# Submission to the Queensland Competition Authority in response to the submission provided by Queensland Rail dated 11 March 2019

26 April 2019

NEW HOPE GROUP

YANCOAL 兖煤澳大利亚有限公司

## Contents

# 1 Introduction

This submission is made on behalf of New Hope Corporation Limited and Yancoal Australia Limited (the ***South West Producers***) in relation to the Queensland Competition Authority's (***QCA***) review of the declaration of the below-rail service provided by Queensland Rail (***QR***).

The South West Producers, once again, thank the QCA for the opportunity to make submissions in this process – this time in response to:

(a) QR's submission dated 11 March 2019 (the ***Latest QR Submission***) which opposed the QCA's draft decision dated 18 December 2018 (the ***QCA Draft Decision***) to recommend that the West Moreton and Metropolitan system service be declared under Part 5 of the *Queensland Competition Authority Act 1997* (Qld) (the ***QCA Act***);

(b) comments made by QR and its advisers in the QCA stakeholder forum held in relation to the QR declaration review (the ***Stakeholder Forum***); and

(c) the QCA questions of 5 April 2019 (the ***QCA Questions***).

As the latest submission in the declaration review of the Queensland Rail declared service, this submission should be read together with the South West Producers' previous submissions to the QCA in this process dated:

(d) 30 May 2018;

(e) 16 July 2018; and

(f) 11 March 2019.

# 2 Executive Summary

The South West Producers continue to consider it is clear, that each of the access criteria are satisfied in respect of the West Moreton and Metropolitan system service.

In summary, the arguments that QR raised in the Latest QR Submission and at the Stakeholder Forum should not alter the QCA's draft decision to recommend declaration of the West Moreton and Metropolitan system rail access services for the reasons set out below:

## 2.1 Criterion (a)

At their heart, QR's principal assertions in support of not continuing the declaration principally rest upon constraints that QR alleges will apply to QR's conduct, or incentives QR will have, in a future without declaration, as a result of:

(a) existing capacity on the relevant parts of the QR rail network;

(b) limits on users' ability to pay in the 'low tonnage' scenario; or

(c) the Access Framework.

However, those assertions do not withstand scrutiny.

The excess capacity that QR asserts will exist on the West Moreton and Metropolitan systems is likely to be short-lived. With New Acland Stage 3 progressing and an expansion of Cameby Downs likely to proceed, the 'low tonnage' scenario is not a likely outcome other than in the very short term, such that QR's incentives for the vast majority (if not all) of the declaration period will be to engage in monopoly pricing, not to increase volume.

Even if QR was correct that there would be initial existing capacity on the system, that does not remove the incentives to cause a two period economic hold up as identified by the QCA (which as explained by the QCA involves how QR would conduct itself after users had made sunk investments such that volume was already committed).

In any case, QR's previous conduct, and the impact of QR being publicly subsidised for any shortfall, clearly impacts on QR's incentives, and suggests that it is not likely that QR will seek to maximise usage of the rail access service as asserted.

The Access Framework does not provide a material constraint on QR's behaviour, for numerous reasons including legally being ineffective, the extreme difficulties access seekers would experience in enforcing it, significant uncertainty as to its future application, and a term substantially shorter than the appropriate declaration period. It is also easy for QR to amend and would only be likely to be varied further in QR's favour across the period, further blunting productivity improvements and chilling investment incentives that the regulatory framework with declaration would otherwise provide in the future.

## 2.2 Criterion (b)

QR has accepted that there is no viable substitute service for coal freight, such that QR's only argument in respect of criterion (b) is the assertion that foreseeable demand will increase above the West Moreton system's capacity (despite the inconsistent submissions QR makes in respect of criterion (a) about the uncertainty of volume and low tonnage scenario).

QR's demand forecasts are not credible, are based on speculative rail and mine developments and the QR network clearly has sufficient capacity (if necessary including further reasonably possible capacity expansions) to meet any reasonable estimate of foreseeable demand.

## 2.3 Criterion (c)

QR's arguments in respect of criterion (c) are based on:

(a) understating the importance of the West Moreton and Metropolitan systems size – which are significant by reference to their size of any measure;

(b) drawing conclusions from the NCC's application of the 'national significance' declaration criterion to a very different cane rail service – which are clearly flawed given the differences between the services and the lower 'State significance' threshold in the Queensland regime'; and

(c) drawing inappropriate conclusions that the West Moreton and Metropolitan systems are not significant to the Queensland economy based principally on their contribution relative to the central Queensland coal region rail system – which disregards the fact that the test is one of significance, not relative significance to other facilities.

## 2.4 Criterion (d)

QR's arguments in respect of criterion (d) are principally derived from and reliant on their arguments in respect of criterion (a) (and therefore suffer from the same flaws).

The promotion of competition which results in criterion (a) being satisfied, gives rise to incentives to invest in West Moreton coal developments, which in turn gives rise to numerous material public benefits including royalties, reducing government subsidies, and increasing employment and regional development. There is also no reason to believe that the administration and compliance costs would be reduced without declaration, with it being far more likely that such costs will be exacerbated by the Access Framework's being so heavily dependent on private arbitration and litigation to achieve any prospect of future compliance.

## 3 Procedural Fairness

The South West Producers note for the record that they consider they were provided with insufficient time in which to make submissions in response to QR's latest submissions and have, accordingly, not been provided with a reasonable opportunity to be heard as required by the principles of natural justice.

The first QR submission, lodged with the QCA on 30 May 2018, was nine pages in length. That submission provided a very high-level overview of QR's position that the declared service it provides, as described in section 250 of the QCA Act (the ***QR Network***), should not continue to be a declared service under Part 5 of the QCA Act, but amounted to little more than a shopping list of potential arguments with no evidence to support it.

On 18 June 2018, QR provided a further two page letter with a draft access framework and deed poll attached. No further elucidation was provided in relation to QR's position.

The Latest QR Submission was 770 pages in length. It included lengthy submissions making arguments that to date had only been made in unsubstantiated bullet points, supporting consultant reports, an amended Access Framework and executed Deed Poll.

That submission, while notionally lodged in response to the QCA's request for submissions in response to the QCA Draft Decision, puts forward several new material grounds of argument (which QR ought to have raised in response to the QCA's initial request for submissions in respect of the access criteria in April 2018) and reargues (in greater detail) a number of its positions put forward in the first nine page submission.

Consequently, QR's conduct appears to be both intentional and strategic in lodging this submission at a point in the QCA's planned schedule for the declaration review which coincides with the shortest period for stakeholders to prepare cross-submissions in response. The South West Producers consider this is a blatant abuse of process and a clear attempt to derail an otherwise carefully planned (by the QCA) consultation process. We have encountered similar issues where QR has attempted to game regulatory processes in previous access undertaking processes.

In addition, QR has refused to make disclosures of information it is relying on in the submissions being made to the QCA – such that the South West Producers have only very recently obtained access to that material or are still at this date of this submission being denied an opportunity to comment on that material. In particular, some of the material redacted from the public version of the Latest QR Submission was finally made available on 15 April 2019 and 18 April 2019 (some on the basis that it could not be provided to the South West Producers themselves without a further consent) and a small amount of material remains undisclosed.

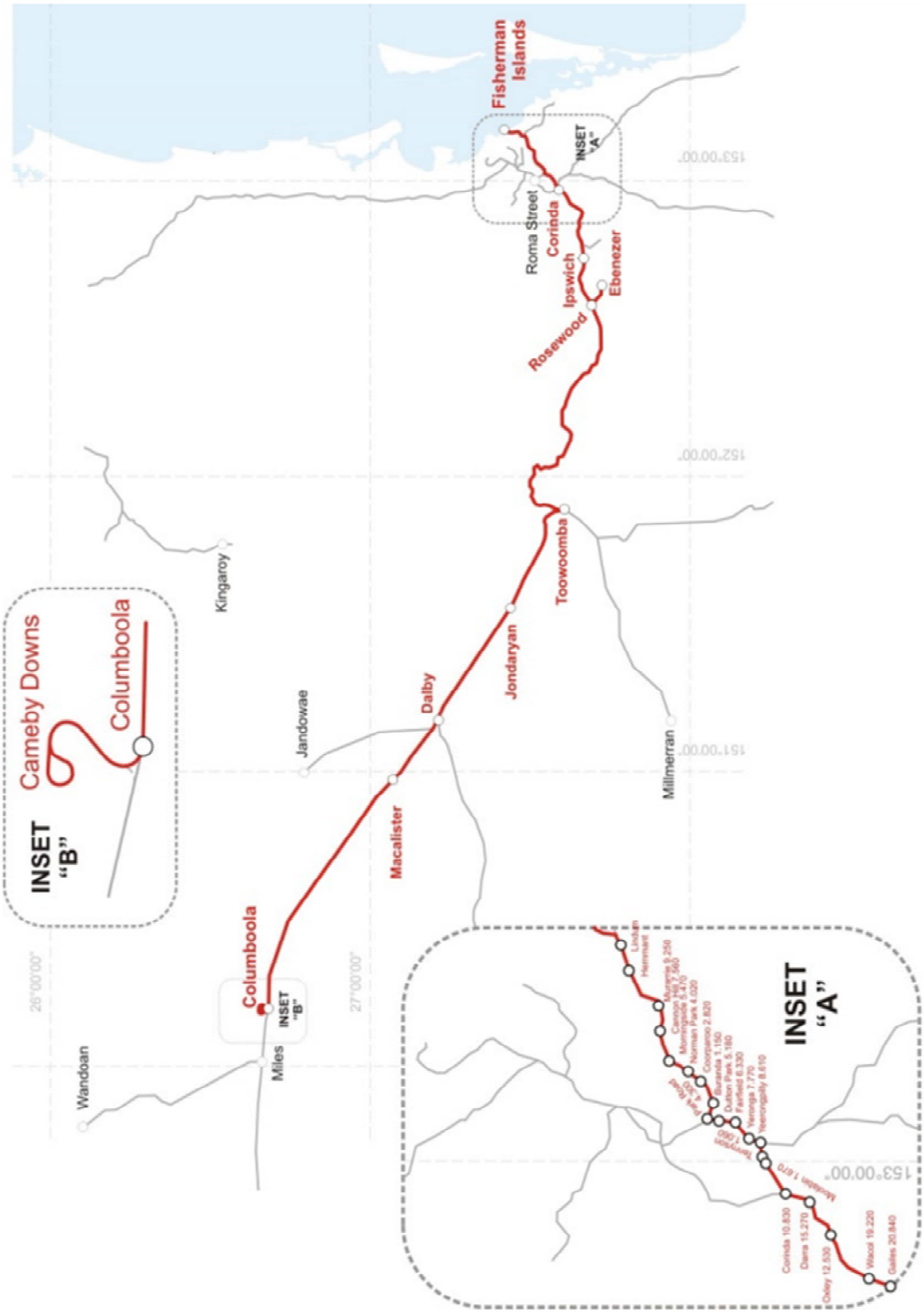
If, contrary to the South West Producers' submissions, the QCA was to come to the view that it should recommend against declaration of access to the West Moreton and Metropolitan systems on the basis of materials or arguments contained in the Latest QR Submission, the South West Producers consider that natural justice requires they be given a further opportunity to address those submissions.

## 4 Definitions of the Service and the Facilities

QR seeks to maintain its position that there is a separate 'West Moreton System' service and 'Metropolitan System' service (with the facility being defined as the relevant rail network infrastructure that makes up those systems as defined by QR).

In the alternative QR argues that the 'West Moreton System' service should include use of the Metropolitan System from Rosewood to Corinda, Yeerongpilly and to Fisherman Islands (with access to the Metropolitan System service not otherwise being generally declared).

The below diagram from QR's West Moreton System Information Pack provides some context to QR's alternative formulations of the systems and facilities concerned.


Fisherman Islands
INSET "A"
Roma Street
Corinda
Ipswich
Ebenezer
Rosewood
Toowoomba
Jondaryan
Dalby
Macalister
Jandowae
Kingaroy
Millmerran
Columboola
INSET "B"
Miles
Wandoan
Cameby Downs
Columboola
INSET "B"
INSET "A"
153°00'00"
152°00'00"
151°00'00"
27°00'00"
26°00'00"

The South West Producers continue to consider that the rail access service utilised by coal producers with mines in the West Moreton system is properly considered as a single service involving access to parts of both the West Moreton and Metropolitan systems.

That 'West Moreton corridor coal rail access service' was described as follows in the South West Producers' initial submission:

*The use of rail transport infrastructure for providing transportation for coal to the Port of Brisbane by rail consisting of the West Moreton network, future extensions or expansions to it, and relevant parts of the South-East Queensland network, including the dedicated dual gauge track from Lytton Junction to Fisherman Islands*

This is closer to QR's alternative service definition – but is far more appropriate as it defines the service by reference to what the customer is acquiring, rather than being unnecessarily prescriptive about particular points in the Metropolitan system (which the South West Producers consider has the potential for making any declaration ineffective because of QR making changes to how coal services utilise the Metropolitan system to access the Port of Brisbane during the declaration period).

QR argues that as access can theoretically be obtained separately for the West Moreton and Metropolitan system they should be considered separate services. However, that completely ignores both the commercial realities of how the service is provided and what constitutes a service for the purposes of the access criteria.

In particular, the South West Producers continue to consider the QCA Draft Decision is correct in analysing the West Moreton and Metropolitan components together as one service for the following reasons:

(a) as the South West Producers have previously noted in their initial submission, '*Travelling only along the West Moreton system is of very limited utility on its own*';

(b) access is currently applied for and contracted on the basis of a service from a coal producers' rail load out to the QBH coal terminal at the Port of Brisbane (it is not contracted as separate services for each system);

(c) while it might be *theoretically* possible to apply for access separately, it would be a disaster to require the South West Producers to contract access separately for each of the West Moreton and Metropolitan systems from several perspectives, and the South West Producers would not do so given:

  (i) the greater potential for increased cost and risk that contracting separately would cause, including in terms of operational and scheduling misalignment or a change in policy which prevents coal from being transported on only one system;

  (ii) it would duplicate the time spent and costs incurred in negotiating access to two separate systems, as well as the regulatory risk (and associated costs) borne by users and the risks around receiving Ministerial approval; and

  (iii) issues like force majeure being called on one system's access service but not the other; and

(d) the access criteria, and particularly criterion (b), only makes sense when the West Moreton corridor coal rail access service is considered as a whole – as there is no, or extremely limited, demand for the West Moreton component of the service considered on a stand-alone basis.

Consequently, the South West Producers strongly reject QR's position and fully endorse the QCA Draft Decision that the West Moreton system and the Metropolitan system constitutes a single service.

## 5 Criterion (b) – meeting foreseeable demand at the least cost

The South West Producers agree with the QCA's approach to the interpretation of criterion (b) and the steps involved in determining whether criterion (b) is satisfied and do not consider that any part of the Latest QR Submission should change that position.[1]

### 5.1 The service and facility

The South West Producers note QR's assertions that the QCA needs to consider the relevant parts of the QR network used to provide the relevant service (i.e. the West Moreton and Metropolitan rail network) rather than considering criterion (b) in respect of the entirety of the QR network.

Given that the South West Producers consider it is absolutely clear that criterion (b) is satisfied on either approach, it has addressed how it would be analysed based on defining the service as the 'West Moreton corridor coal rail access service' (as discussed above).

### 5.2 The market

QR has acknowledged that it does not face road haulage competition for some bulk goods, expressly including coal on the West Moreton system.

That is consistent with the findings in the QCA Draft Decision that rail transport enjoys an inherent cost advantage in the transport of bulk freight due to its ability to exploit economies of scale and that bulk freight is constrained to use transport by rail without the ability to substitute road haulage due to those cost differences.[2]

As discussed in the South West Producers' previous submissions, there are also significant non-cost barriers for West Moreton coal producers (such as coal terminal lease restrictions on receival at QBH's coal terminal other than by rail, and environmental and social licence to operate issues).

Consequently, consistent with all of the South West Producers' previous submissions, and the QCA's Draft Decision the relevant market for the purposes of criterion (b) is clearly the market for below rail access.

If each service is analysed separately as QR proposed, that would be the market for supply of rail access (for either coal or bulk freight more generally) from the West Moreton region to the Port of Brisbane.

### 5.3 The period for assessing total foreseeable demand

(a) **15 year declaration period is appropriate**

QR asserts that only a 5 year declaration period should be considered based on 'changing market developments and dynamics'.

That is materially shorter than all previous declarations under the QCA Act regime or under the national access regime.

In that regard the South West Producers note the following declaration periods that have previously been considered appropriate:

| Service | Declaration Period |
|---|---|
| Aurizon Network access service | 10 year existing declaration under QCA Act<br>15 years proposed in QCA Draft Decision |
| Dalrymple Bay Coal Terminal access service | 10 year existing declaration under QCA Act |

[1] QCA Draft Decision, pages 8-18.
[2] QCA Draft Decision, Part B, page 18-20

| | |
|---|---|
| | 10 years proposed in QCA Draft Decision |
| Port of Newcastle shipping channel service | 15 year declaration under CCA |
| Goldsworthy rail access service | 20 year declaration under CCA |
| Robe rail access service | 10 year declaration under CCA |
| Tasmanian rail access service | 10 year declaration under CCA |

Certifications of State rail access regimes in Queensland, South Australia and Western Australia have also been granted for 10 years.

It is clear from that review of other declarations that the Houston Kemp analysis that *'A shorter declaration period – say, of five or at most ten years – would also be consistent with the approach taken in most other rail access regimes in Australia*' involves a substantial degree of cherry-picking and excluding from the analysis relevant regulatory precedent regarding appropriate declaration periods for rail access services and other mining related infrastructure services.

A period of 5 years also completely ignores the need for access seekers and holders (and service providers such as rail haulage operators) to have certainty given the long term investment decisions they are considering in relation to investment in mine development and new rolling stock. That is particularly the case when one considers the length of the declaration review process and that there would then be a substantial part of the declaration period itself where there would be uncertainty.

In that regard, the South West Producers confirm that coal mine investments typically have economic lives of at least 10-30 years, and rolling stock investment typically have economic lives of at least 20 years. The South West Producers consider that the QCA's analysis that 'on average' such investments will be in the middle of their lives will not hold true for the West Moreton system, given that the New Acland Stage 3 and new rolling stock investments will be more likely to be being made earlier in the declaration period, justifying a longer declaration period.

In the QCA Draft Decision, it was noted that 15 years was an appropriate balance between that need for long term certainty and QR's legitimate interests in having the service declared for the period in which there was certainty the access criteria were met.[3] The South West Producers continue to strongly agree with that assessment.

(b) **QR's assertions regarding relevance of potential future developments**

In respect of the West Moreton system, QR notes the proposed development of Inland Rail, previous proposals to develop Surat Basin Rail and Central Surat rail infrastructure, and the uncertainty around the expected volumes of freight to assert that there are significant expected changes in the West Moreton System's competitive environment.

**Inland Rail**

In relation to Inland Rail, the South West Producers agree with the QCA's analysis:[4]

*Given that there are some uncertainties as to the final alignment (route) of Inland Rail, its operational characteristics (e.g. operating in conjunction with, or in competition with, Queensland Rail systems), and the expected completion date of the project, the QCA does not consider that the project is materially relevant to a decision on the declaration period … To the extent that the Inland Rail project was completed and could be demonstrated to materially affect circumstances*

[3] QCA Draft Decision, Part B, page 20
[4] QCA Draft Decision, Part B, page 21

*on these systems during the declaration period, it would be open for Queensland Rail to submit a revocation application for the relevant system at the relevant time.*

The Latest QR Submission relies on volume projections from ARTC's 2015 Inland Rail Business Case. However, a more detailed review of that Business Case reveals how conditional the volume projections QR refers to are.

The South West Producers acknowledge the ARTC Business Case talks about 'the potential' for Inland Rail to be a catalyst for additional coal exports. However, the potential of *'up to* 19.5 million tonnes of coal' is premised on a wide range of assumptions that were not discussed by QR including:

(i) assumed coal prices and foreign exchange rates;

(ii) sufficient capacity at the Port of Brisbane;

(iii) upgrades to feeder lines; and

(iv) a demand maximising Inland Rail coal access charge of around $9 per thousand gross tonne kilometres on average across the mine to port journey.[5]

Given that the charging regime is completely unknown (including because the costs of development of Inland Rail are in the billions and difficult to quantity) and there are real questions as to whether prices would be set at a 'demand maximising charge' or whether the other assumptions would hold true, the South West Producers consider the maximum demand figure indicated is highly speculative and optimistic.

In addition the 'up to 19.5 million tonnes' maximum is only one of two 'core' cases discussed in the Business Case, and the Business Case stated in respect of the 2nd core case:[6]

*An alternative core scenario has also been presented which excluded upgrades to the Western Line and Brisbane metropolitan network, reducing forecast coal volumes to around 8.8 million tonnes as a result of restricting train lengths to 650 metres, which would mean the assumed cap of 87 coal train paths becomes binding at lower volumes, and not realising operating cost savings that would result from longer train lengths.*

In other words, any step-change in volume as a result of Inland Rail is highly speculative at this point (even if it is assumed that the Inland Rail project is developed during the declaration period and the alignment that is chosen permits use by West Moreton coal services).

QR has a statutory right to seek revocation in the unlikely event that such a step-change in demand was to occur to test whether criterion (b) would still be satisfied – but when that demand is not foreseeable, speculation about such a change in demand should not be used to justify a change to the proposed declaration period.

**Surat Basin Rail and Central Surat Rail connections**

In relation to the Surat Basin Rail and Central Surat rail connections, the South West Producers note that the Surat Basin Infrastructure Corridor State Development Area was declared by the Coordinator-General in 2011.

These rail links have still not been developed, and there is no evidence that the project proponents are taking any steps to progress those developments.

Any future development of them is purely speculative, such that they are not a relevant consideration for determining the appropriate declaration period.

[5] ARTC, Inland Rail Business Case, August 2015, page 119
[6] ARTC, Inland Rail Business Case, August 2015, page 128

Again, the South West Producers note that QR has a statutory right to seek revocation in the unlikely event that there is real evidence of those projects being developed together with evidence of significant additional coal demand. Even if that was to occur, there is still a clear question as to whether that would really be demand in the same market, given:

(i) the demand from New Acland and Cameby projects is specific to the Port of Brisbane;

(ii) New Hope ownership of the QBH terminal; and

(iii) the parties' existing take or pay commitments,

whereas those projects are likely to connect to coal terminals at other ports.

**Volume Outlook**

In relation to QR's submissions regarding the potential uncertainty of future volumes, the South West Producers note that:

(i) uncertainty of volume should only be an issue relevant to the declaration period where the volume is such that it brings into question whether foreseeable demand can be met at least cost – and therefore any 'down side' risk to volumes just makes it clearer that criterion (b) is satisfied; and

(ii) they do not consider that any downturn in volume is likely to be a long term issue.

In relation to the potential reduction of volumes, the South West Producers also note there is clear evidence that foreseeable demand across the declaration period does not reflect the low volume scenario QR is referring to.

In particular, the South West Producers note:

(i) QR evidently believes that volume will return – given how strongly it is advocating for loss capitalisation as part of the 'low tonnage' scenario tariff in the QR rail access undertaking process;

(ii) all of the discussions between QR and each of New Hope and Yancoal about low tonnage tariff scenarios have proceeded on the basis that volume will return;

(iii) QR in the same section of its submissions is indicating likely increases in volume from future rail developments (as discussed above);

(iv) on 12 March 2019 (subsequent to the date of the Latest QR Submission) New Acland Coal Pty Ltd was granted its environmental authority for the New Acland Stage 3 project, delivering one of the remaining key regulatory approvals to development of New Acland;

(v) on 12 March New Hope's ASX release stated *'New Hope remains committed to delivering the New Acland Stage 3 Project and will actively work with the relevant government departments to progress through these steps'* – such that there are clearly now strong prospects of the New Acland Stage 3 Project proceeding in the declaration period;[7] and

(vi) Cameby Downs is seeking an environmental authority amendment to permit an increase in production to a [redacted] run of mine coal (approximately [redacted] product coal which would be railed).

[7] New Hope Corporation Limited, ASX Release – *New Hope Welcome New Acland Mine Stage 3 Environmental Authority*, 12 March 2019

## 5.4 Foreseeable demand at least cost

The Latest QR Submission does not provide any revised estimate of foreseeable demand.

Rather it merely refers to the potential for increased demand if one assumes the development of Inland Rail and/or Surat Basin Rail links. As discussed above, any coal demand arising from Surat Basin rail connections is highly speculative and not part of any reasonable estimate of foreseeable demand at this point.

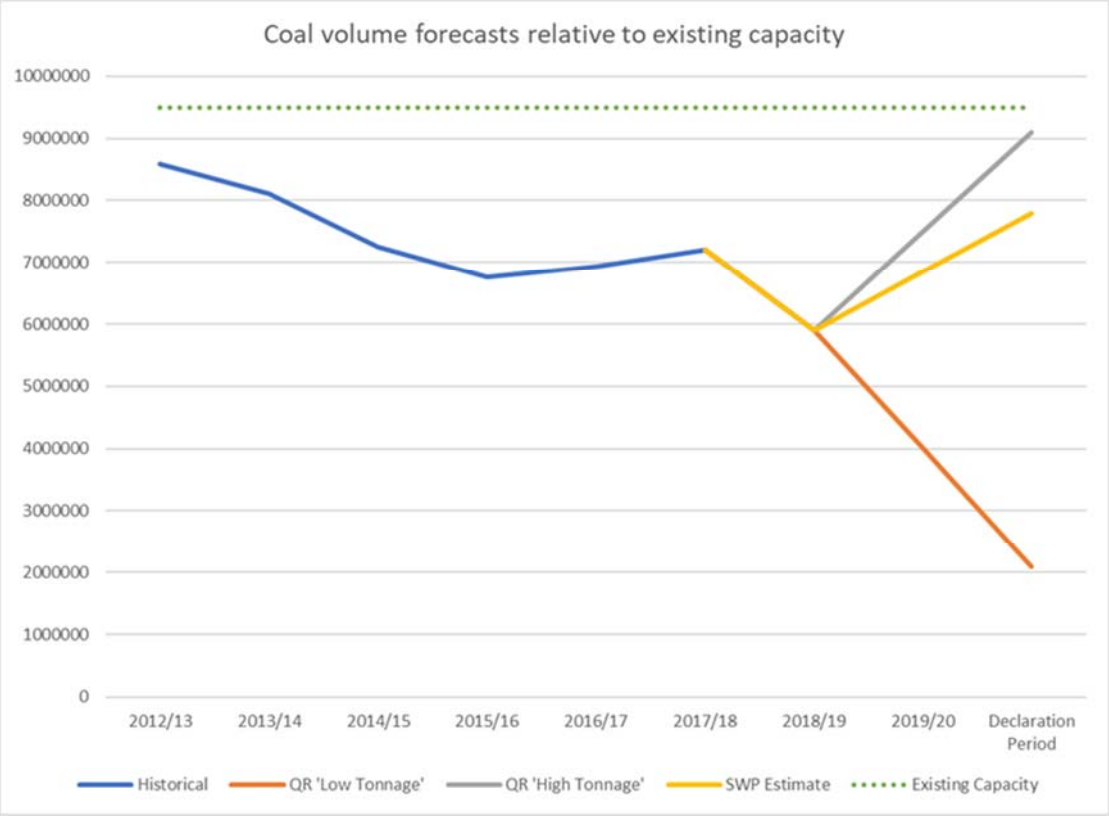
The South West Producers consider a reasonable estimate of foreseeable demand during the declaration period is likely to be 7.8 mtpa based on:

(a) New Acland Stage 3 proceeding (with a production of approximately [redacted] and potentially up to an approved [redacted]); and

(b) Cameby Downs continuing production with an incremental expansion (with a production of [redacted], based on its environmental authority amendment currently under consideration which proposes a [redacted] mtpa run of mine coal).

For completeness, the South West Producers note that QR has submitted in the 2020 access undertaking process a 'high tonnage' scenario of 9.1 mtpa and a 'low tonnage' scenario of 2.1 mtpa.

Criterion (b) is clearly satisfied at any of those levels of demand – as the South West Producers understand that level of demand can be met by the existing capacity of the West Moreton and Metropolitan systems (of approximately 9.5 mtpa).




Even if it assumed that Inland Rail would drive a step-change in coal volumes, those volumes are still predicated on being provided by the West Moreton and Metropolitan networks (as upgraded) rather than any alternative facility.

There continues to be no viable alternative facility (and therefore no substitute service).

In the scenario where there is no substitute service, both the explanatory memorandum to the Commonwealth bill that introduced the revised criterion (b)[8] and the Productivity Commission Report that recommended its revision in this form,[9] indicate that criterion (b) involves a comparison of:

(a) the costs of meeting demand utilising QR's existing rail facility; and

(b) the costs of meeting demand utilising a combination of QR's existing rail facility and a new duplicate or partial duplicate rail facility.

Given the massive costs relating to QR's existing rail facility that would be incurred in both scenarios, and the massive development costs that would be involved in developing a new rail facility for the haulage distances under consideration, it is clear that any such demand can be met at least cost by QR's rail network alone.

The ARTC's Business Case assumption that the West Moreton and Metropolitan networks can meet the estimated level of foreseeable demand is also consistent with information QR has previously provided to the South West Producers as shown in the West Moreton System Regional Network Management Planning presentation from April 2017 (enclosed as Schedule 1 to this submission). That presentation shows a range of expansion options, including above that volume. The South West Producers note that all of those expansions are 'reasonably possible' and therefore may be considered by the QCA in assessing criterion (b) pursuant to section 76(3)(b) of the QCA Act.

Consequently it is clear on any view of foreseeable demand that criterion (b) is satisfied.

## 5.5 Conclusion

Accordingly, the South West Producers consider it is clear that the West Moreton and Metropolitan rail networks are able to meet total foreseeable demand throughout the proposed 15 year declaration period at the least cost compared to any two or more facilities, such that criterion (b) is satisfied.

[8] Explanatory Memorandum to *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) at [12.27]
[9] Productivity Commission, *National Access Regime Productivity Commission Inquiry Report*, 25 October 2013, at page 162.

# 6 Criterion (a) – promote a material increase in competition

## 6.1 Dependent markets definition

QR indicates that it does not consider it necessary to definitively define the dependent markets for the purposes of criterion (a) as it asserts the key dependent markets are each effectively competitive.

However, it then goes on to (relevantly to the West Moreton corridor coal rail access service) discuss global coal markets.

As discussed in their last submission, the South West Producers continue to consider it is clear that (consistent with market realities, and judicial and regulatory precedent discussed in detail in previous submissions) there are in fact a number of other dependent markets distinct from such coal markets.

Critically, the question which falls to be answered under criterion (a) is not whether declaration would promote a material increase in competition in the thermal coal market, but whether it would promote a material increase in *any* dependent market.

The South West Producers agree with and support the analysis in the QCA Draft Decision[10] that the relevant dependent markets include:

(a) the West Moreton region coal tenements market (subject to there potentially being separate markets for exploration and development tenements and production tenements);

(b) the above-rail haulage market on the West Moreton system; and

(c) the Port of Brisbane coal handling services market.

## 6.2 Promotion of a material increase in competition

The Latest QR Submission places a heavy reliance on a flawed interpretation of what is required to show that declaration would promote a material increase in competition so as to satisfy criterion (a).

### (a) Material increase is not a 'significant increase'

The South West Producers acknowledge that there must be a 'material' increase in competition. However, by seeking to equate that with a 'significant' increase in competition, QR continues to overstate the threshold for criterion (a).

It is clear that material in this context only means 'not trivial' or 'not marginal', which the Final Harper Review Report accurately describes as setting a *'low threshold'*.[11]

The legislative intent as to the level of the materiality threshold was clearly set out in the explanatory notes to the *Motor Accident Insurance and Other Legislation Amendment Bill 2010* (Qld) which introduced the 'material increase' wording in the QCA Act:

> *"… to clarify that access (or increased access) to the service should be expected to promote a material increase in competition in order for this criterion to be satisfied.* ***This will prevent the declaration of services where only a trivial increase in competition is expected to result."***

To similar effect was the explanatory memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth) (which made the equivalent changes to criterion (b) in the national access regime):

[10] QCA Draft Decision, page 62
[11] Competition Policy Review, Final Report, March 2015, page 433.

> *In responding to the Productivity Commission's report, the Government indicated that while the current declaration criteria (such as 'the national significance' test) preclude declaration where the relevant infrastructure and subsequent public benefits are not significant,* ***this does not sufficiently address the situation where, irrespective of the significance of the infrastructure, declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial***

Subsequent consideration has, unsurprisingly given that clear legislative intent, adopted that interpretation. So for example, the Australian Competition Tribunal concluded in *Application by Services Sydney Pty Limited 'there are little, if any, practical differences between the descriptions 'not trivial', 'real' and 'material' in this context*.'[12]

QR's submissions also ignore the fact that the amendments to introduce the 'material increase' wording were passed after the clear rejection by the Federal government of the Productivity Commission's recommendation of a 'substantial increase' due to concerns that would unduly narrow the scope of the regime.[13]

Consequently, the South West Producers consider it is clear that the QCA Draft Decision is correct in its approach to the interpretation of criterion (a) and QR's continued arguments for a 'significance' threshold should be rejected.

(b) **Promotion of competition**

The promotion of a material increase in competition was correctly concluded by the QCA to involve 'an ***improvement in the opportunities and environment for competition*** such that competitive outcomes are materially more likely to occur'.[14]

The South West Producers also continue to consider the QCA is correct in its analysis that:[15]

> *'What matters in terms of a material impact on competition is not necessarily the number of competitors in the market, or the number of potential entrants that may be discouraged from entry. Rather, it is the possibility that more efficient firms would be discouraged from entering a dependent market in a future without declaration. That is,* ***if efficient entry is likely to be promoted in a future with declaration, the QCA considers that this would indicate that access as a result of declaration would promote an increase in competition that is material.'***

That interpretation is consistent with numerous statements from the leading decisions of the Australian Competition Tribunal.

Thus in *Re Sydney International Airport*, the Tribunal stated (at 40,775):

> '*The Tribunal does not consider that the notion of 'promoting' competition in s.44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of "promoting" competition in s.44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.'*
>
> *and:*

[12] [2005] ACompT 7 at [134]
[13] Hon P Costello MP (Treasurer), *Government response to Productivity Commission Report on the Review of the National Access Regime*
[14] QCA Draft Decision, page 21.
[15] QCA Draft Decision, Part B, page 28

> *'**The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. … that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that … if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial**.'*

This approach was also confirmed in *Re Duke Eastern Gas Pipeline Pty Ltd*. After citing the relevant passage from *Re Sydney International Airport*, the Tribunal said:[16]

> *'The Tribunal [in Re Sydney International Airport] concluded that the TPA analogue of criterion (a) is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the notion of promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. We agree.'*

Similarly in *Application by Services Sydney Pty Limited*, the Tribunal stated:[17]

> *'The Tribunal has expressed a view in the past that the promotion of competition test does not require it to be satisfied that there would necessarily or immediately be a measurable increase in competition. Rather, consistent with the purpose of Part IIIA being to unlock bottlenecks in the supply chain, declaration is concerned with improving the conditions for competition, by removing or reducing a significant barrier to entry. Other barriers to entry may remain and actual entry may still be difficult and take some time to occur, but **as long as the Tribunal can be satisfied that declaration would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted**.*
>
> …
>
> *The promotion of competition is a relative, rather than an absolute, concept.'*

QR appears to assert that that interpretation was based on the previous form of criterion (a). However, it is clear that formulation remains correct and appropriate. The 'promote a material increase in competition' wording was not changed in the recent revisions to criterion (a) – all that has changed is what is required to have produced that promotion (i.e. access on reasonable terms and conditions due to declaration not access).

There was similarly nothing in explanatory materials suggesting any legislative intention to change the meaning of promotion of competition.

Finally, as the QCA Draft Decision notes, the approach of considering whether there would be an improvement in the opportunities and environment for competition is consistent with the NCC's interpretation in its Guide to Declaration (which has been updated since the criterion (a) amendments),[18] and is also consistent with the NCC's approach in its even more recent consideration of the Newcastle shipping channel service.[19] Consequently it is absolutely clear that the NCC agrees with the QCA on how 'promote a material increase in competition' should be interpreted, and does not believe that the recent changes to criterion (a) have changed that threshold.

[16] [2001] A Comp T 2 at [75].
[17] [2005] A Comp T 7 at [131] and [135].
[18] National Competition Council, Declaration of Services – A Guide to Declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth), April 2018, page 32
[19] National Competition Council, Statement of Preliminary Views – Revocation of the declaration of the shipping channel service at the Port of Newcastle, 19 December 2018

Accordingly, the QCA's interpretation is correct and QR's arguments to the contrary should be rejected.

## 6.3 Ability and incentive to exercise market power

All stakeholders appear to agree with the QCA's analysis that consideration of criterion (a) requires an analysis firstly of whether QR has market power and secondly whether it has the ability or incentive to exercise such market power.

It is absolutely clear that QR does have market power. In respect of the West Moreton corridor coal rail access service they are a monopoly supplier in the market, and there are (on QR's own admission) no viable substitute services.

Consequently, the critical question is whether QR has the ability or incentive to exercise such market power with and without declaration.

QR's assertions that it does not have such ability or incentive rest upon constraints that QR alleges will apply to QR's conduct in a future without declaration as a result of:

(a) lack of vertical integration;

(b) existing capacity on the relevant parts of the QR rail network;

(c) users' ability to pay in the 'low tonnage' scenario;

(d) QR's 'statutory obligations and position as a statutory authority';

(e) the threat of regulation or declaration; and

(f) the Access Framework.

Why each of these do not provide the constraints or incentives asserted by QR is considered in turn below.

## 6.4 Criterion (a) can be satisfied by monopoly pricing without vertical integration

No stakeholder has denied that QR is not vertically integrated (other than in respect of passenger services).

However, as the NCC Guide to Declaration recognises:

(a) criterion (a) may be satisfied where the service provider is not vertically integrated into a dependent market(s);[20] and

(b) where a service provider charges monopoly prices for the provision of the service, those monopoly prices may adversely affect competition in a dependent market by suppressing demand or restricting entry or participation in a dependent market.[21]

QR not being vertically integrated removes one theoretical source of an incentive to exercise market power, namely to discriminate in the access terms offered to favour its related business in a dependent market.

However, as the QCA recognises *'As a business, Queensland Rail has an incentive to maximise profits'*.[22]

It is also evident from the financial information presented by QR at the Stakeholder Forum that the West Moreton network is one of only two networks from which the revenues QR is making (even excluding all transport service contract payments from the Government) exceed its costs

[20] NCC, Guide to Declaration, page 30.
[21] NCC, Guide to Declaration, page 34.
[22] QCA Draft Decision. Part B, page 46

(including depreciation) – such that QR's incentives to maximise profits are in fact focused on the West Moreton coal rail access service and Mt Isa line rail access service.

Consequently, the question remains whether it is profit maximising for QR to exercise its market power (i.e. charge monopoly prices in a way that impacts on demand and raises barriers to entry in dependent markets) in a future without declaration.

## 6.5 Existing capacity does not remove the two period economic hold-up problem

### (a) There is only limited excess capacity across the declaration period

The South West Producers accept that QR currently has some surplus capacity on the West Moreton and Metropolitan systems.

However, the extent of that spare capacity, and likely duration for which it will exist, should not be overstated.

Where foreseeable demand is approximately 7.8 mtpa of capacity (see section 5.4 of these submissions above) and existing capacity is in the order of 9.5 mtpa, there is a clear limit to QR's incentives to increase utilisation.

This is not like some of the other infrastructure services with very significant spare capacity which have been considered in the declaration context such as the Newcastle shipping channel service (considered by the NCC) or the Duke Eastern Gas Pipeline (considered by the Australian Competition Tribunal) where the operating costs are very limited relative to the capital costs involved in providing the service. Rather, judging by the capital expenditure and operating cost allowance claims made in QR's submissions on its 2020 draft access undertaking, provision of the West Moreton corridor coal access service involves:

(i) very substantial asset renewal expenditure; and

(ii) high operating costs,

such that the profit maximising price is not the same as the volume maximising price.

### (b) Two-period economic hold-up problem

QR also does not provide any credible evidence which demonstrates that the two-period economic hold-up problem which the QCA has correctly identified will not arise.

That is, the QCA Draft Decision discusses that where QR may have incentives to initially price in a way that encourages entry and utilisation, once the coal producer or haulage provider has incurred significant sunk costs, at the next contracting period QR will be in a position to extract monopoly rents. That in turn creates an impact on competition in dependent markets as potential investors can foresee that risk of expropriation and are deterred from investing.

The critical passages from the QCA Draft Decision as this analysis is applied to the West Moreton corridor coal rail access service are set out below:[23]

**The two-period hold up problem**

*In a future without declaration, due to the availability of spare capacity on the West Moreton and Metropolitan system, the QCA considers that it is likely that Queensland Rail will be incentivised to provide access to a potential market entrant in the first period (i.e. at the time of market entry), but will have the ability and incentive to exert market power in the second period (i.e. at the time of contract renewal) in order to maximise profits.*

*Participating in the coal tenements market requires considerable investment in exploration, development and production over time given mines are long-life projects requiring significant*

[23] QCA Draft Decision, Part B, page 67

*upfront development costs. A typical coal mine has a 10 to 30 year useful life, compared with the 10-year typical term of a rail access agreement; as a result, at some point in the middle of the useful life of the coal tenement, it can be expected that the below-rail access agreement will be due for renewal.* ***Therefore, at the time it is considering investment, a potential new market entrant will be faced with the prospect that, having incurred these sunk costs, at the time of contract renewal, Queensland Rail will have the ability to exercise market power in setting access prices and other terms and conditions of access.***

QR seeks to rely on Houston Kemp's *Does Queensland Rail's network satisfy criterion (a)?* report as evidence that the two-period economic hold-up will not occur.

However, it is clear that Houston Kemp accepts that the West Moreton system is an exception to much of its commentary (where it is asserted in respect of other systems that competition from road or end user's countervailing power will limit prices without declaration or that access revenue is below ceiling prices such that declaration is not limiting access prices).

Leaving aside whether that analysis is correct in respect of QR's other rail systems, that only leaves two points raised by Houston Kemp which QR and Houston Kemp don't themselves directly acknowledge do not apply to the West Moreton system, namely that:

(i) QR will be incentivised to agree a contractual solution that resolves the economic hold-up problem (seemingly through a long contract term and options for renewal); or

(ii) that there will be 'multiple rounds' of negotiation such that the risks for QR in undermining future investment incentives of other customers will disincentivise them from expropriating sunk costs of existing users (with this argument being the focus of Question 6(a) in the QCA Questions).

Each of those might be more sound in respect of some other infrastructure services – but do not reflect the realities of coal producers seeking to contract the West Moreton corridor coal rail access service from QR.

**Contractual solutions will not resolve the economic hold-up problem**

The South West Producers confirm that a 'contractual solution' to the economic hold-up problem is not workable, and does not reflect their practical experiences in negotiating access with QR.

New Acland Coal Pty Ltd, a subsidiary of New Hope, was engaged with QR in a protracted negotiation for a duration in excess of nine months while seeking to enter into an access agreement under which it would hold the access rights (rather than an operator). The lengthy period and positional tactics assumed by QR eventually led New Acland Coal Pty Ltd to abandon the negotiation to wait for a Standard Access Agreement to be developed as part of the Access Undertaking. It is worth noting that New Hope's submission to the QCA on the standard access agreement reflected the issues that it had previously raised with QR (and which were rejected by QR) and that the QCA accepted as reasonable and appropriate the majority of the amendments put forward by New Hope.

Rail access with long term take or pay components is not something coal producers can commit to for a term that would prevent the hold-up problem – which would effectively need to be a whole of mine life contract. Issues as varied as natural disasters, thermal coal prices, foreign exchange rates, Australian or international climate policies, trade or tariff policies of key Asian export destinations, Australian environmental, taxation, royalties or industrial relations regulations mean that contracts for more than 10 year terms impose significant risk on the coal producer either:

(i) having a shorter than anticipated mine life – so that the producer would have a substantial 'take or pay tail' of liability trailing after any decision to cease production; or

(ii) having a longer than anticipated mine life – so that the producer would be exposed to the two period economic hold-up problem anyway despite trying to resolve it with a longer term contract.

For completeness, New Hope and Yancoal confirm that they have never been offered any lower proportion of take or pay in contracts for rail access with QR than prescribed by the standard access agreement (currently set at 100%). The South West Producers also doubt whether QR would ever be incentivised to do so given the views QR has expressed about uncertainty of future volumes, the fixed costs they face, and QR's extremely low risk appetite.

QR also has no incentives to provide renewal rights (other than at significant cost to the user) as by doing so it is thereby quarantining capacity which could otherwise be contracted by other users. QR has never previously provided renewal options to either South West Producer, and the concept of providing renewal options also appears inconsistent with the queuing provisions contained in QR's Access Framework.

QR's actual incentives in that regard are well demonstrated by its offer of only a *5 year* access framework in the face of stakeholders considering 10-30 year investment decisions, based on a contractual regime which is extremely objectionable to access holders and access seekers (including for the reasons set out in section 6.10 below), and does not reflect the numerous criticisms of the Deed Poll and Access Framework raised by the South West Producers and other stakeholders during this declaration review process.

**The relevance of sunk costs**

In addition, it is not just about contracting arrangements as Houston Kemp appears to envisage. New Hope has long term sunk investments in the QBH terminal that leave it particularly exposed to the economic hold-up problem in the absence of reference tariffs, and Cameby Downs has substantial coal resources that can justify a long-term mine life without a new mine development.

QR stated at the QCA Stakeholder Forum that the QCA's reasoning in respect of the two period economic hold-up problem disregards the sunk investments that QR also holds in respect of the network itself. However, the South West Producers disagree. Even taking those investments into account, the two period economic hold-up problem still exists.

That is the case because the users of the West Moreton rail access service, including the South West Producers, are typically single-project users whereas QR is a multi-customer service provider. As such, a failure to reach an agreement with QR in relation to rail access results in a complete loss of the project's value to the relevant producer.

By contrast QR:

(iii) as a below-rail service provider across a vast part of the State, provides services to a number of other users (whether they are single-project users or not) such that QR has an ability to offset any losses by making agreements with any other number of those users, and only part of their investment is stranded / lost through a failure to reach agreement with any one user; and

(iv) QR clearly has another major source of revenue in the transport service contract payments that it can rely on to 'fill the gap' left by any shortfall in revenue.

Consequently, while QR has some degree of sunk costs, its stranding risks are heavily mitigated relative to users of the West Moreton network, such that the two period economic hold-up is still highly likely to occur.

**'Multiple rounds' of negotiations**

The multiple rounds of negotiation theory advanced by QR and Houston Kemp may be applicable to a large multi-user system like the Aurizon Network central Queensland coal network, or other services such as the Newcastle shipping channel service, where there are numerous projects in the dependent market and many project proponents have multiple projects, such that there is a continued series of negotiations occurring.

However, that is not reflective of the circumstances relevant to the West Moreton rail access service. In most cases there will in fact not be multiple rounds of negotiation for that service.

That becomes evident when you consider the potential contracting periods for the most likely projects in the West Moreton region of the Clarence-Surat coal basin (with the potential exception of Cameby Downs):

| **Project** | **Likely contract periods (assuming 10 years)** | **Commentary** |
|---|---|---|
| [redacted] | | |
| Restart of Wilkie Creek | 1-2 | Based on further mine life proposed by previous proposed acquirers |
| New Rolling Stock for Aurizon or alternative haulage provider | 2 | Based on estimated useful life of rolling stock of approximately 20 years |

For the Houston Kemp analysis to be correct there needs to be at least 3 rounds of negotiations to disincentivise QR from engaging in hold-up during the 2nd round of negotiations.

In addition, this theoretical analysis that multiple rounds of negotiation will incentivise QR to offer pricing that incentives additional volume rather than monopoly pricing ignores QR's actual conduct when it comes to pricing.

In particular:

(i) no efforts were made to change pricing models to maintain volume from Wilkie Creek, which is on record as being a material contributing factor to Peabody Energy's decision to place Wilkie Creek into care and maintenance.[24] The South West Producers consider QR's decision in that regard was made with clear knowledge that QR could offset any loss in access revenues from Peabody by increasing the cost of access for each of them through the reference tariff;

(ii) no agreement has been able to be reached with Yancoal in respect of Cameby Downs to try to maintain volume for the period when New Acland may not be producing;

(iii) despite lengthy attempts by the South West Producers and Aurizon, no agreement has been able to be reached on the operation of longer (and therefore higher payload) trains on the network – which would have resulted in material cost savings and productivity improvements; and

[24] Letter from Michael Roche, QRC to Charles Milsteed, QCA, dated 5 June 2015 regarding Peabody comments in respect of uncompetitive rail costs (page 4) http://www.qca.org.au/getattachment/b9e1592e-99e4-4fa9-8559-4966d512d63b/QRC-Submission-on-QR-2015-DAU-June-15.aspx.

(iv) QR did not change tariffs to try to save grain volumes departing the West Moreton system. The fact that QR has commenced works for tunnel floor lowering for a number of rail tunnels on the Toowoomba Range and Little Liverpool Range (which were represented by QR at the QCA Stakeholder Forum as being to facilitate grain traffics, but the South West Producers note are in fact for container traffics) does not change the fact that rail pricing is not being offered which would result in grain volumes staying on rail. In addition, given the limited use of the system by container traffics due to substantial access tariffs, the South West Producers hold considerable doubt as to whether the tunnel floor lowering will have any effect in increasing container traffics.

In relation to Wilkie Creek in particular, Peabody Energy had made numerous submissions in October 2013 regarding the impacts of proposed tariffs,[25] including:

(i) "*The proposed tariffs would place an uncompetitive cost burden on existing West Moreton system users in comparison to other Australian coal supply chains*"

(ii) "*From a mining viewpoint, the operation is a relatively low cost operation, yet within the high cost of infrastructure services it is often at a cost disadvantage to other mining operations and is consequently a marginal mining operation in the current low price environment*"

(iii) "*On this bases we believe that **the proposed reference tariffs** are not in the public interest as they **threaten the viability of the Wilkie Creek operation** and consequently the long term interests of Queensland Rail*" (our emphasis added)

(iv) "*Should the RAB be deemed appropriate we believe that at the very least a mechanism such as Loss Capitalisation as used by ARTC in support of growth regions in the Gunnedah basin in NSW be reviewed as a viable alternative to provide a reduction in the existing price structure to create a long term incentive for continued operation*"

As is evident from Wilkie Creek's ultimate closure, and the lack of any change in approach from QR to its access pricing, those clear warning signs went unheeded. QR's response was to increase tariffs at the next available opportunity to seek to recover the same revenue from the remaining users. That is the opposite pricing response to what would be expected from a service provider incentivised to increase volume, who would presumably reduce tariffs to seek to attract and restore demand.

There is therefore no credible evidence that QR has incentives to increase volume, or is likely in the future to conduct itself in a way which incentivises additional volumes.

## 6.6 Ability to pay does not provide a material constraint

QR's argument in respect of the South West Producers' ability to pay is effectively premised on the assumption that the 'low-tonnage scenario' will become a long term feature of the market. QR accepted in the Stakeholder Forum that 'ability to pay' was not a meaningful constraint in the 'high-tonnage scenario'.

As discussed in sections 5.3 and 5.4 of these submissions above, any such limitation is, by contrast, likely to be a transient feature which will not continue to apply across the declaration period.

[25] Peabody Energy Australia Pty Ltd, Submission to the Queensland Competition Authority – Queensland Rail West Moreton Tariff Proposal, 31 October 2013.

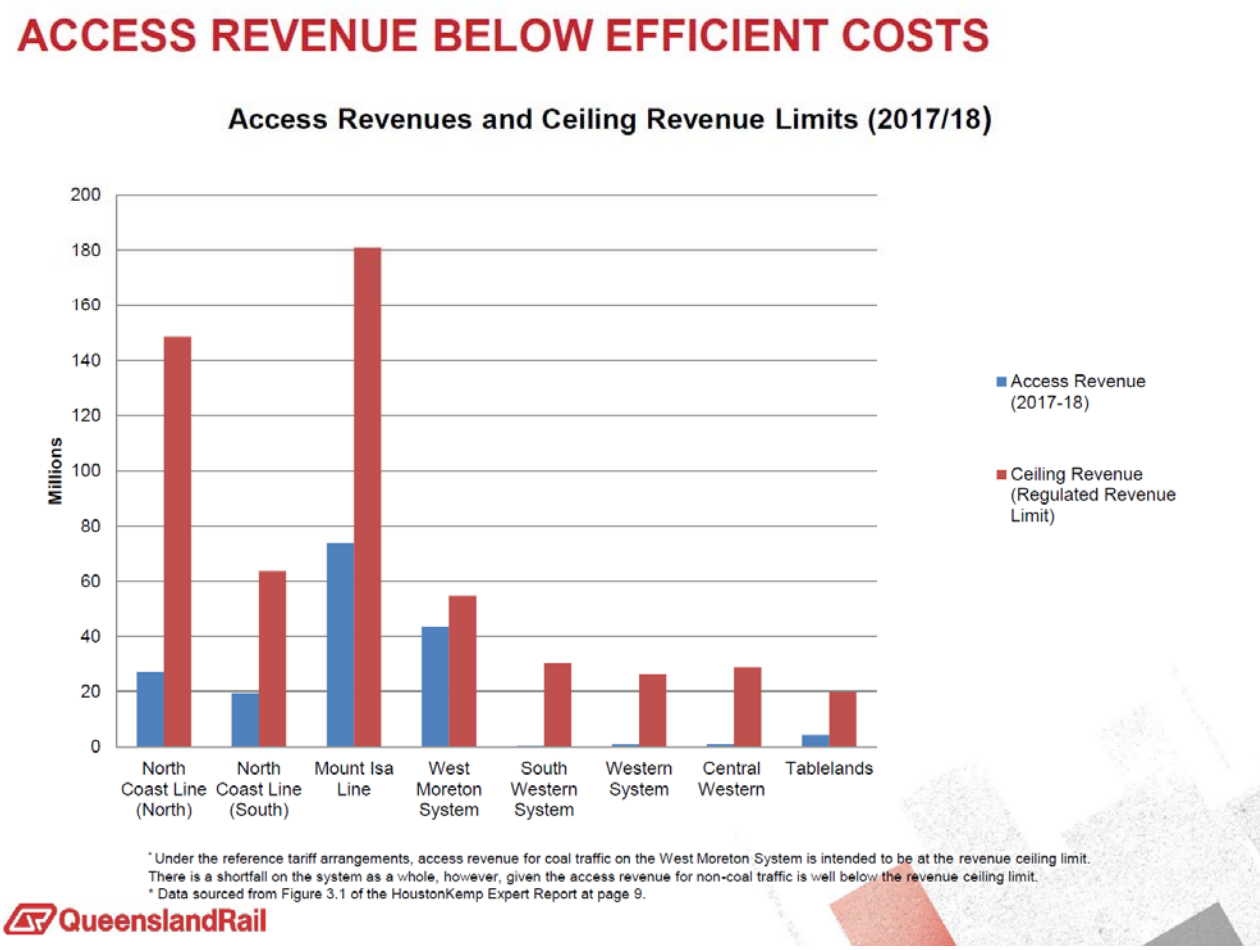
In particular, it is clear that New Hope is getting closer to having the approvals required to develop New Acland Stage 3 and remains committed to doing so, and Yancoal is progressing approvals required to incrementally expand Cameby Downs. QR's approach to regulatory pricing arrangements in the 2020 draft access undertaking submissions where it is seeking loss capitalisation once volume has returned is clear evidence of that being the case.

QR's argument also does not engage with the two period economic hold-up problem identified by the QCA (as discussed in more detail in section 6.5 above).

That is, even if it is assumed that QR has incentives to increase volumes that initial incentive is (once volume has been increased) replaced with an incentive to use the next contracting period to expropriate monopoly profits.

Additional support for this very real risk for the coal traffics on the West Moreton and Metropolitan systems is substantiated by the fact that access revenue for those traffics are clearly not far below the existing ceiling price. As is shown in the footnotes to the graph below which was referenced by QR at the Stakeholder Forum, QR states:

*Under the reference tariff arrangements, access revenue for coal traffic on the West Moreton System is intended to be at the revenue ceiling limit. There is a shortfall on the system as a whole, however, given that access revenue for non-coal traffic is well below the ceiling limit.*




It is also notable that QR has not been able to reach agreement with either of the South West Producers on low tonnage scenario tariffs – because it appears to not be willing to entertain a tariff based on Cameby Downs' ability to pay during the period where New Acland Stage 3 is not in production.

## 6.7 QR's statutory obligations and position as statutory authority does not provide a material constraint or incentivise it to maximise volume

The South West Producers consider it is clear that QR's statutory obligations and position as a statutory authority do not provide a likely constraint on their incentive or ability to engage in monopoly pricing without declaration.

As was made clear in the Stakeholder Forum, QR distributes its revenue to the State. It would therefore be anticipated that it would have strong incentives to increase profit or at least mitigate losses wherever possible to improve the impact on the State's consolidated revenue position.

In addition, although QR's position as a statutory authority is admittedly unique, that results in QR having a number of drivers in the operation of its business (some of which are not purely economic). First, QR receives much of its revenues through subsidies provided by the State Government. This fact, together with recent historical experience, has the effect of creating the expectation that shortfalls in revenue may be recovered through alternative mechanisms such as revised transport service contract subsidy arrangements, and a focus on shorter term revenue maximising rather than long term economic outcomes. That is incentives which might otherwise exist to increase volumes are actually blunted given QR's nature and other sources of revenue.

Second, as a potential consequence of being a Queensland government statutory authority, QR has a low appetite for commercial and operational risk. This manifests itself through a range of matters such as a reluctance to vary operating practices, a conservative approach to setting technical and commercial standards, lengthy engagement and approval timeframes and limited appetite to pursue technological and productivity enhancement initiatives.

The net result of these drivers is that there is limited, if any, evidence that QR conducts itself in a manner consistent with its purported economic incentive to promote higher volumes of access to its infrastructure.

If anything, being so directly answerable to the State, required to carry out Ministerial directions, and needing Ministerial approval for major access agreements, means QR is subject to the whims of the government of the day (and the future policy positions of governments of different persuasions cannot be readily assumed to be supportive of promoting coal investment in the West Moreton region and railing coal through Brisbane).

QR's behaviour when access charges were one of the contributing factors to the closure of the Wilkie Creek mine suggest that no action was taken (even in the presence of declaration) to preserve coal volumes, and no material action has been taken since to try to restore volumes.

Similarly QR and the State maintain 'preserved paths' for non-coal services and limit the scheduling of coal services through passenger priority and other scheduling priorities in respect of the Metropolitan system and passenger services, which again demonstrates that it should not be assumed that QR will be incentivised to maximise coal volumes in a way that a private monopolist without those competing priorities might.

The South West Producers understand that he internal policies and pricing principles which the Latest QR Submission appears to point to only relate to road-contestable services (such that they are not relevant to the West Moreton coal rail access service) and do not provide legally binding constraints in any case (and of course can be easily varied in the future without any regulatory oversight).

Accordingly, there is no evidence that QR's position, State ownership, statutory obligations or internal policies or principles provides it with incentives to maximise coal services across the declaration period.

## 6.8 Previous financial returns does not demonstrate an inability to monopoly price without declaration

In the Latest QR Submission and at the QCA Stakeholder Forum, QR commented that its history of access charges on each of its systems being below the ceiling price indicated that it does not have an ability or incentive to extract super normal profits.

The South West Producers strongly disagree with that view.

(a) **Past financials are a reflection of the constraints that exist with declaration**

First, the 'lookback' to previous access charges received does not demonstrate QR's argument at all given that it shows the figures *over a period in which declaration existed* – that is a period where constraints such as a West Moreton reference tariff and a right to refer access disputes (including failures to agree tariffs for non-reference services) to the QCA for arbitration both constrained QR from exercising its market power.

QR simply asserts that past profit and revenue outcomes are attributable to factors other than declaration, but provides no evidence to support the proposition that the constraints are 'market based' and not a product of declaration.

That assertion is most clearly misconceived in respect of the West Moreton access service. In relation to that service:

(i) QR has acknowledged that it faces no market constraints from any substitutable or competing service (i.e. road haulage is not substitutable); and

(ii) QR's submissions in respect of previous reference tariff processes clearly indicate it wishes to charge more than the QCA approved reference tariff.

Accordingly, it could not be any clearer that in respect of the West Moreton coal rail access service, *the constraint that is reflected in past financials is the constraint arising from the QCA approved reference tariffs which only exist because of declaration*.

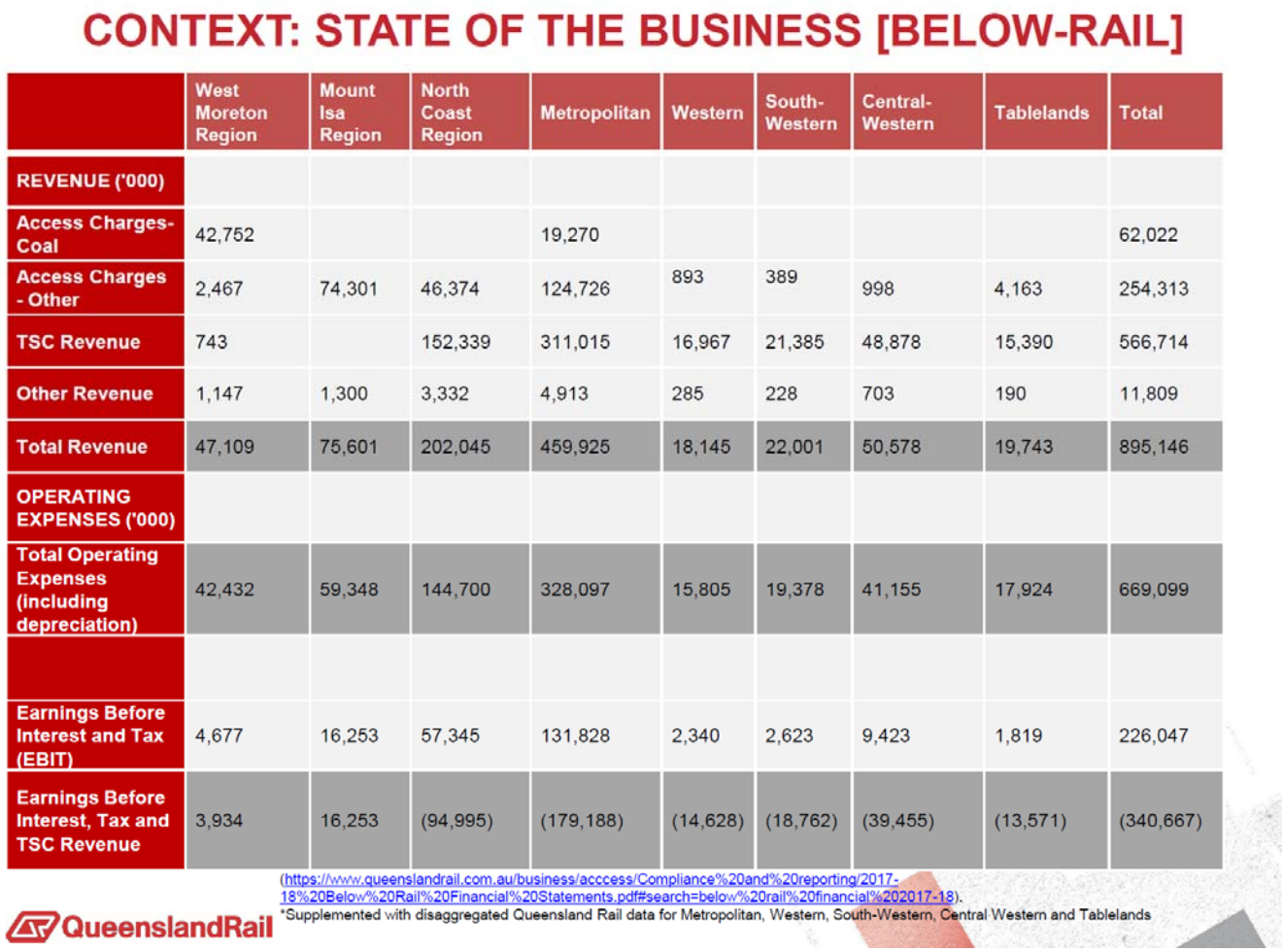
(b) **West Moreton is clearly profitable in any case**

Second, even if those financials were considered, the systems servicing the West Moreton region and the Mount Isa region are the two systems on which QR actually does make a profit.

As discussed earlier in this submission, QR has indicated that '*under the reference tariff arrangements, access revenue for coal traffic on the West Moreton System is intended to be at the revenue ceiling limit*'.

For the West Moreton and Metropolitan system service, QR's own figures presented in the Stakeholder Forum demonstrate that access charges for coal services alone are greater than operating expenses including depreciation, such that QR receives a profit and a return of capital from the West Moreton coal access service before any government subsidy (or contribution from non-coal freight)

This indicates that users of those systems have a larger appetite to accommodate rail costs (which we consider is clearly due to the inability to truck large volumes of bulk commodities at some distance) such that QR would have an incentive to increase those charges further to offset losses on other systems in the absence of declaration.



CONTEXT: STATE OF THE BUSINESS [BELOW-RAIL]

| | West Moreton Region | Mount Isa Region | North Coast Region | Metropolitan | Western | South-Western | Central-Western | Tablelands | Total |
|---|---|---|---|---|---|---|---|---|---|
| REVENUE ('000) | | | | | | | | | |
| Access Charges-Coal | 42,752 | | | 19,270 | | | | | 62,022 |
| Access Charges - Other | 2,467 | 74,301 | 46,374 | 124,726 | 893 | 389 | 998 | 4,163 | 254,313 |
| TSC Revenue | 743 | | 152,339 | 311,015 | 16,967 | 21,385 | 48,878 | 15,390 | 566,714 |
| Other Revenue | 1,147 | 1,300 | 3,332 | 4,913 | 285 | 228 | 703 | 190 | 11,809 |
| Total Revenue | 47,109 | 75,601 | 202,045 | 459,925 | 18,145 | 22,001 | 50,578 | 19,743 | 895,146 |
| OPERATING EXPENSES ('000) | | | | | | | | | |
| Total Operating Expenses (including depreciation) | 42,432 | 59,348 | 144,700 | 328,097 | 15,805 | 19,378 | 41,155 | 17,924 | 669,099 |
| | | | | | | | | | |
| Earnings Before Interest and Tax (EBIT) | 4,677 | 16,253 | 57,345 | 131,828 | 2,340 | 2,623 | 9,423 | 1,819 | 226,047 |
| Earnings Before Interest, Tax and TSC Revenue | 3,934 | 16,253 | (94,995) | (179,188) | (14,628) | (18,762) | (39,455) | (13,571) | (340,667) |

(https://www.queenslandrail.com.au/business/acccess/Compliance%20and%20reporting/2017-18%20Below%20Rail%20Financial%20Statements.pdf#search=below%20rail%20financial%202017-18).
*Supplemented with disaggregated Queensland Rail data for Metropolitan, Western, South-Western, Central Western and Tablelands

QueenslandRail

## 6.9 Threat of declaration or regulation does not provide a constraint

The South West Producers consider that the QCA reached the appropriate conclusion in respect of the alleged threat of declaration or regulation, and strongly agree with that view:[26]

*The QCA is not satisfied that the threat of declaration would be a sufficient constraint on Queensland Rail's ability and incentive to exercise monopoly power in a future without declaration. Additionally, the QCA does not consider the possibility of declaration in the future negates the argument for declaration in the present where the access criteria are satisfied.*

As the South West Producers continue to note, the threat of redeclaration is not a real one. That is because in this hypothetical scenario the QCA would have already determined during the current declaration review process that, despite QR having no effective constraints, the service should not be declared applying the very same declaration criteria which would apply in any future application for declaration.

The Latest QR Submission also notes the potential application of price monitoring under Part 3 of the QCA Act. However, that is a price monitoring regime under which the QCA only has powers to make recommendations – it does not provide a constraint on QR's pricing.

The potential application of a Part 3 price monitoring and pricing principles investigation is very similar to the IPART price monitoring regime about which the NCC stated in the Newcastle shipping channel revocation draft decision that while *'these requirements may provide some very*

[26] QCA Draft Decision, Part B, page 53

*limited constraint of PNO's pricing practices by promoting transparency'* they were *'not a substitute for the type of access regulation contemplated by the National Access Regime'* and were not a *'direct regulatory constraint that acts to set or limit the prices that PNO may charge'*.[27]

Consequently there is no basis on which to conclude that threat of declaration or regulation would provide a constraint on QR's ability or incentives to exercise market power without declaration.

## 6.10 Defects in the Deed Poll and Access Framework

Ultimately therefore QR's arguments in respect of criterion (a) (as it applies to the West Moreton coal rail access service) rely on the unilaterally proposed Access Framework (and related Deed Poll) being considered to impose an effective constraint on QR's ability to exercise market power in the absence of declaration.

For the reasons set out below, the South West Producers consider it is absolutely clear that is not the case.

### (a) The Deed Poll does not operate in favour of all future users

Firstly, the Deed Poll operates 'only' for the benefit of the covenantees set out in clause 2.1. By restricting 'Confirmed Access Seekers' to those who have signed an access application or renewal access application, it means that potential or future users who have not progressed their project to that point will have no legal rights under the Deed Poll.

It means, for example, that a potential investor in a coal tenement in the West Moreton region cannot make the investment in reliance on the Deed Poll, because it can be revoked, amended or simply breached without them having even the extremely limited recourse that the Deed Poll actually provides for.

This issue also arises in relation to future amendments, where the mandatory consideration is expressed to be 'the interests of Confirmed Access Seekers' – such that the interests of future access seekers which have not yet made an access application are not even a consideration.

This stands in stark distinction to the access undertaking process that occurs with declaration where the QCA can only approve an access undertaking which it considers appropriate having regard to factors including 'the interests of persons who may seek access to the service' (section 138(2)(e) QCA Act).

### (b) The Deed Poll's term is far shorter than the declaration period

The Deed Poll has a term of 5 years (see clause 5.1) with no obligation to renew or any certainty that any renewal would occur on the same terms.

Where:

(i) coal producers are considering making 10-30 year investments in mine development and rail haulage providers are considering making 20 year investments in rolling stock; and

(ii) due to the timing for obtaining regulatory approvals and undertaking development being such that by the time that a coal exploration or development project acquired during the term of the Deed Poll is in production it is likely the Deed Poll's term will have expired,

the South West Producers are at a loss as to how QR considers that any alleged constraint that the Deed Poll provides being in place for merely 5 years resolves the impact on competition during the 15 year declaration period.

[27] NCC Preliminary Statement of Reasons, pages 28-29.

In particular, even if QR was assumed to be correct in that it did provide a constraint during those 5 years, it all but confirms that any investor would be subjected to the two-period economic hold-up problem after expiry of the Deed Poll term. In addition, investments in West Moreton region coal tenements which are being considered in that first 5 years are likely to come into production in the balance of the declaration period, such that the lack of constraints will actually impact on investments during that period as well.

(c) **The Deed Poll is not actually irrevocable**

QR seeks to make much of the Deed Poll being irrevocable.

However, that is legally not the case. The only reference in the Deed Poll to it being 'irrevocable' is in the title and heading to clause 3, and clause 1.2.1 makes it clear that headings are for convenience only and do not affect the interpretation of the Deed Poll.

While clause 3.1 involves QR covenanting that it will not revoke the Deed Poll, clause 9.2 clearly anticipates the potential for clause 3 to be breached, and clause 2.3 makes it clear that the covenant in clause 3 is subject to the conditions set out in clause 9 of the Deed Poll.

Accordingly it is clear on a legal review of the Deed Poll that it can by its very terms be revoked and that a court will consider that such a right to revocation was clearly contemplated and built in to its terms. The South West Producers particularly note that the drafting in clause 9 is a new addition since QR's draft Deed Poll was first submitted to the QCA, suggesting that QR has now clearly contemplated needing to preserve the right to revocation.

There is also no evident right to an injunction to prevent such a revocation occurring – even assuming the user somehow became aware of the intention to revoke the Deed Poll prior to its occurrence.

In addition, it is clearly possible for QR to revoke the Deed Poll without any recourse from users. That follows, because a users' ability to commence court proceedings for revocation of the Deed Poll must be brought within 120 days of the date of the alleged breach (not a period of time from when the user becomes aware of the breach). Given that QR is not under any obligation to notify a user of its revocation of the Deed Poll, it is likely that a user would not discover that the Deed Poll had been revoked until after the 120 day limit had expired. Consequently, QR could then rely on the limitation included in the Deed Poll (clause 9.3) which states that a failure to commence proceedings within that time is a complete defence to any proceedings filed or served 121 days or more after the alleged breach.

(d) **The Deed Poll / Access Framework ceases to have any effect following a restructure of the QR business or its assets**

Another material difference between declaration and the Deed Poll / Access Framework is that the existing declaration under section 250 of the QCA Act applies to QR and each of its "successors, assigns or subsidiaries" (such that the service would remain declared despite any future restructure or change in ownership).

Whereas, as a matter of contract law, a deed poll cannot unilaterally impose obligations on third parties – such that at best it is only binding on the specific Queensland Rail entity that executed it.

Consequently, if QR (as it exists today) was to undergo a business restructure or divest its assets and responsibility as railway manager of all or parts of the West Moreton or Metropolitan network to another entity, the Deed Poll would cease to provide any constraints on QR or protections to other stakeholders. That would be the case in the event of a privatisation, but it would also be the case even if the transfer was to another government vehicle as part of an internal restructure.

Perhaps the most concerning issue in this respect is that a restructure of the QR business and ts assets and liabilities can occur completely outside of QR's control (such that this is not an issue

that can ever be resolved through a Deed Poll). Both QR as an entity, as well as QR's below-rail business, assets and liabilities are listed as a declared entity and declared project respectively under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (the ***IIARD Act***).

The IIARD Act provides the relevant Minister with very broad power to restructure and dispose of the business, assets and/or liabilities of a declared project. A relevant example of this occurring is the transfer of the central Queensland coal network assets to QR National in 2010 (which later became the privately owned Aurizon Network).

In this regard, section 8 of the IIARD Act provides:

*For the purposes of a declared project, the Minister may do any of the following –*

*…*

*(b) decide the most appropriate way of restructuring a business, asset or liability of a declared entity or the State, including by deciding whether or not a business, asset or liability of a declared entity or the State is to be transferred to another declared entity or the State;*

*(c) decide the most appropriate way of disposing of a declared entity or of a business, asset or liability of a declared entity or the State;*

*(d) anything else necessary or incidental to facilitate the disposal of a declared entity or of a business, asset or liability of a declared entity or the State or the continuing operation of a declared entity.*

In addition, at the QCA Stakeholder Forum QR stated that a restructure of QR or its business would result in a breach of clause 4.1 of the Deed Poll. Whilst the South West Producers do not consider that position is at all clear on the face of that clause, perhaps the bigger issue is how a stakeholder could ever take action for such a breach in any case.

That is, if it was correct that clause 4.1 was breached, the remedies for a breach of clause 4.1 (provided under clause 9.2) involve a user commencing legal proceedings to seek damages and/or specific performance. Difficulty first arises in determining from what entity a user would seek those remedies, being from either the shell that was previously QR (and which, by that stage, may not hold any assets) or from the State or new railway manager neither of which are a party to the Deed Poll and are therefore not bound by it.

Further difficulty arises in that the opportunity for a user to successfully litigate against any successor of QR for a breach of the Deed Poll pursuant to a restructure under the IIARD Act is seemingly eliminated by section 22 of the IIARD Act, which provides (among other things) that:

*Nothing done under this Act –*

*(a) makes* [the State or a declared entity, or either of their respective employees or agents] *liable for a civil wrong or contravention of a law, including for a breach of a contract, confidence or duty; or*

*(b) makes* [the State or a declared entity, or either of their respective employees or agents] *in breach of any instrument, including an instrument prohibiting, restricting or regulating the assignment, novation or transfer of a right or liability or the disclosure of information.*

Lastly, a decision made under the IIARD Act cannot be challenged, appealed, reviewed, quashed, set aside or called in question in any other way, under the *Judicial Review Act 1991* or otherwise.[28]

Even if this was done under new legislation, it would be likely to be to similar effect.

[28] *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld), s 17.

Further, the potential for such a restructure is not mere speculation. Consideration has previously been given to Australian Rail Track Corporation (***ARTC***) managing QR's regional rail network and the separation of Aurizon from Queensland Rail demonstrates what is possible.

All of that is relevant because it means that the theoretical protections that the Deed Poll is asserted to provide can also be taken away with the stroke of a pen (a notice under legislation). In the absence of declaration, investors will take that uncertainty into account, and it will have a chilling impact on investment incentives in dependent markets.

(e) **The Deed Poll can be very easily amended – such that its terms are completely uncertain**

The Deed Poll provides QR with the right to amend the Access Framework from time to time, so long as the amendment(s) are not inconsistent with the Framework Objectives and appropriate having regard to each of the mandatory considerations set out in clause 6.3.

First 'not inconsistent' is an extremely low threshold and a myriad of amendments could be justified as being 'not inconsistent' with the Framework Objective that is particularly the case given the broad nature of the objective:

*to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream market*

Given the balancing that objective envisages between what can be competing matters to be promoted, it is not hard to see how it would be nearly impossible to demonstrate that an amendment was inconsistent with such an objective.

In that regard, the South West Producers note (and consider entirely correct) the QCA's concerns about DBCT Management's Access Framework – which actually has a higher threshold of 'promoting the framework objective':[29]

*the QCA has concerns with DBCT Management's proposal.*

*One concern is over DBCT Management's discretion in amending the access framework. The QCA considers that there are a range of outcomes, in relation to an access undertaking or the access framework, which may satisfy or promote the object of Part 5 in any given scenario. Where the issue is the approval of an access undertaking for a declared service, the judgment about the outcome that will best promote this objective is a matter for the QCA (having considered and applied the criteria in the QCA Act).*

***Under DBCT Management's access framework/deed poll proposal, DBCT Management, the access provider, would also be the entity who would exercise this discretion. The role of the court, under this approach, would not be to substitute its judgment for that of DBCT Management, but rather to resolve any dispute about whether proposed amendments fall within the range of outcomes that satisfy the relevant criterion (based on the object of Part 5). The QCA considers that this is a crucial difference between the outcomes that can be anticipated depending on whether the service is declared****.*

*Additionally, under the QCA Act's access regime for a declared service, the QCA has periodically approved an access undertaking and standard user agreement for the coal handling service at DBCT. The access undertaking and standard user agreement establish standard price and non-price terms, which seek to facilitate commercial negotiations by providing a credible backstop position from which access seekers can choose to either adopt the standard terms or negotiate alternative terms for access, and minimise access disputes. In contrast,* ***the discretion DBCT***

[29] QCA Draft Decision, Part C, page 68-69.

***Management would have in amending the proposed access framework may create uncertainty as to the scope of the framework itself as well as the standard access terms which may apply**.*

*For these reasons, the QCA's view is that DBCT Management's ability to modify its access framework could be counterproductive to conducting negotiations in a timely and cost effective manner, particularly considering the opportunity cost (in the form of lost sales) miners would face because of a delay in obtaining terminal access.*[30]

QR suggested at the QCA Stakeholder Forum that the QCA's comments in this regard involved an error of law to the extent that the QCA had made its recommendation in that process in respect of criterion (a) on the basis of the QCA 'prejudging' its own competence to make a decision versus that of a court in respect of amendments to the Access Framework. QR suggested that the same critique of the QCA would exist if it were to make those comments in the context of QR's Access Framework.

However, as was raised in response at the Stakeholder Forum, this is completely incorrect. That is the case because the QCA's comments were clearly made in the context of identifying the differences between a decision made by a court in the absence of declaration on the one hand (as involving an assessment of whether the amendment was 'not inconsistent with the framework objective' and 'appropriate'), and on the other hand, a decision made by the QCA under declaration (which involves assessment of the amendments in the context of all of the terms of access and the protections of the QCA Act).

In that regard, the QCA sought to identify the shortcomings of the power to amend the Access Framework. The South West Producers are satisfied that the same reasoning applies here given the overbroad drafting of the amendment power and ability for QR to incrementally amend the Access Framework in its favour.

Second, and further to the point above, the requirement that amendments be 'appropriate' having regard to the mandatory considerations is completely unworkable in the context of disputes about amendments being determined by a court.

In that regard, the South West Producers consider the QCA was clearly correct in its analysis in the QCA Draft Decision:[31]

*The QCA considers that it is not clear that the recourse to court proceedings will provide an effective means of reviewing Queensland Rail's amendments. Any access seeker or user who sought to challenge any amendments would have to undertake expensive and potentially protracted court proceedings, with an uncertain outcome … Therefore, the QCA considers that even if the proposed access framework were executed, there would be considerable uncertainties as to its terms over the period of its operations.*

Third, while QR has now included a consultation process, QR's obligations are only to *'review and consider'* any comments from stakeholders and the Deed Poll expressly provides that QR *'is not bound to implement any comments'* received during that process (clause 6.4.3).

Fourth, given that QR itself decides whether or not an amendment is appropriate in accordance with the Framework Objective and mandatory considerations, it is inherently biased such that users would have no real ability to obtain a fair or balanced outcome. This was raised by the QCA (correctly, in the South West Producers' view) at the QCA Stakeholder Forum, where it was noted that, by contrast, the existence of bias during a decision-making process conducted by the QCA would result in the decision being impugned through a judicial review process.

[30] QCA Draft Decision, Part C, pages 68-69.
[31] QCA Draft Decision, Part B, page 31.

In considering that, it is patently clear that QR's covenant to assess the 'appropriateness' of any amendment in accordance with the mandatory considerations is totally unworkable given that it would be impossible for QR to weight and balance those considerations (some of which concern its own interests) in the same way that an independent regulator such as the QCA would.

Fifth, a user's only theoretical recourse if they raise issues with amendments that are not accepted by QR is to commence legal proceedings – which they have to do within 120 days of the amendments being finalised (clause 6.5).

Sixth, the futility and unlikelihood of challenge by an adversely affected user becomes clear when it is considered that even if a user was to successfully challenge an amendment, its likely remedy is mere declaratory relief that the amendment would be invalid. QR would then be able to make minor changes to the proposed amendment and then force the user to go through the same expensive and protracted process again if they want to prevent the amendment. In other words, if QR is minded to make amendments it will be excessively expensive for a user to try to prevent repeated attempts to make a series of substantially similar amendments.

When all of that is considered it becomes absolutely clear that no potential investor in tenements in the West Moreton region would rely on the terms of the access framework remaining the same, and the terms in fact are likely to become ever more favourable to QR across the term of the Deed Poll.

(f) **Uncertainty of pricing**

The pricing rules in the Access Framework provide for a ceiling limit based on the stand alone costs of providing access.

However, it is absolutely clear in the context of a rail line of the length involved (over 300 kilometres) with significant fixed capital costs (that based on QR's 2020 access undertaking submissions hardly vary at all with changes in volume), that the stand-alone costs of providing access will be completely uneconomic for any user of the West Moreton coal corridor access service.

Moreover, a ceiling price of the stand-alone costs of providing access does not reflect a workably competitive price at all. In fact, it represents a truly extreme monopoly price as it involves (at least for the South West Producers) duplication of large parts of the West Moreton and Metropolitan systems to accommodate each of the South West Producers' projects.

Consequently, it is clear that the pricing regime in the Access Framework will not provide any constraint at all on QR's ability to engage in monopoly pricing in the absence of declaration.

In addition, the ceiling limit relies on concepts like a DORC based asset valuation and a weighted average cost of capital – that will be highly contentious in the absence of a highly experienced independent regulator such as the QCA as the arbiter of the appropriate valuations and WACC parameters. Determining appropriate estimates for those WACC parameters involves significant and detailed analysis. The South West Producers consider that analysis is clearly best undertaken by an unbiased third party regulator with access to the specific resources and expertise required to conduct such investigations, and not by a self-interested, profit-maximising service provider like QR.

The ceiling limit is even more problematic when sought to be determined in the absence of the QCA in respect of the relevant parts of the Metropolitan system, where even the QCA has not conducted a true 'bottom-up' build-up of capital costs.

As a consequence:

(a) there is real doubt as to whether a private arbitrator without the experience, expert staff, resources and other machinery of the QCA or involvement in the wide range of other

regulatory pricing matters that the QCA would have, can make these difficult assessments in a way that is appropriate (particularly where there is no guarantee that the same arbitrator being involved in multiple arbitrations rather than individuals having one-off roles); and

(b) even if it was theoretically possible for such a private arbitrator to make such a decision, the predictability of that decision would be severely impacted, such that the negotiate-arbitrate regime would not serve its purpose of facilitating commercial resolution.

Again, this is a stark contrast, to the position with declaration, where an up-front QCA determination of approved reference tariffs ensures that all users receive access at efficient and reasonable cost, and can make investments knowing the access price during the access undertaking period and having a high degree of certainty in relation to the methodology.

(c) **Likelihood of expropriation of monopoly rents through auctioning of capacity**

The South West Producers also note the application of the provisions regarding mutually exclusive applications (in clause 2.9.2 of the proposed Access Framework) which allow QR to provide access to the access application which in the opinion of QR is most favourable to it, with QR expressly being able to make such a decision based on the access agreement that *'represents the highest present value of future returns to Queensland Rail'*.

This (in combination with a ceiling limit which does not provide any practical limit to QR's pricing) has the obvious outcome of allowing QR to auction remaining available capacity to the highest bidder.

Again, this is a stark contrast, to the position with declaration, where QCA approved reference tariffs ensure that all users receive access at efficient and reasonable cost.

(d) **Extreme difficulties in enforcement and resolving disputes**

It is extremely difficult for users to enforce the Deed Poll or commence disputes.

The absence of an experienced, well-resourced and independent economic regulator to monitor compliance, and with enforcement powers under the QCA Act, makes a substantial difference to the likelihood of compliance and effectiveness of enforcement with and without declaration.

The only avenues for breaches of the Deed Poll are effectively protracted and expensive court proceedings. In many cases, the time delay and cost involved in bringing such proceedings will mean that users may be better off just accepting breaches of the Deed Poll and Access Framework – making the protections it provides illusory. The lack of the QCA's monitoring role and information gathering powers (which it currently has under the QCA Act and access undertaking) will also make it harder to even identify non-compliances.

The Deed Poll also contains substantial limitations on a user's ability to bring disputes including

(i) the 120 day time bars on most breaches (clause 9) which run from when the breach occurred – not when the user became aware of the breach (which obviously means that breaches that are not transparent are unlikely to ever be actionable);

(ii) limits on remedies (clause 7); and

(iii) QR's ability to revoke the Deed Poll and amend the Access Framework means that any victory in a dispute is unlikely to permanently resolve the issue in the user's favour in any case.

The vast difficulties that users would face in enforcement, directly impacts on the incentives QR would have to comply with the Access Framework in the absence of declaration.

Consequently, these are real issues which mean that the likely future without declaration does not involve compliance with the Access Framework terms (and that potential users of the service will consider investment decisions on that basis).

(e) **Access Framework inhibits crucial reform**

While the Access Framework can easily be amended at QR's own initiative there is no mechanism for it to include appropriate reforms over time that an independent body (like the QCA where declaration exists) would be able to confirm as being appropriate.

As alluded to in section 2.1 of this submission, the QR Access Undertaking is the very first undertaking that QR has administered (other than the transitional application of an undertaking principally concerned with the central Queensland coal region network).

Like many new contractual arrangements, the Access Undertakings require practical application over time to tease out, and determine appropriate solutions to, any differences in the application of the undertaking to the intended outcomes.

In particular, the Access Undertaking requires additional reform around key matters such as:

(i) productivity improvements;

(ii) reporting, to align with standards that apply in respect of other coal supply chains (which providers like Aurizon Network and ARTC meet); and

(iii) improved cost management, including greater transparency around allowances, greater rigour around prudency of capital expenditure and greater focus on achieving efficiencies.

Naturally these, and other matters will be put to the QCA for consideration as part of the current QR draft access undertaking process.

In circumstances where QR's proposed Access Framework is based on its first Access Undertaking it becomes a static document and thereby inherits the shortcomings of an Access Undertaking that is in its infancy. Declaration does not entrench any such shortcomings, as it provides an opportunity for an independent regulatory review of the appropriate terms of access.

Worse still, given the simplicity with which the Access Framework can be amended by QR, the prospect of reforming the terms of access to achieve these ends becomes very remote given that it would be highly unlikely that QR would amend the Access Framework in favour of users.

Even though litigation over amendments is clearly futile as discussed above, it should be noted for completeness that in fact the South West Producers do not even have the ability to do that other than for amendments proposed by QR (i.e. they cannot propose amendments themselves no matter how clearly appropriate).

## 6.11 Deed Poll is legally ineffective

All of the above analysis assumes that the Deed Poll is actually legally effective in accordance with its term.

However, the South West Producers consider that is not actually the case, such that even if the individual issues substantiating that the Deed Poll does not provide any effective constraint on QR's exercise of market power discussed above are ignored, the Deed Poll itself is legally ineffective.

As a matter of law, a deed is not effective until it has been delivered.[32]

[32] *Segboer v AJ Richardson Properties Pty Ltd* [2012] NSWCA 253 at [51] (Sackville JA, Allsop P and Campbell JA concurring); *Goddard's Case* (1584) 2 Co Rep 4b; 76 ER 396.

Delivery occurs where there are acts or words sufficient to show that the party making the deed intends for it to be presently binding upon him or her.[33]

However, in the case of a unilateral deed poll of this nature, delivery cannot necessarily be assumed from execution, or even notification.[34] In *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*[35] Priestly JA (with whom Glass JA agreed) found that a deed poll must be accepted or relied upon by the intended beneficiary before it can be considered to be delivered.

In that case, a lessor, by deeds poll, sought to consent to any future request by the lessee to use the leased premises for a purpose other than the purpose stated in the original lease. The lessee did not accept that its rights were affected by the deeds poll and challenged their validity (because the lessor had ulterior motives for expanding the purposes for which the leased premises could be used, namely justifying a higher rent at the next rental review).

The analogy to this situation is clear, QR is seeking to grant rights through a deed poll for the ulterior purpose of having declaration cease in respect of its service.

In finding that the deeds poll were void and of no effect, Priestly JA (with whom Glass JA agreed) said:[36]

> *"… an undelivered deed is no more in law than a soliloquy under seal. Although the deeds here were sent to the lessee, I think the facts I have earlier narrated show that delivery was not accomplished in the sense that they were accepted by the lessee as documents either having any legal effect or upon which the lessee would act.*
>
> *I am not aware of any case in which it has been necessary to consider the meaning of "delivery" in regard to a deed from precisely this point of view. The fact however that delivery is necessary for the effectiveness of a deed shows that* ***something more is necessary for the effectiveness of a deed poll than its execution****; the present case requires identification of what that something more is when it is not only effectiveness, but irrevocable effectiveness that is claimed for the deed.* ***I think it must be something more than mere notification but acceptance or reliance of some kind of or upon it by the person to whom it is delivered.*** *One short reason for this conclusion is that before acceptance or reliance of or upon the deed by some person, there seems to me no way in which the maker of the deed could be prevented from revoking it, notwithstanding its terms. This reason for my conclusion however may be no more than a restatement, at an earlier stage in the reasoning, of the conclusion I have already formed regarding what ought to be regarded as "delivery" in such circumstances as the present." (emphasis added)*

However, there has clearly been no reliance and no acceptance of QR's Deed Poll. To the contrary it has been expressly rejected by the South West Producers in their previous submissions and again here. They have no appetite for doing so in the future both given the potential consequences in the declaration review and the myriad of difficulties with the terms of the Deed Poll (as outlined above).

Consequently, the Deed Poll may have been executed QR – but it is not legally effective and will never become legally effective.

[33] *Xeros v Wickham* (1867) LR 2 HL 296, 312 per Blackburn J.
[34] Nicholas Seddon, *Seddon on Deeds* (The Federation Press, 1st ed, 2015) 118.
[35] (1986) NSWLR 642 at 659E
[36] At 659D-G.

### 6.12 The Access Framework and Deed Poll are an artificial contrivance and it is inconsistent with the legislative intent of the criterion to consider them

Irrespective of the terms of the Deed Poll and Access Framework they should be rejected as a clearly contrived and artificial attempt to defeat criterion (a) in any case.

There was no suggestion in the Productivity Commission inquiry into the national access regime which recommend the current version of criterion (a) (or the Federal government's response) that it was envisaged such an approach was legitimate or the legislative intent for how criterion (a) would be applied in these circumstances.

As a matter of principle, they must be rejected. Any interpretation of criterion (a) that requires taking them into consideration creates absurd results and unleashes the very mischief that the access regime is designed to prevent.

It is a fundamental principle of statutory interpretation that a statutory provision should be given an interpretation that best achieves its purpose (a principle enshrined in section 14A *Acts Interpretation Act 1954* (Qld)) and prevents the mischief which is sought to be avoided (i.e. damage to competition arising from an enduring market power).

Both the NCC and the QCA have formed the view that criterion (a) does not require a detailed consideration of the detailed terms of access that would apply with and without declaration (which is typically the counterfactual). Where a declaration already exists and the counterfactual is the declaration ceasing, it is obviously directly inconsistent with that reasoning to then accept that the Deed Poll and Access Framework impose a constraint on QR.

If the principle that a Deed Poll and Access Framework of this nature can be considered as part of determining the likely state of the market without declaration is accepted, it leads to the result that infrastructure service providers can 'contract out' of access regulation. That cannot be seen as consistent with the purpose as expressed in the object of Part 5 (section 69E QCA Act).

It is also a fundamental principle of statutory interpretation that statutory provisions should not be interpreted in ways that give rise to such clearly absurd results.

Absurdly, on QR's interpretation, it would be open to QR to continually seek declaration reviews and make revocation applications slightly amending the terms of the Access Framework until they can convince the Minister that the criteria are no longer satisfied. That cannot be the intention of the Queensland third party access regime.

QR's interpretation also results in the QCA being placed in the position of providing a quasi-approval of the Access Framework in the event that the access criteria are not satisfied, which is a result at clear odds with the structure of the QCA Act. That is the case because the QCA Act provides a clear avenue for seeking the QCA's approval for access terms for non-declared services (in the voluntary access undertaking process), where the QCA still only approves the access undertaking under section 138 QCA if it considers it appropriate. Providing an alternative method for effectively getting QCA approval applying a much lower threshold, is contrary to the clear legislative intent.

### 6.13 The Competition Principles Agreement provisions regarding certification are irrelevant

QR has argued that because there are a range of ways to produce outcomes that promote competition and achieve the objects of economic regulation, the QCA must not 'get into the weeds' of the terms of the Access Framework and how a QCA approved access undertaking would be more favourable. Instead, QR stated that the terms of the Access Framework were

relevant only to the extent that they meet the criteria for certification of an access regime as set out in the Competition Principles Agreement.

Similarly, at the Stakeholder Forum QR made submissions that the Access Framework should somehow be accepted because it would (they argued) meet the principles in the Competition Principles Agreement between the States and the Commonwealth in relation to certification of an access regime as an 'effective access regime'.

Leaving aside whether that is true, it would be a clear error of law to adopt that approach.

It is absolutely clear that the role of the QCA in a declaration review under section 87C QCA Act is to determine whether it is satisfied of the access criteria (in which case it must recommend declaration) or it is not satisfied (in which case it must recommend against declaration).

The access criteria set out in section 76 QCA Act clearly sets out the criteria which the QCA must apply. There is no reference to the Competition Principles Agreement, and no basis for somehow implying that there was intended to be one.

### 6.14 The future with declaration – the constraints declaration imposes

The South West Producers strongly support the QCA's view that a third party access regime under Part 5 of the QCA Act would, in a future with declaration, provide a credible constraint on QR's use of market power.[37]

The South West Producers note that the fact that declaration provides a constraint on QR's behaviour is clearly evident even from the previous access undertaking tariff submissions relative to the ultimate QCA determinations.

| **Access Undertaking Process** | **Initial QR Tariff Claim** | **Ultimate QCA Approved Tariff** |
|---|---|---|
| Queensland Rail[38] 2005 Draft Access Undertaking | $12.48-$13.19/'000gtk | $8.50/'000gtk |
| Queensland Rail 2015 Draft Access Undertaking | $19.41/'000gtk (escalated to $19.74/'000gtk by the time of the QCA decision on the 2016 Access Undertaking) | $17.92/000gtk West Moreton<br>$16.66/000gtk Metropolitan |

Yet even QR's starting tariff claims are clearly less than they would be in the absence of declaration, due to knowledge they will be subject to QCA review.

Similarly, through the undertaking process, the terms of access QR offers (in its standard access agreement), and terms of the undertaking have become more favourable and appropriate than those proposed by QR. They provide a guaranteed reasonable position for obtaining access to all new entrants.

Even for non-reference services, or disputes over non-pricing terms, the ability to have the QCA arbitrate access disputes is a critical constraint that removes the potential for exercise of monopoly power.

By contrast a private arbitration mechanism under the Access Framework provides nothing like the same level of protection against exercises of monopoly power. In particular, private arbitrations are likely to:

(a) be significantly more costly;

[37] QCA Draft Decision, Part B, page 33
[38] Note: this entity was subsequently privatised and became Aurizon Network.

(b) involve significantly more uncertainty as the decision is being made by a single person who, even assuming that the person did have experience in the field of economic regulation, could not propose to make such a deeply informed and holistic decision as what would be produced by the QCA, with more than 20 years of experience in regulating these assets and a machinery of highly experienced economists and analysts ;

(c) need to occur each time there is a dispute in an ex-post way – whereas with declaration the Access Undertaking provides a way to resolve an appropriate position on any matter in an ex-ante way to prevent that problem arising in the first place and provide all parties certainty as to the treatment of that issue in advance of investment decisions being made; and

(d) be more open to issues of bias, given that judicial review would not be open for decisions of an arbitrator in the way it would be for decisions of the QCA.

The QCA Act also contains numerous provisions which are not included in the Deed Poll or access framework such as obligations that QR:

- must not prevent or hinder a user's access to the service under an access agreement (sections 104 and 125 QCA Act);
- must take all reasonable efforts to satisfy the reasonable requirements of an access seeker (section 101 QCA Act),

and do not have the defects in legal enforcement and effectiveness that the Deed Poll and Access Framework do.

It is therefore absolutely clear that the likely future with declaration, involves QR's pricing and non-pricing terms being subject to constraints which prevent the exercise of market power that would be unconstrained without declaration.

### 6.15 Application to Dependent Markets

As previously identified there are a number of dependent markets which have been identified, being:

(a) the West Moreton coal tenements market (which is separate from other coal tenements markets due to infrastructure cost differences and coal quality differences);

(b) the West Moreton regional coal rail haulage services market (which is separate from other haulage markets due to the specific smaller/lighter payload train required for operation on the network which cannot be used in other coal regions or other bulk commodity networks); and

(c) the Port of Brisbane coal handling services market (for which other coal handling service providers are not substitutes due to distance, lack of connections and therefore massive additional freight costs required, from the South West Producers).

For the reasons set out in previous submissions and the QCA Draft Decision, the South West Producers continue to agree with those definitions of the dependent markets as appropriate. In particular each of those markets are separate from and dependent on the primary market for the service, being the West Moreton coal rail access service.

In all cases, what is clear is that, conducting a with and without declaration analysis:

(d) with declaration – investors have certainty of reasonable pricing and terms of access through a combination of the reference tariffs, standard access agreement terms, undertaking provisions, a right to have the QCA determine access disputes and QCA Act rights and protections; but

(e) without declaration – investors know that QR has no effective constraint on its ability to engage in monopoly pricing (whether from road transport or the defective Deed Poll and Access Framework), and with clear incentives to engage in monopoly pricing (either initially or through a two period economic-hold up).

The QCA is therefore entirely correct in its conclusion that:[39]

*Given its dependence on the use of rail transport infrastructure, the QCA is satisfied that the certainty provided by access under declaration, including access at an efficient price and on reasonable terms and conditions, will be a critical factor in promoting future efficient entry into and operations in the West Moreton region coal tenements market.*

*…*

*In a future without declaration, the QCA is concerned that all market participants will face uncertainties relating to material price and non-price terms for access to below rail services in the West Moreton and Metropolitan system, particularly at the time of contract renewal, and that these uncertainties will deter efficient entry and efficient participation across the West Moreton region coal tenements market.*

Consequently, it is clear that declaration will promote investment, and a material increase in competition by new entrants.

The certainty of reasonable pricing and other access terms is also critical not just in the tenements markets, but for any future investments in the haulage services and coal handling services market.

If anything, it is particularly important in the rail haulage market where both South West Producers are aware of the need for either Aurizon or a new operator to invest in new rolling stock and the prospects of competition (even competition for the market between Aurizon and a new entrant) are heavily tied to the conditions of access being such that the coal customers and the haulage provider are not subjected to monopoly pricing. Given the unique rolling stock requirements of the network, no haulage provider will make the required investment without such certainty.

## 6.16 Conclusion

QR's arguments that criterion (a) is not satisfied are fundamentally flawed and should not be accepted by the QCA for the reasons discussed above.

The South West Producers firmly support the QCA's conclusion that access on reasonable terms and conditions as a result of declaration would materially promote competition in at least the West Moreton region coal tenements market (and most likely the West Moreton coal haulage market and Port of Brisbane coal handling services market) such that criterion (a) is satisfied in respect of the West Moreton and Metropolitan systems services.

[39] QCA Draft Decision, Part B, page 65-66

# 7 Criterion (c) – state significance

## 7.1 Interpretation of criterion (c)

Criterion (c) requires that the facility is significant having regard to its size *or* its importance to the Queensland economy.

As noted in the South West Producers' last submission, they strongly agree with the QCA's view[40] that the use of the word 'or' clearly indicates that the two components of criterion (c) are alternatives. That is, it is sufficient if the facility is significant having regard to its size or if it is significant having regard to its importance to the Queensland economy.

By contrast, QR's Latest Submission appears to contend for a contrary interpretation whereby a facility being of significance having regard to its size is not sufficient and that importance to the economy is the paramount economic consideration.

However, the QCA's interpretation is entirely consistent with the interpretation the NCC applies to criterion (c) in the national access regime. In particular, the NCC states in its Guide to Declaration that:[41]

*5.2 Criterion (c) is an assessment of the national significance of the facility providing the service … National significance is to be determined having regard to:*

*(i) the size of the facility, or*

*(ii) the importance of the facility to constitutional trade or commerce, or*

*(iii) the importance of the facility to the national economy.*

*5.3 A facility need satisfy only one of these three benchmarks ….*

This guide reflects the NCC's views as updated on April 2018 (after all of the decisions QR cites which it alleges support its contrary interpretation were decided), such that it is clear that QR has misunderstood how criterion (c) is intended to be interpreted.

## 7.2 Inappropriate comparison to Herbert Cane Railway

QR's Latest Submission seeks to make much of the NCC's consideration of the previous declaration application in respect of the Herbert River cane railway.

However:

(a) that declaration application was considered against criterion (c) under the national access regime which establishes a 'national significance' test – clearly a significantly higher threshold than the state significance threshold which applies under the QCA Act; and

(b) the Herbert River cane railway and the service it provides are significantly different in terms of size, materiality and economic importance than the West Moreton and Metropolitan rail network and the rail access service they provide in any case.

The first of those points is self-evident, and even acknowledged by QR. The second of those is discussed in more detail below to explain why trying to draw an analogy between the very different services will lead to erroneous conclusions.

## 7.3 Size

As the Latest QR Submission notes, the West Moreton system is 314 kilometres in length, and the total rail distance from the (current) further West Moreton coal mine to the Port of Brisbane is 380 kilometres.

[40] QCA Draft Decision, page 26 and Part B, page 88.
[41] NCC Guide to Declaration, [5.2]-[5.3]

The South West Producers agree with the QCA's analysis in the Draft Decision:[42]

*The QCA considers that each of the West Moreton and Metropolitan systems are of significant length, with track extending across a significant areas of the state, and are significant having regard to their size.*

*…*

*The QCA considers that the volume of freight carried annually by the West Moreton system is substantial. For example, the 314 km West Moreton system carries approximately 7 mtpa of freight, compared with the 1,032 km Mount Isa Line, which carries approximately 6 mtpa of freight. Thus, the QCA considers the West Moreton system is significant, having regard to its size.*

*…*

*The QCA considers that a substantial volume of freight and passengers are carried by the Metropolitan system annually and thus the Metropolitan system is significant, having regard to its size.*

QR's responses to this, centres around its inappropriate interpretation of criterion (c) (which should be rejected for the reasons described in 7.1 of this submission above) and its comparison to the Herbert cane railway decision (which QR notes involved a longer total length of track and as containing a NCC statement about size not being determinative).

To understand why the NCC's decision does not actually support QR's argument it is worth considering larger parts of the NCC final decision (rather than the isolated quotes that QR has sought to 'cherry pick'):

*7.11 The Council does not consider that any single dimension of a facility will be determinative in terms of its size. Rather, the Council considers various indicators in assessing the 'size' element of criterion (c). The Council has previously said that:*

> *[t]he physical dimensions of a facility may provide guidance on whether it is of national significance. Relevant indicators of size include physical capacity and the throughput of goods and services using the facility (NCC 2009, [5.5]).*

*7.12 The size of a facility is not of itself determinative. Rather, a facility's size is considered in the context of assessing whether the facility is of national significance.* ***The Council considers that the question it must ask itself is whether it is satisfied that the facility is nationally significant, in light of relevant indicators of size****.*

The NCC then goes on to discuss the differences between considering size in the context of linear point to point infrastructure (like the rail facilities used to provide an access service to West Moreton coal mines) and radial infrastructure (such as the Herbert cane railway):

*7.15 The Council's consideration of the question of the size of the Network is informed in part by the Services Sydney Final Recommendation (NCC 2004). Being reticulated rather than linear, the facilities under consideration in that matter may be considered to be a closer analogy to that of a radial network like a cane railway than previously considered rail networks, such as in the Pilbara railway matters. In addition, the Council sees the Bondi Reticulation Network as a relevant comparator because its total length and replacement costs are broadly comparable to those of the Network.*

*7.16 The Council acknowledges that comparisons with the Bondi Reticulation Network, or with any other facility that has been the subject of a Council recommendation, can provide guidance only. With that in mind, the Council notes that the Network services a cane*

[42] QCA Draft Decision, Part B, pages 84-86

*growing area of approximately 55 000 hectares with 575 growers (Synergies Report, p 36), but is fully contained within the Hinchinbrook Shire, which has a population of 12 513.26 By contrast, the Bondi Reticulation Network serviced, at the time of the Services Sydney Final Recommendation, 258 252 people, importantly including the Sydney central business district (NCC 2004, [7.6] and [7.10]).*

…

*7.18 … **While the Network is 'big' in certain dimensions, it is "not big" in others**. For example, the Network's total track length is somewhere between 504 kilometres and 550 kilometres but **its maximum haulage distance is less than 60 kilometres** …*

What becomes clear when that decision is actually read, is that the NCC would have considered the West Moreton and Metropolitan rail networks to be of much greater significance than the Herbert cane railway, given the significantly greater capacity, throughput and haulage lengths.

Consequently, the South West Producers consider it is clear that the West Moreton and Metropolitan rail networks are significant having regard to their size.

## 7.4 Importance to the Queensland economy

The South West Producers agree with the QCA's analysis in the draft decision:[43]

*The QCA is satisfied that both the West Moreton system and Metropolitan system are significant, having regard to their importance to the Queensland economy. This is based on the systems' substantial direct contributions to the economy in the form of access revenue, as well as the substantial indirect contributions to the economy that access to these systems provided. In particular, access to these systems facilitates the operation of many areas of economic activity (such as coal, rail haulage, agriculture and commuter passenger transport), which contribute substantially to the Queensland economy both in terms of direct revenue (gross state product), as well as employment and regional development.*

That analysis is clearly supported by the economic data provided to the QCA, including the $58.9 million in coal access charges (2016/17), the extent to which such charges funded the operation of the system (thereby minimising the need for government subsidies) employment, coal royalties and other economic contributions.

Further, coal mining activities in the South West region generate approximately $700 million in annual revenue. New Hope anticipates that the New Acland Stage 3 project will generate $7 billion in economic activity over the expected 14 year life of the Project.[44]

Indeed QR's Latest Submission even acknowledges that:[45]

*Queensland Rail notes that the West Moreton System, whilst subsidised under the TSC, is not dependent upon such funding, generating approximately $44 million per year in access revenue which is sufficient to cover operating costs.*

QR's response to that depth of clear evidence is centred upon the coal volumes not being significant when compared with Queensland's total coal commodity exports. However, the threshold is whether *the facility is significant*, having regard to its importance to the Queensland economy – such that the fact that the Aurizon Network rail system is of even more importance does not actually assist in the analysis. Comparisons to the Mount Isa line are misplaced for similar reasons. It is clearly possible for multiple facilities to be significant.

[43] QCA Draft Decision, Part B, page 57
[44] New Hope Corporation Limited, ASX Release – New Hope Welcome New Acland Mine Stage 3 Environmental Authority, 12 March 2019
[45] QR Latest Submission at [343]

Consequently, the South West Producers consider it is clear that the West Moreton and Metropolitan rail networks are significant having regard to their importance to the Queensland economy.

## 7.5 Conclusion

Accordingly, the South West Producers strongly reject QR's assertion that criterion (c) is not satisfied, and continue to express their strong support for the QCA's conclusion that the West Moreton and Metropolitan rail networks are significant, having regard to both their size and importance to the Queensland economy such that criterion (c) is satisfied.

# 8 Criterion (d) – promote the public interest

## 8.1 Support for QCA's findings

QR's arguments in respect of criterion (d) are principally derived from and reliant on their arguments in respect of criterion (a) (and therefore suffer from the same flaws).

Again, the South West Producers have analysed criterion (d) on the basis of the West Moreton corridor coal rail access service, reflecting both the QCAs and QR's view that criterion (d) should be analysed based on individual services.

The South West Producers agree with the QCA's conclusions that:

(a) access to the West Moreton and Metropolitan systems services on reasonable terms and conditions, as a result of declaration, would promote the public interest.[46]

(b) the publicly available reference tariff provides additional pricing certainty for coal access seekers and access holders on the West Moreton and Metropolitan systems;[47]

(c) declaration of the West Moreton and Metropolitan system services has had a positive effect on investment in mine facilities in the past, and is likely to continue to have a positive effect in promoting investment in the future, by providing:

  (i) long term certainty of access;

  (ii) access on reasonable terms and conditions (including a transparent dispute mechanism to the QCA); and

  (iii) an access price that reflects efficient costs (including a reference tariff for the West Moreton coal services);[48]

(d) the promotion of mining investment arising as a result of declaration of the West Moreton and Metropolitan system services will provide other public benefits including investment in the above rail haulage market, regional development and employment and reducing the government subsidy required for those systems.[49]

The South West Producers' previous submission address those matters in detail, so the below submissions focus on responding to the arguments raised by QR in the Latest QR Submission.

Despite QR's submissions, the South West Producers' do not dispute that the 'overall gains' required by criterion (d) need to be shown to arise from declaration, not just access – and the QCA's reasoning is very clear that it considered the impacts of declaration.

However, the Latest QR Submission does not take into account that even if QR will provide access without declaration it will not do so on reasonable terms and conditions as its pricing (in particular – but also its non-pricing terms) will effectively be unconstrained – and it is that monopoly pricing which impacts a variety of public interest factors, including the flow-on impacts the QCA has identified.

## 8.2 Constraints and incentives

As discussed in detail in respect of criterion (a), QR has an incentive to maximise profits, but does not face material constraints of the nature asserted in the Latest QR Submission.

[46] QCA Draft Decision, Part B, page 107.
[47] QCA Draft Decision, Part B, page 108.
[48] QCA Draft Decision, Part B, page 109
[49] QCA Draft Decision, Part B, page 109-115.

It is well recognised that non-vertically integrated firms still have incentives to maximise profits and can find it profit maximising to engage in monopoly pricing that has an adverse impact on both the public interest and competition and investment in dependent markets.

In addition, the existence of some surplus capacity and the transitory 'low-tonnage' scenario, do not address the two period economic hold up problem that effects investment.

### 8.3 Factors impacting on investment decisions

The South West Producers (as the entities who actually consider and have in the past made investment in the West Moreton coal industry) confirm that declaration is a material driver of investment and, having seen how QR has responded to Wilkie Creek's impending closure and attempts by third parties to acquire or restart the Wilkie Creek operations considers it is highly unlikely that QR would (in the absence of regulation) take steps to reduce its asserted asset stranding risks.

It is obviously true that regulatory uncertainty has played a role in the timing of an investment in the New Acland Stage 3 project, and global coal prices play a role in coal investments – but that does not impact on investment in other tenements in the region any more than it impacts on investment in coal elsewhere across Queensland.

However, if declaration was retained in the central Queensland coal region and the Hunter Valley rail network remains subject to an access undertaking, the relative lack of pricing constraints and transparency on the West Moreton and Metropolitan systems that would arise without declaration will clearly be taken into account in determining whether to invest in coal tenements in the West Moreton region.

### 8.4 The Access Framework does not provide reasonable terms and conditions

The Latest QR Submission appears to assert that the Access Framework means that the some public benefits will be produced without declaration as QR will provide access, and it is 'fit for purpose' or 'cost-effective'.

However, as discussed at great length, in respect of criterion (a) above, the Access Framework does not provide reasonable terms and conditions for reasons including:

(a) the lack of protection for future access seekers;

(b) the very limited term (which is only a third of the QCA's proposed declaration period);

(c) the ease with which it can be revoked by QR;

(d) the ease with which it can be amended by QR;

(e) the chilling impact it will have on future reforms and productivity improvements;

(f) the uncertainty of pricing, and ability to engage in monopoly pricing, it creates;

(g) the ability to auction capacity it provides;

(h) the difficulties of enforcement and disputes;

(i) the lack of protections included in the QCA Act (including the differences between a QCA administered access dispute and a private arbitration); and

(j) not even being legally effective in any case.

The flaws in the Deed Poll means that even if it is considered as part of the likely future without declaration (which the South West Producers contend it should not), it does not constrain QR's conduct or the adverse public interest impacts in the way QR asserts.

## 8.5 Administrative and compliance costs

The South West Producers continue to support the QCA's analysis that:[50]

*To the extent that administrative and compliance costs continue to be paid in practice by the users of the West Moreton and Metropolitan systems services in a future with declaration, the QCA considers that these costs are likely to have a minor effect in terms of the costs burden on Queensland Rail as a result of declaration. More generally, notwithstanding the identity of the ultimate bearer of the costs, the QCA considers that the administrative and compliance costs associated with the regulatory access regime should be balanced against the benefits generated by the regime. Such benefits include certainty and transparency of access terms (including the possibility of a reference tariff), which leads to the promotion of competition and investment in dependent markets … The QCA considers that these benefits are likely to outweigh the administrative and compliance costs associated with the regulatory regime.*

The South West Producers continue to consider that it is QR's approach to the regulatory process that is causing costs – but that only serves to demonstrate the clear benefits it is delivering, given QR's ambit pricing claims even within the context of the regulatory process. To the extent that QR wishes to decrease regulatory and compliance costs it is always welcome to provide draft amending access undertakings to the QCA seeking to remove or amend provisions that it considers imposes costs that are not justified by public benefit outcomes. The fact that QR has not done that, clearly raises questions about their assertions of undue regulatory burdens that are imposed as a result of declaration.

The point also remains that if the South West Producers are willing to pay for all of the costs of the regulatory system they must see real benefits from the regime in advance of the costs incurred.

The analysis of administrative and compliance costs also needs to be considered on a with or without declaration basis – and the South West Producers consider it is clear that there will be very substantial administrative and compliance costs without declaration. The costs of disputes will rise without declaration – as the lack of a regulator leaves the only available avenues as costly arbitrations and court proceedings This was noted at the Stakeholder Forum in the context of the increased level of consultation QR proposes to undertake in respect of amendment to the Access Framework – 'a QCA-like approach'. The QCA questioned how the Access Framework would reduce costs in the absence of declaration.

In fact, the South West Producers consider it is very clear that in the absence of declaration, costs will increase. As discussed in respect of criterion (a) above, the absence of declaration will increase the frequency of litigation and arbitration due to the difficulties of enforcement and likely protracted nature of disputes. In respect of disputes regarding the access charge, the costs of those protracted arbitrations are very likely to result in users that are unable to fund such lengthy processes to settle early at a higher price, compared to users with deeper pockets that may have more ability to fund those disputes. Consequently, even where QR intended for the access charge to be consistent across each of its agreements in a future without declaration, that is highly unlikely to reflect reality.

In any case, in addition to the issues with arbitration and litigation discussed in respect of criterion (a), there are any number of further factors that would prevent QR from putting itself in the QCA's shoes as decision maker. For example, the QCA has substantial information gathering powers under Part 6 of the QCA Act which can require a person to produce statements and documents to the QCA for an investigation.[51] This would not be available in the absence of

[50] QCA Draft Decision, Part B, page 111
[51] *Queensland Competition Authority Act 1997* (Qld) s 185(1).

declaration and in many instances, would result in QR failing to provide what would otherwise be material information. This in turn would likely lead to users engaging in highly cumbersome processes to request access to that information pursuant to the *Right to Information Act 2009* (Qld) with no assurance as to whether or not such requests would be successful.

## 8.6 Environmental benefits

The QCA considered the environmental impacts with and without declaration were finely balanced, ultimately concluding that declaration is likely to have a small beneficial effect in terms of promoting the public interest in the areas of social and environmental consideration through increasing rail freight.[52]

Again, QR's arguments these benefits would arise anyway are based on their views about the constraints and incentives they face in the absence of declaration which have been comprehensively rejected by the QCA and have been clearly demonstrated by the South West Producers in this and previous submissions not to reflect the likely future without declaration.

## 8.7 Assessment of private benefits based on nature of recipients

The Latest QR Submission argues that:

*To the extent that users are foreign owned mining companies, private benefits resulting from declaration must be appropriately discounted. Conversely cost savings benefits accruing to Queensland Rail, as a statutory authority, are relevantly benefits accruing to the people of Queensland.*

A discussed in the South West Producer's initial cross-submission:

*This is a bizarrely xenophobic submission for a government entity to be making. Declaration benefits haulage providers, coal producers and other rail users with substantial operations in Australia, which provide employment, coal royalties and economic growth. Both the South West Producers have their head office in Australia, are listed on the ASX and employ substantial people across their Australian operations. They are 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*

*… 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. If the allegation is that reference tariffs are preventing them from engaging in monopoly pricing – that is a very clear public benefit. It is a fundamental tenet of economics that while monopoly pricing increases the suppliers profit/utility it causes a deadweight loss to society.*

It is also clear that the promotion of investment in the West Moreton coal industry would drive numerous local public benefits including additional State royalties, federal income tax, employment growth, and economic activity for businesses in related industries.

## 8.8 Conclusion

The South West Producers continue to strongly support the QCA's conclusion that access to the West Moreton and Metropolitan systems services on reasonable terms and conditions as a result of declaration would promote the public interest as a result of the beneficial impact on competition in dependent markets, investment in dependent markets, limited administration and compliance costs relative to the benefits derived and benefits to regional development, environmental and safety issues and State funding, such that criterion (d) is satisfied.

[52] QCA Draft Decision, Part B, page 113.

## Schedule 1 - West Moreton System Regional Network Management Planning presentation