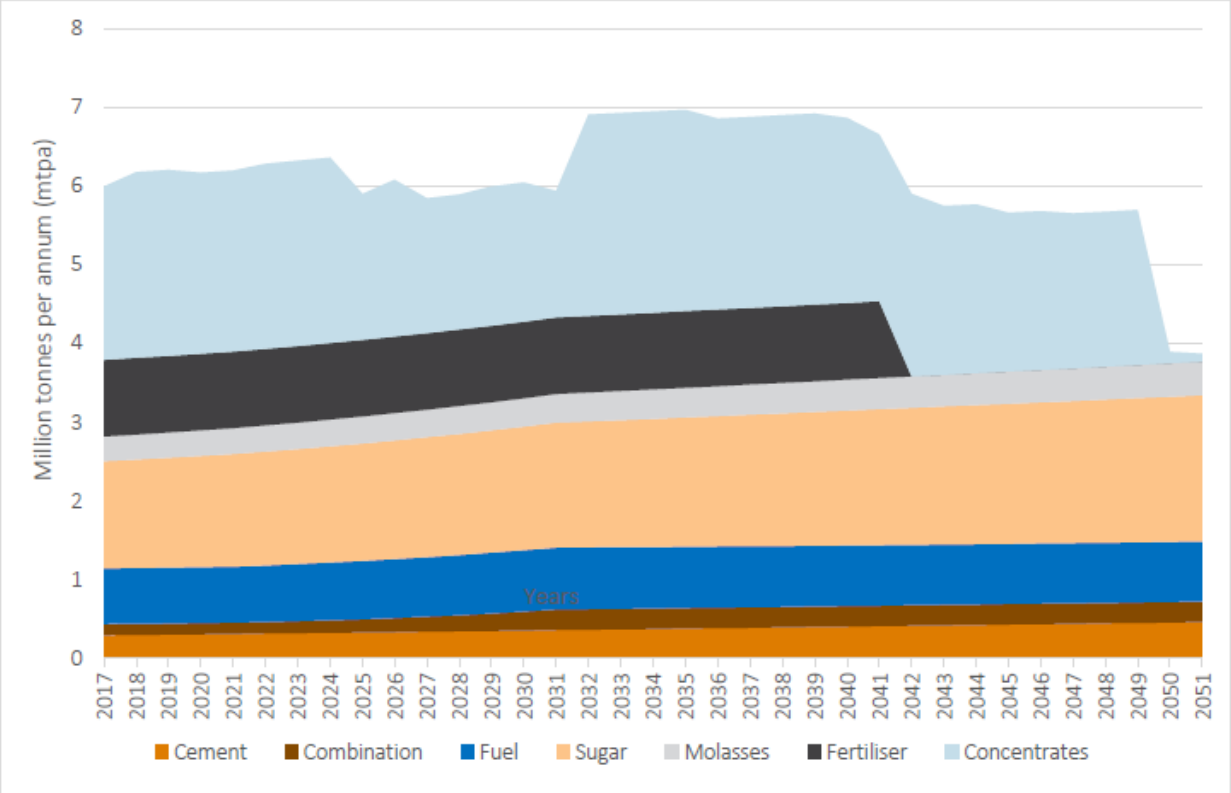
(a) there is material surplus capacity in the Mount Isa Line sufficient to meet even the highest credible forecast of foreseeable demand, as set out in the Building Queensland Report (which refers to the TEARC project business case which takes into account a forecast of the total rail demand on the Mount Isa Line); and

(b) given the extremely high costs of building another rail line to meet some or all of the demand, it is clear that foreseeable demand is met at least cost by the existing facility (the Mount Isa Line rail corridor infrastructure).

In relation to the demand forecast taken from the TEARC business case which was extracted in the Glencore's Initial Submission, Glencore notes that it overstates actual demand for the Mount Isa Rail Access Service as it also comprises some freight attributable to the North Coast Line or other local sources. As shown in the diagram below (also extracted from the business case), a material amount of that demand is in fact attributable to products such as sugar and molasses which would not use the Mount Isa Rail Access Service.

[6] [2010] ACompT 2.

Figure 4.2 Total Rail Demand Forecast for Scenario 1 (Central Case) (mtpa)



Consequently, Glencore remains very confident that total demand for the Mount Isa Rail Access Service is met at least cost by the Mount Isa rail corridor infrastructure, such that criterion (b) is satisfied.

6 Criterion (c) - Significance

Criterion (c) requires that the facility for the service must be significant, having regard to its size or its importance to the Queensland economy.

QR has submitted that the Mount Isa Line is of such sufficient size and of such sufficient importance to the Queensland economy that it clearly satisfies criterion (c) on the basis of significance.

Glencore consider that submission is completely logical when regard is had to:

(a) the size of the Mount Isa Line, which is 1,032 kilometres of rail track (in addition to the Phosphate Hill branch line);

(b) the significance of the region the Mount Isa Rail Access Service provides for, which transport 75% of Queensland's non-coal mineral output;

(c) recognition of the Mount Isa Line as a key freight route; and

(d) significant economic contributions to Queensland from the mining, processing and other industries that depend on the Mount Isa Rail Access services,

as stated in Glencore's Initial Submission.

On that basis, Glencore remain absolutely certain that the Mount Isa rail transport corridor infrastructure is significant and criterion (c) is satisfied.

7 Criterion (d) – Public Interest

7.1 QR Submissions on criterion (d)

Criterion (d) as amended, requires:

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

Section 76(5) QCA Act sets out the matters which the QCA and the Minister must have regard to when considering criterion (d), including (for a service which does not extend outside Queensland):

(a) the effect declaring the service would have on investment in:

  (i) facilities; and

  (ii) markets that depend on access to the service;

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and

(c) any other matter the QCA or the Minister considers relevant.

QR's submissions in respect of criterion (d) are effectively a list of unsubstantiated assertions.

Specifically, QR has asserted:

(a) that access under the proposed Access Framework will promote significant public benefits by removing 'unnecessary regulatory burdens' and promoting flexibility and proportionality;

(b) there are significant direct costs of declaration borne by each of QR, the QCA and users of the QR Network;

(c) there are several significant indirect costs of declaration; and

(d) that there are 'policy arguments' as to why declaration does not promote the public interest.

Glencore consider those positions are either misconceived or substantially overstate the costs of declaration.

In addition, QR's submissions fail to acknowledge or engage with the benefits of declaration and adverse outcomes which would arise in the absence of declaration (discussed further below). In particular, it is mandatory under section 76(5)(a) QCA for the Minister and QCA to consider the effect declaration would have on investment, which Glencore consider is a very clear public benefit that is not considered by QR.

When scrutiny is applied to QR's unsubstantiated claims in respect of criterion (d) and the benefits of declaration and adverse outcomes which would arise in the absence of declaration are properly taken into account, Glencore continue to consider it is absolutely clear that declaration promotes the public interest such that criterion (d) is satisfied.

7.2 Interpretation of criterion (d)

While not addressed in the QR Initial Submission, Glencore note that the threshold required under the new criterion (d) is not a particularly high one.

While now expressed as a positive 'promote the public interest' test rather than a 'not contrary' to the public interest test, it has no materiality threshold (in contrast to the wording of criterion (a) and its reference to 'a material increase').

Consequently, the threshold is probably best described as noted in the explanatory memorandum to the Competition and Consumer Amendment (Consumer Policy Review) Bill 2017 at [12.37] that criterion (d) means:

> *that a decision maker must be satisfied that declaration is likely to generate overall gains to the community.*

This effectively involves an analysis of all public benefits and detriments arising with and without declaration, with the criteria being satisfied if declaration provides any net 'overall gains'.

7.3 Access Framework

The Access Framework does not provide reasonable terms and conditions

QR asserts that the Access Framework provides 'access on reasonable terms and conditions'.

As discussed in respect of criterion (a) above, the proposed Access Framework (and related access agreement and deed poll) is clearly a contrived counterfactual designed by QR to manipulate its preferred regulatory outcome and cannot reasonably be considered to reflect the likely state of the future without declaration.

However, even if it was considered to provide a counterfactual, Glencore consider that it is clearly not the case that the Access Framework provides access on reasonable terms and conditions – at least in respect of the Mount Isa Rail Access Service.

By way of some key examples:

(a) **it provides no certainty of efficient pricing**:

  (i) the range between the floor price (at incremental cost of providing access) and the ceiling price (stand alone cost) is so ridiculously large that it is effectively worthless in seeking to guide negotiations or an arbitration of access pricing; and

  (ii) as discussed in respect of criterion (a) above, Glencore's experience is that providing QR such a wide discretion will not result in efficient pricing – but will instead result in prohibitively high costs above the level that is economically viable and ultimately the end of the North West Queensland minerals industry – it is only the threat of QCA arbitration that has brought some reasonableness to previous price negotiations;

(b) **it is limited to 10 years**: with no certainty as to how the terms of access will continue beyond that point;

(c) **it provides no certainty of terms given the ease of QR amendments**:

  (i) the most critical aspect of the Deed Poll is its amendment provisions, which allow QR to amend the Framework objective (only with prior written consent of the State) and clause 7.2 of the Deed Poll allows QR to 'amend the Access Framework, from time to time, so long as the amendments are not inconsistent with the Framework Objective'; and

  (ii) 'not inconsistent' is a very low threshold – particularly when combined with a broadly expressed objective of the nature proposed – such that it will be nearly impossible to show any specific detailed amendment is inconsistent with such an objective. In the case of QR, the consent of the State is also not likely to be a barrier given QR's status as a State owned statutory authority,

such that the Access Framework can effectively be changed at QR's whim; and

(d) **it will be very difficult to enforce**: the removal of the declaration would effectively remove the involvement of the QCA in monitoring and potentially taking enforcement action in relation to compliance with the access undertaking.

A more fulsome summary of the differences between the Access Framework and the approved access undertaking is contained in Schedule 1.

Alleged regulatory burden

QR states that efficiencies will be promoted by removing unnecessary regulatory burdens. QR does not elaborate upon what these alleged regulatory burdens are, or what efficiencies may be promoted in their absence such that it is frankly hard to see how the QCA can give this claim any weight.

The QCA has relatively recently determined that the current access undertaking is appropriate (which is a pre-condition under the QCA Act of providing approval for an access undertaking). Consequently, any alleged 'regulatory burden' has already been assessed to be justified by the benefits produced.

Finally, it is hard to see what burden is created by declaration itself. If QR's concern is with provisions of the undertaking – they have a chance with each undertaking review to propose amendments to remove regulatory burden they consider unjustified (with those claims then being assessed by an independent regulator).

In addition, given that criterion (d) requires an assessment of overall gains, an assessment of regulatory burden needs to actually be a comparison of the burdens created by declaration with burdens created by the Access Framework.

To that end, Glencore consider the burden of establishing and administering the proposed Access Framework will (when assessed across the community rather than just from QR's perspective) be far greater than any burden which may exist in an environment where access to QR's network remains declared.

That is principally the case because:

(a) access negotiations are made substantially more efficient with declaration – given:

  (i) the greater availability of information to access seekers through transparency measures which inform access negotiations and investment decisions (including reporting, master planning and the like)

  (ii) standard access terms which reduce the prospects of protracted negotiations over non-pricing terms;

  (iii) the power of the QCA to resolve disputes if negotiations fail (and the transparency of how the QCA would be likely to determine such outcomes given the publications of its reference tariffs and access undertaking related decisions);

(b) there is far less prospects of an arbitration occurring with declaration – given the more informed basis on which negotiations are occurring and the greater certainty of how a pricing dispute would be resolved (given the QCA's transparent methodology for determining efficient and reasonable pricing being evident from the western system coal tariff decisions);

(c) there will be real costs to society from the monopoly pricing that will occur without declaration – which, as simple economics indicates, will result in a lower volume of supply and a deadweight loss to society;

(d) having monitoring and enforcement being largely in the hands of an independent and experienced economic regulator rather than arbitrators or courts with less experience,

resources and powers – is likely to result in greater prospects of compliance at lesser cost than would occur without declaration.

Alleged promotion of flexibility and proportionality

From Glencore's perspective, the only party that benefits from the 'flexibility' QR sees in its proposed framework is QR itself.

For example:

(a) the proposed Access Framework easily lends itself to amendment by QR; and

(b) QR has an extensive discretion in relation to pricing given the extremely wide range between the proposed floor and ceiling prices.

Yet that very flexibility from QR's perspective – provides deep and enduring uncertainty for all other stakeholders.

Certainty is critical to the businesses of miners and investors in industrial and processing facilities, of whatever kind, and haulage providers, such that the extreme levels of flexibility QR is seeking will damage the commercial viability of stakeholders and have a chilling effect on their investment decisions (as discussed further below).

That is particularly the case in relation to pricing matters, as infrastructure and logistics costs are some of the most significant costs incurred by Glencore and others in the North West Queensland region such that the ability to obtain access to infrastructure and regulated pricing is extremely important.

In terms of 'proportionality' Glencore can only guess that QR's concern might be that the access undertaking regulates some parts of the Declared Service more than QR considers might be required. First, the QCA has relatively recently determined that the access undertaking was appropriate. Secondly, even if it was assumed for a moment that QR's position was correct, the solution to that is to have the access undertaking provide greater flexibility for parts of QR's business where access and economic regulation is less relevant – not to remove the protections and benefits of declaration in respect of all of QR's services. To use a colloquialism – that is very much throwing the baby out with the bathwater.

7.4 Alleged significant direct costs of declaration

QR lists three types of direct costs of declaration: compliance and regulatory costs borne by QR, costs of the QCA performing its regulatory functions and direct administration costs borne by the QCA.

It is hard to see how the QCA can give the costs borne by QR significant weight.

Glencore consider that QR's approach to the access undertaking (particularly in the multiple withdrawals and changes of positions), substantially exacerbated the costs of declaration. That sort of self-harm cannot lead to a finding that declaration involves significant direct costs.

By contrast, the consultation which has occurred to date in relation to the next access undertaking sounds significantly more promising, with a lesser number of changes, and would involve lesser costs being incurred by QR, the QCA and stakeholders if that is ultimately how QR determines to proceed.

For the reasons noted above, Glencore is confident that the aggregate costs of regulation through the QR system are significantly less than would be incurred under an Access Framework model where:

(a) there would be much higher costs of negotiation (particularly due to the difficulties of price); and

(b) compliance, enforcement and disputes would become much more expensive given the absence of an independent regulator and the reliance on arbitrators and courts.

In addition, the QCA would continue to exist irrespective of the decision on the review of the declaration of the Declared Service – so removing the declaration in relation to QR actually increases the costs of regulation of other services (as much of the QCA's costs would remain at similar levels and costs would be shared among a lesser volume of stakeholders).

7.5 Alleged significant indirect costs

QR asserts there are a number of indirect costs of declaration. In each case those costs are completely unsubstantiated.

In relation to those arguments:

(a) **regulatory error**: there is no evidence to support that declaration introduces the risk of regulatory error. As discussed above, the QCA is a well-resourced, experienced regulator that is amply qualified to carry out its duties as the state's economic regulator. Glencore would be far more concerned about errors being made by commercial arbitrators forced to grapple with disputes in the absence of the resources and deep experience that the QCA has. The lesser prospect of error is a factor that shows that declaration promotes the public interest;

(b) **inconsistent regulation**: the fact that other significant infrastructure is not declared is largely as a result of applications to seek declaration not having been made. That is not necessarily because such services would not be declared if such an application was made – in many cases it is because the current operators or owners are providing access on pricing and terms that are not materially worse than what might occur with regulation. To state that declaration is inconsistent with the object of either Part IIIA of the CCA or Part 5 of the QCA is clearly absurd in circumstances where the legislation is the foundation for access regulation in Australia and is obviously vital to that purpose. While it is acknowledged that section 44AA(b) of the CCA Act provides for 'a framework and guiding principles to encourage a consistent approach to access regulation in each industry' this wording does not exist in section 69E of the QCA Act. For the reasons set out elsewhere in this submission, Glencore consider it is clearly evidence that declaration facilitates investments and efficient operation and use of QR's network such that it is consistent with the object of Part 5 of the QCA Act;

(c) **public detriment in superfluous regulation**: QR has not substantiated any alleged superfluous regulation, such that it is hard to see how the QCA can give this assertion any weight. The QCA has relatively recently approved the existing access undertaking as being appropriate (and therefore clearly not superfluous). If QR holds the view that the access undertaking regulates some parts of the Declared Service more than might be required then, the solution to that is to have the access undertaking provide greater flexibility for parts of QR's business where access and economic regulation is less relevant – not to remove the protections and benefits of declaration in respect of all of QR's services;

(d) **efficiency**: QR has not substantiated how declaration reduces efficiency. Glencore consider that declaration is critical for promoting efficiency. In particular, setting prices at efficient levels using a certain and transparent methodology results in efficient investment decisions – both in terms of QR's rail infrastructure and by haulage providers, bulk minerals producers and other rail customers, whereas the uncertainty in pricing and access terms created by the Access Framework will prevent and hinder efficient investment;

(e) **discounting of benefits to foreign owned companies**: this is a bizarrely xenophobic submission for a government entity to be making. Declaration benefits haulage providers, all variety of miners and other rail users with substantial operations in Australia, which provide employment, royalties and economic growth. Glencore pays corporate taxes to the Commonwealth government and royalties to the Queensland government, employs substantial volumes of people across its Australian operations and makes substantial investments to Australian regional communities. Glencore is clearly part of the community across which the overall gains from declaration are to be measured. Discounting of clear public benefits based on some element of ultimate foreign ownership is clearly not appropriate; and

(f) **private benefits to QR**: it is acknowledged that economic benefits derived from QR are 'public' in a sense. However, QR has not substantiated in any way how declaration is decreasing those benefits. It is a fundamental tenet of economics that while monopoly pricing increases the suppliers profit/utility it causes a deadweight loss to society.

Consequently, Glencore considers that the alleged indirect costs are either not relevant to an assessment of criterion (d), not substantiated, or actually weigh in favour of declaration promoting the public interest.

7.6 Policy arguments

QR asserts three policy arguments which it alleges show declaration does not promote the public interest.

In relation to those arguments:

(a) **environmental and safety benefits from increased rail modal share**: Glencore cannot see how it is considered that the Access Framework is said to promote efficiencies. In any case, in relation to the Mount Isa Rail Access Service, road is not competitive as described earlier in this submission (and in Glencore's Initial Submission);

(b) **Queensland Moving Freight Strategy**: Glencore has reviewed this strategy and cannot see how QR have formed the view that non-declaration is any more consistent with this strategy than continued declaration. If anything, the general policy positions of seeking to move greater volumes of road freight to rail freight and facilitating greater investment in freight are policies that are clearly fostered and facilitated by the certainty produced by the declaration and access undertaking; and

(c) **safety obligations**: no evidence is provided to suggest that non-declaration enables QR to more efficiently adhere to safety obligations. Glencore understand that QR will propose some amendments to the next undertaking and standard access agreement to resolve some of its concerns which demonstrates any issues are not a result of declaration. If changes are justified they will presumably be approved by the QCA.

Consequently, Glencore considers that those 'policy arguments' are either not relevant to an assessment of criterion (d), or actually weigh in favour of declaration promoting the public interest.

7.7 Benefits of Declaration

Importantly, QR does not acknowledge or engage with the benefits arising from declaration.

Those benefits are discussed in detail in Glencore's Initial Submission, but most importantly including:

(a) facilitating investment by providing certainty of pricing and other terms of access – noting the investment in the mineral industry in the North West Queensland region has major

economic benefits in terms of employment, royalties, regional growth and economic growth;

(b) facilitating investment in QR's network itself by providing certainty in relation to how pricing will operate over the useful life of the investment;

(c) reducing the costs which would otherwise be incurred by QR / the State to subsidise the use and maintenance of the Mount Isa corridor rail infrastructure through continuing to facilitate further investment in mining and other businesses that use that infrastructure; and

(d) reducing negotiation and administration costs.

With those benefits being taken into account, Glencore consider it is absolutely clear that declaration promotes the public interest and criterion (d) is satisfied.

Schedule 1 – Summary of Access Framework

The key changes between AU1 and the proposed Access Framework are:

- move to a negotiate-arbitrate model;
- QR has a host of discretions to amend the Access Agreement/Access Framework and alter existing use of various systems; and
- 10 year term, with no certainty of access arrangements beyond that point.

A summary comparison of the differences between QR's current approved access undertaking and the Proposed Access Framework are set out below:

Affected Clause	QR Access Undertaking 1	QR Access Framework	Implications of Difference
Objective **[*new* cl. 1.2.2]**			Intends to import objective of Part 5 QCA Act into the Access Framework
Term	Indefinite, assuming the service continues to meet the access criteria	10 years (proposed definition of Terminating Date is the 'earlier of' 10 years from 9 September 2020; and, the date on which use of the Network is taken to be a service declared under Part 5 of the QCA Act).	Future users have no certainty as to the terms of access to the Network beyond the initial 10 year term. That will have a chilling effect on activity in some markets (like the tenements market) where investment in exploration occurs many years in advance of determining there is a project to develop.
Line Diagrams **[*new* cl. 1.2.4]**	QR was obligated to keep the network Line diagrams updated including to amend the diagrams no more frequently than 6 months and notify the QCA of changes	Obligation to publish and maintain diagrams on the QR website	Ability to update and alter diagrams without notice to interested stakeholders
Consistency and Differentiation **[cl. 1.3]**	QR was not able to unfairly differentiate between Access Seekers in the levels of service provided to Access Seekers in	General obligation not to differentiate between Access Seekers and Access Holders in a way that has a material adverse effect on their ability to compete with each other.	Incentivises QR to price differentially between users. Substantial uncertainty as to the ability to achieve a fair outcome through arbitration.

	relation to the AU1	General obligation does not prevent QR from treating Access Seekers differently to the extent the different treatment is reasonably justified because of the different circumstances applicable to QR or any of the Access Seekers or expressly required or permitted by the Framework or arbitration determination under the Framework	Arbitration is costly which will likely cause issues due to QR's bargaining strength which may incentivise it to drag arbitration out.
Funding Agreement Register **[former cl. 1.4.5]**	Requirement to maintain a register of Funding Agreements and provide copies of registered funding agreements to the QCA.	Deleted	No transparency as to whether a relevant Funding Agreement has mandated construction of a network Extension or not.
Extension Pre-approval for inclusion in a Regulatory Asset Base **[former cl. 1.4.6]**	Ability to seek QCA pre-approval of scope, standard and cost of a proposed Extension for inclusion in the Regulatory Asset Base prior to execution of a Funding Agreement.	Deleted	
Master planning and extension coordination **[cl. 1.5]**	Required QR to prepare a Regional Network Master Plan for each Regional Network (West Moreton Network, the Mt Isa Network and the North Coast Network) and undertake consultation and seek funding for a Regional Network Master Plan.	QR will consult with relevant Access Holders and Nominated Rolling Stock Operators regarding QR's master planning for Extension projects for the Mt Isa Line, North Coast Line and West Moreton System. Access Holders and Nominated Rolling Stock Operators may request QR undertake a Concept study, Pre-Feasibility study or Feasibility study on their behalf (and at their cost) to investigate a relevant Extension.	Shift of costs of various studies from QR to Access Holders and Rolling Stock Operators.

Preliminary Steps **[cl. 2.1.2]**	A prospective Access Seeker may give a written request to QR to produce Capacity Information which QR will make available in 10 Business Days	Deleted	Uncertain as to whether a prospective Access Seeker could expect to receive this information during the initial meetings with QR (cl. 2.1.2(a)) or if the information will not be available at all. If the information will not be made available at all, this will inhibit users from procuring long-term certainty required for investment decisions.
Requirement for confidentiality agreement **[cl. 2.2.2]**	QR and Access Seekers could require each other to enter into confidentiality agreements which would not prevent an Access Seeker or Holder from disclosing information to the QCA for the purpose of a dispute.	QCA references deleted and allows QR only to disclose information: • as required by law; • to the Minister under the Rail Authority Act; • DTMR; • Rail Safety Regulator; and • Rail Authority (including board members, officers and employees).	Imbalanced allowance for QR to disclose confidential information. No provision to disclose for the purpose of advice from external advisors, arbitration or litigation.
Ring fencing arrangements **[cl. 2.2.3]**	QR obligated to submit a DAAU to the QCA regarding ring fencing arrangements in the event it develops interests in upstream or downstream markets	Obligation to submit DAAU deleted. QR required only to 'consider the need for ring fencing arrangements taking into account the Framework Objective and its obligations under the Framework.	Clearly gives QR the opportunity to become vertically integrated without constraint.
Inclusions in Indicative Access Proposal **[cl. 2.4.2]**	QR required to provide detail of the methodology for calculating Access Charges. Provides for costings if a Reference Tariff does not apply to the requested Access Rights,	Only required to provide a 'basis for calculation' of Access Charges. Provision for costings if a Reference Tariff does not apply have been deleted.	Lack of transparency around pricing calculations.

Access Seeker to Give Notice of Intent to Negotiate or Not **[cl. 2.5.1]**	Access Seekers not formerly required to advise QR if it did not intend to proceed with its Access Application on the basis of the relevant Indicative Access Proposal.	Access Seekers required to give written notice to QR if it does not intend to proceed but only specifies 'as soon as reasonably practicable after receiving the Indicative Access Proposal'.	Increased obligations on users. (Also see consequence of late notification of intent to negotiate cl. 2.5.2 which requires a response within 20 Business Days, otherwise QR is able to choose to either give a revised Indicative Access Proposal or proceed on the existing IAP).
Issues to be Addressed in Negotiations **[cl. 2.7.2]**	Reference to requirements under the QCA Act to provide specific information	Reference to QCA Act removed and specifies requirement for Access Seeker to request information (to the extent it has not already been provided): • information about the price of Access, including the way price is calculated (including floor and ceiling); • estimate of available Capacity; • diagram or map of rail transport infrastructure and information about its operation and safety system	Places obligation on Access Seekers to request information that is highly relevant to negotiations instead of the information automatically being provided. This may afford QR the opportunity to withhold material information.
Safety considerations **[cl. 2.8.2]**		Addition prevents an Access Seeker from disputing a Negotiation Cessation Notice issued under the clause (2.8.2) and the dispute resolution clause (6.1) does not apply to the issue of a notice under the clause.	Clearly gives QR the power to arbitrarily prevent users from accessing a Network if it considers (acting reasonably) that use of any Access Rights may adversely affect the safety of any persons using or intending to use a passenger Train Service. This clearly creates very significant concerns for coal or mineral services where QR may attempt to rely upon issues of safety to prevent those services from travelling on the Network.

Mutually Exclusive Access Applications **[cl. 2.9.2]**	• Provided for the creation of and administration of an access queue to accommodate nominations of Competing Access Seekers' Applications. • Particular requirements for the categorisation of Access Applications for coal services on the West Moreton Network. • Provision for an Access Seeker to assign its position in the queue. • Provision for dispute resolution	• Provision for an access queue is deleted and QR is provided a discretion to make a determination with respect to mutually exclusive access applications. • QR's discretion is exercised with regard to what is most favourable to QR, which is 'ordinarily' based on (though not limited to) the Access Agreement that represents the highest present value of future returns to QR after considering the Access Agreement. • Remainder of listed provisions are deleted.	Provides QR with a significant and unconstrained discretion to determine which Access Applications will be accepted and which will not. In circumstances where Capacity information is not available to a potential Access Seeker, there is no transparency around whether or not the Network can accommodate existing Access Applications to verify whether existing Applications could all be met by existing Capacity.
Renewals **[cl. 2.9.3]**	• QR obliged to notify an Access Holder if an Access Seeker (who is not a Renewal Access Seeker) applies for the Capacity that will arise when the Access Holder's existing Access Agreement expires. • Only applies where the relevant existing Access Agreement concerns coal carrying Train Services or other bulk mineral carrying Train Services.	• Only required to notify the Access Holder if 'the then current term' of the Access Agreement (whether initial or as renewed) is at least 5 years. • QR will only execute an Access Agreement with a new Access Seeker if the relevant Renewal Access Seekers fails to, or cannot submit a Renewal Application to QR in respect of the relevant Renewal within 20 business days of receiving QR's notice. • Specification relating to coal or bulk mineral carrying services deleted – no differentiation between types of services. • A decision to grant access to the Access Seeker or the relevant Renewal Access	• Uncertain drafting what is 'the then current term'? • Provides QR with a significant and unconstrained discretion to favour alternative Access Seekers including discretion beyond a determination of which Access Agreement presents the highest present value of future returns and allows QR to consider 'all risks associated with the Access Agreement'. • This extra discretion clearly allows QR to arbitrarily dismiss an Agreement that represents the highest present value of future returns if it is favourable to QR to do so.

		Seeker will be made by QR on the basis of which of those parties accepts (and executes) an Access Agreement with QR which, in the opinion of QR is most favourable to it (decision also to be ordinarily based on (but not limited to) the Agreement that represents the highest present value of future returns to QR 'after considering all risks associated with the Access Agreement.'	
Development of Standard Agreements **[cl. 2.9.4]**	Access Seeker can propose variations to the terms of the Standard Access Agreement which the Access Seeker can demonstrate would promote, or are required to accommodate, productivity or efficiency improvements to the Access Seeker's proposed Above Rail Services and QR rejects those proposed variations, QR will provide written reasons for the rejection.	Insertion of 2.9.4(c) that an Access Seeker is not entitled to dispute a rejection by QR and the dispute resolution process under clause 6.1 does not apply to such a rejection.	Arbitrary and unconstrained power to object to legitimate variation proposals. Deprives users of any recourse against QR's decision, even where written reasons may be deficient.
Execution of Access Agreements **[cl. 2.9.5]**	Provided for execution of Access Agreements as soon as was reasonably practicable and in any case within 20 Business Days of the Access Seeker receiving QR's offer. Provides that QR and the Access	Now requires only that an Access Seeker and QR use all reasonable endeavours to execute a Funding Agreement as soon as reasonably practicable if the Funding Agreement is preventing the Access Agreement from becoming unconditional.	Removes alternatives such that a Funding Agreement that prevents an Access Agreement from becoming unconditional must be executed.

	Seeker must use reasonable endeavours to execute the Funding Agreement that is preventing an executed Access Agreement from becoming unconditional.		
Part 3 – Pricing Rules			
Application **[formerly cl. 3.0]**	Described application to Reference Train Services and the Reference Tariff	Deleted	
Pricing Objectives **[cl. 3.1]**	Previously applied to non-coal carrying Train Services	Reference to non-coal carrying services is deleted	No differentiation between coal and non-coal services.
Revenue Adequacy **[cl. 3.1.1]**	Specifies that Access Charges and Transport Service Payments should generate expected revenue that is at least enough to meet the efficient costs of providing Access and should include a return on investment commensurate with commercial risk involved. Where QR is expected to earn excess revenue, QR could seek to reduce Transport Service Payments instead of Access Charges	Now demands return on investment commensurate with 'the risks involved'. Ability to reduce Transport Service Payments instead of Access Charges is deleted.	QR has no obligation to reduce Transport Service Payments or Access Charges such that it can maximise its profits. This clearly incentivises QR to charge monopoly rents.
Network Utilisation	Provided QR with an ability to differentially price Train Services	Deleted	

[former cl. 3.1.2]	based upon varying markets.		
Floor Revenue Limit **[cl. 3.2.2 and definition]**	The level of revenue that will recover the expected Incremental Cost of providing Access to the individual Train Service or combination of Train Services as applicable. Taken into account in setting the methodology, rates and other inputs for calculating Access Charges for an Access Seeker's proposed Train Services,	Now requires QR to also take into account the level of contribution provided by Transport Service Payments towards the relevant rail transport infrastructure.	Ability to manipulate the floor price with changes in the TSP.
Ceiling Revenue Limit **[cl. 3.2.3]**	• Is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with cl 3.2.3(c) at the commencement of the Evaluation Period • the value of assets used in 3.2.3(a) is agreed by the Access Seeker and QR or, failing agreement, as determined by the QCA	• The value of assets in clause 3.2.3(a) will be calculated by QR using the Depreciated Optimised Replacement Cost (***DORC***) methodology. • DORC methodology set out at cl 3.2.3(c) and includes: optimisation (determination of the optimal configuration and sizing of network assets); replacement cost (a modern engineering equivalent (***MEE***) is established for each asset in the optimised assets and a replacement cost established) and depreciation (those MEE assets are depreciated using the standard economic life of each existing asset together with an estimate of the remaining life of each existing asset). • QR will publish annually on its website the estimated asset value for the West Moreton	No regulation around the valuation of assets. DORC methodology lacks transparency. Scope for QR to manipulate valuations to increase ceiling price.

		System and Mt Isa Line System, including key assumptions used.	
Access Charge Differentiation **[cl 3.3.1]**		QR to consider a range of factors 'which impact on its business' in determining access charge differentiation, including: • initial estimate of Access Charges for the requested Access Rights as in the Indicative Access Proposal; • characteristics of the relevant Train Service (including axle load, speed, wheel diameter, Train length, origin and destination etc) • the commercial impact on QR's business (including factors such as the potential for growth of the QR business; opportunity costs to QR; credit risk associated with the business; part of the Network relevant to the Access being sought.	QR is clearly incentivised to cherry pick its customers and price discriminate between customers in a way that is likely to impact on competition in affected markets.
Limits on Access Charge Differentiation [cl 3.3.2]	Only allowed differentiation of Access Charges if	• [3.3.2(a)] QR not to 'have regard to the identity of the Access Seeker'; • [3.3.2(b)] Will not price differentially between Access Seekers if the Train Services are alike and the Access Seekers are operating in the same end market (but will have regard to location/duration and quality of the Train Path/etc to determine if characteristics are alike)	• This is subject to the QR Passenger Priority Obligations, cl 3.3.1 and matters under 3.3.2(b) which will clearly inform QR as to the type of service such that any attempt to disguise identity is largely futile. • error at 3.3.2(c)(iii) – incomplete sentence
Reference Tariffs **[cl 3.5 – including sub-clauses]**	Reference Tariffs applied to Reference Train Services	• All mention of Reference Tariffs is deleted. • Now only General provisions relating to all Train Services	Removes the opportunity for users to seek to have a reference tariff imposed to constrain QR's tendency to increase prices

Take or Pay Charges **[cl 3.5.2]**		Take or Pay Charges payable under Access Agreements have been implemented	
Consequences of contravention (of Part 3 – Pricing Contravention)	QCA determined	Only avenue to dispute a Pricing Contravention is to refer the matter for arbitration in accordance with cl 6.1	No ability to first raise the issue/s with QR directly – users directed straight to arbitration. This means users will be forced to weigh-up the opportunity cost of accepting QR's contravention or engaging in a long and expensive arbitration process. QR will have the ability to exploit that.
Part 4 – Operating Requirements			
Network Management Principles [cl 4.1]		Removed obligation to provide 'Capacity related' information to Access Holders.	Lack of transparency around Network Capacity means users will not have the necessary long-term certainty required for investment in projects.
Consultation for Through-Running Times **[cl 4.2]**	Required consultation with relevant Railway Managers in relation to proposed amendments to the Operating Requirements Manual	Requirement is deleted	
Operating Requirements Manual [cl. 4.3]	Operating Requirements Manual is set out in Schedule G Must make the Manual available to Access Seekers	Reference to Schedule G deleted (as is Schedule G) QR will publish the ORM on its website (instead of providing to Access Seekers directly) QR will consult with Access Holders regarding changes to the ORM '(other than those of a minor or administrative nature)'.	No description as to how the assessment of whether or not an amendment to the ORM will be considered minor or administrative. This, in addition to the specification of absolute discretion at 4.3(c) demonstrates that QR is left with far too broad of a discretion to amend and/or consult or not consult.

		4.3(c) subject to the requirement to consult on amendments to the ORM unless they are minor or administrative, 'QR may amend the ORM from time to time in its absolute discretion'.	
Part 5 - Reporting			
Quarterly network train performance reports [cl. 5.1]	Public release of information regarding QR Train Services for the quarter (including average delay and cancellation information) and written complaints from Access Holders etc.	Obligation to provide a quarterly report (and obligations as to contents) deleted. Previous cl 5.3.1 amended and rolled into an obligation to publish an annual financial report. The financial report will not include Financial Statements and will include information in connection with the Below Rail Services, including: • revenue and expenses; • return on assets for each of the West Moreton System, North Coal Line System and Mt Isa Line System; • return on assets for other Systems on an aggregated basis. The report will also be accompanied by an audit certificate prepared by a suitable auditor.	No transparency as to the operation of various parts of the QR Network. Inhibits users' ability to assess the viability of projects in other regions.
Annual report on negotiation phases [cl. 5.2]	Required annual publication of details including the number of requests for Capacity Information throughout the year (and time taken to provide the information); the number and percentage of Access Applications acknowledged in accordance with the Undertaking and within the	Deleted.	Reduced transparency around the operation and cost of various Networks prevents users from properly assessing those costs increasing the information asymmetry which will already impact upon users' ability to effectively negotiate pricing.

	applicable timeframe; information about Regional Networks to which a Reference Tariff applies; maintenance and operating costs of Regional Networks to which a Reference Tariff does not apply, etc.		
General reporting obligations **[cl. 5.4]**	Obligations to ensure the accuracy of reports issued under clauses 5.1 and 5.2. Obligations regarding information requested by the QCA or about compliance with the Undertaking. Obligation to audit as required by the QCA, acting reasonably.	Deleted	
Monthly Operational Reports **[*new* cl. 5.2]**	New clause	QR will provide each Nominated Rolling Stock Operator and Access Holder with an Operational Report for each relevant System on which it operates or holds Access Rights. QR will consider 'relevant comments' from a Nominated Rolling Stock Operator or Access Holder regarding inaccuracies or omissions. The report(s) will include information including on time train performance; actual and scheduled Train transit times; actual Train Services summary; cancellations and reasons; major operational, safety or environmental incidents and summary of speed restrictions in place at the end of the month.	Limited information available to users regarding other rail systems and how performance on the system relevant to them measures against other systems. This impacts both upon negotiations for the systems relevant to them and transparency in assessing investment opportunities in other regions which are serviced by a QR network..
Rail User Groups	New clause	Provides that QR and relevant Nominated Rolling	Contrived attempt to emulate a responsible

[*new* cl. 5.3]		Stock Operators and Access Holders may agree to establish a Rail User Group for each of the West Moreton System, North Coast Line System and Mt Isa Line System. Purpose is to provide a forum to review, discuss and improve rail operational issues. Frequency and rules for the conduct of meetings are by agreements or, failing agreement, as determined by QR acting reasonably, but acknowledging that ideally, meetings would be held either monthly or quarterly.	regulated regime which in practice, is unlikely to provide any benefit to users. Particularly in circumstances where QR maintains the ability to amend the Deed Poll / Standard Access Agreement / Access Framework at its discretion.
Part 6 – Administrative provisions			
Governing law **[*new* cl. 6.1.1]**		The law in the State of Queensland	
Alternative Dispute Process **[cl. *new* 6.1.2]**	Access Seekers and QR can agree to use a different dispute resolution process or timeframes. If such an agreement is struck, the different dispute resolution process or timeframe is binding and neither can seek to alter the process without agreement of the other; or seek to alter or challenge the outcome except for in the case of manifest error.	Agreement as to different dispute resolution process must be evidenced in writing. Can only change the different dispute resolution process by written agreement with the other party. Reference to ability to alter or challenge the outcome of the different dispute resolution process is deleted.	Where a different dispute resolution process is agreed, the outcome can now be altered or challenged even where no manifest error exists. Allows QR the opportunity to encumber users with multiple long and expensive dispute resolution processes.
Application of dispute and complaint resolution	Any dispute, complaint or question arising in relation to the Undertaking, a request for Access or the negotiation of an	Divided to provide for disputes under each of the: • Access Framework – resolved in accordance with cl. 6.1; • Access Agreement – resolved in accordance	Separates the dispute resolution procedures for each document causing increased uncertainty and confusion.

process **[*new* cl. 6.1.3]**	Access Agreement to be resolved in accordance with clause 6.1. Provision for disputes arising in relation to Schedule D (Reference Tariffs) or Schedule F (Network Management Principles)	with the provisions of the relevant Agreement; and • Deed Poll – disputes determined in the courts of Queensland.	
Resolution by QCA / Reporting unresolved disputes and complaints to the QCA / QCA Decision-Making **[former cl. 6.1.4, 6.1.5, 6.5]**		Deleted	No regulation or independent moderator
Resolution by Senior Management **[*new* cl. 6.1.4]**	Former cl. 6.1.3 resolution by escalation allowed escalation of unresolved disputes to representatives of the parties to resolve the dispute after 5 business days. If not resolved, the dispute is escalated to senior management representatives who must resolve the dispute within the specified time. If still not resolved, the dispute must be referred to each party's	Removes middle step of previous clause. If after 5 business days (or such longer period as agreed by the parties) after the date on which a Dispute Notice is given, representatives of the parties (comprising their chief executive officers or nominees) must meet and use reasonable endeavours to resolve the Dispute. If the dispute cannot be resolved within 10 business days, either party can refer the dispute to arbitration.	Appears to streamline process. However, given the increased likelihood of disputes arising under the Access Framework, the additional step would arguably provide insulation from the requirement to arbitrate. There may also be some difficulty around 'agreeing' as to a longer period to resolve a dispute at the outset which may result in a dispute about the time to resolve a dispute.

	chief executive officer who must resolve the dispute within the specified time.		
Arbitration **[*new* cl. 6.1.5]**		All disputes referred to arbitration under the Framework to be dealt with under this clause 6.1.5. Specifies single arbitrator agreed upon between the parties or, failing agreement within 10 days after referral to arbitration, by a single arbitrator nominated by the Resolution Institute. Parties may have legal representation without the need for leave. Ability to consolidate any arbitration commenced under the Framework, as determined by the arbitrator appointed for the arbitration proceeding that was commenced first in time, regardless of the parties involved provided the issues for determination concern common questions of fact or law. Provides factors for the arbitrator's consideration in making a determination, including: • QR's obligations under law (including by legislation, the contract under which Transport Service Payments are made, service level agreements with DTMR, the Rail Authority/Authorities, etc.); • ministerial directions; • QR constitution; • direct costs to QR of providing Access the subject of the dispute (if relevant) including any	Serious issues raised by the prospect of consolidating arbitrations. QR is the only common party across all arbitrations – meaning QR will usually have agreed to the arbitrator appointed. Where parties to an arbitration/s after the arbitration commenced first in time are consolidated, they have no control over the arbitrator and are forced to participate in the consolidated arbitration. Factors to guide the arbitrator's determination concern QR's interests only and do not reflect proper objective considerations.

		costs of extending the network.	
Urgent matters **[*new* cl. 6.1.6]**		Nothing in clause 6.1 prevents a party from seeking urgent injunctive relief in the courts of Queensland	
Limitations **[*new* cl. 6.2]**		Subject to the terms of an Access Agreement, Funding Agreement or any other agreement entered into with QR as contemplated by the Framework: • damages is not a remedy for any breach of the Framework; • only remedy is specific performance; • QR is not liable to Access Holders, Access Seekers, Rolling Stock Operators or any other person for any Consequential Loss arising under or in connection with the Framework.	Overbroad proposed definition of Consequential Loss. Users prevented from recovering for real loss and/or damage by limited remedy of specific performance (not matter how intentional the breach or how much damage caused).
Severability **[*new* cl. 6.5]**		Ability to sever a provision of the Framework to the extent that it is illegal or unenforceable in any relevant jurisdiction without affecting the enforceability of the other provisions of the Framework. Does not apply if severing the provision materially alters the scope and nature of the Framework or would be contrary to public policy.	No indication as to who determines whether a provision materially alters the scope and nature of the Framework or whether it would be contrary to public policy which indicates that QR may seek to exercise a very broad discretion over whether a provision should be severed.
Schedules			
Schedule A - Preliminary Information and Capacity Information		Minimal changes	Aligning with altered Access Framework provisions

Schedule B – Access Application Information requirements		Minimal changes	Aligning with altered Access Framework provisions
Schedule C – Operating Plan Template		Deleted	
***New* Schedule C – Network Management Principles**	Previously provided under Schedule F. Provided for Train Planning Principles, Daily Train Plan Principles, Minimising the adverse effects of Possessions, Network Control Principles (including traffic management decision-making matrix)	Master Plan Principles, Daily Train Plan Principles and Minimising adverse effects of Possessions provisions are deleted. Now provides for: • Repairs, maintenance and upgrading of the Network (including that QR is not obligated to seek Rolling Stock Operators' consent to undertake repairs, maintenance, upgrading, new work or Possession); • Network Control Principles, including traffic management decision-making matrix and principles from managing deviations from a DTP	QR have a wider ability to interrupt train services without consulting with Rolling Stock Operators which will likely result in costly delays and interruptions.
Schedule G – Operating Requirements Manual		Deleted	
***New* Schedule D – Standard Access Agreement**		Placeholder	

Schedule I – Extension Principles (now Schedule E)		Provision for an Access Funder to refer to QCA for review irrespective of confidentiality requirements deleted.	Intends to bind Access Funders to confidentiality requirements of an Access Funding Agreement

Standard Access Agreement

The Proposed Standard Access Agreement generally reflects the existing Standard Access Agreement – subject to significant changes as a result of the removal of the reference tariffs (discussed in the undertaking comparison above).

There is added uncertainty about how the Standard Access Agreement would operate where the Access Framework term expired during the term of an access agreement. All that is provided for is the transitional provision in clause 27.21 that provides that if that occurs, the parties must promptly consult regarding consequential changes to the Access Agreement and 'endeavour to negotiate and agree any changes'.

Deed Poll

The most critical aspects of the Deed Poll are:

Amendment

The amendment provisions, which allow QR to amend the Framework objective (only with prior written consent of the State) and clause 7.2 of the Deed Poll allows QR to 'amend the Access Framework, from time to time, so long as the amendments are not inconsistent with the Framework Objective'.

'Not inconsistent' is a very low threshold – particularly when combined with a broadly expressed objective of the nature proposed – such that it will be nearly impossible to show any specific detailed amendment is inconsistent with such an objective. In the case of QR, the consent of the State is also not likely to be a barrier given QR's status as a State owned statutory authority. The deed poll also fundamentally limits the ability to challenge amendments further by imposing a bar on proceedings unless commenced within 90 days and providing that QR has no liability even if it has amended or sought to amend the Access Framework in a way that breaches QR's proposed threshold for amendments.

Consequently the Access Framework can effectively be changed at QR's whim and consequently provides no certainty on which the QCA could be satisfied as to dependent markets continuing to be workably competitive.

Liability

The Deed Poll provides that QR cannot be liable for damages for breach of the deed and the only remedy available is specific performance.

That is the case seemingly no matter how intention, how egregious, how repeated or how damaging the breach is. It is hard to see how the QCA could ever be satisfied that QR would comply with the Deed Poll when there are basically no consequences for it not doing so.