GLENCORE

Submission on the Queensland Rail 2015 Draft Access Undertaking

1 Background

Glencore's copper, zinc and lead businesses are one of the largest end users by volume of the Queensland Rail (***QR***) network. They contract for the rail haulage of minerals concentrates, metals and mining inputs on the Mount Isa – Townsville line (the ***Mt Isa line***) as part of the Mount Isa and Ernest Henry operations.

The efficiency, costs, and long term security of rails access, are critically important to the commercial decisions Glencore makes in relation to its copper, zinc and lead businesses.

Glencore considers that its various experiences in dealing with QR in relation to the Mt Isa line have demonstrated some significant flaws in the manner in which QR's network is currently regulated.

In that context, Glencore appreciates the opportunity to provide a submission on QR's 2015 draft access undertaking (the ***2015 DAU***) and, despite the challenges of the short time frame allowed for submissions, has sought to provide its view on the major aspects of concern to it in the 2015 DAU.

2 The 2015 DAU is not an appropriate undertaking

While Glencore acknowledges that QR's 2015 DAU represents an improvement on the previous draft access undertakings submitted (and ultimately withdrawn by QR), Glencore considers that it remains a flawed document that the QCA cannot reasonably conclude is appropriate to approve (having had regard to each of the matters set out in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld)).

In particular, the 2015 DAU (including the related standard access agreement) fails to give sufficient weight to the following matters in section 138(2) QCA Act:

(a) the object of Part 5 of the QCA Act – particularly regarding the efficient operation of and use of significant infrastructure (not just investment in infrastructure by QR);

(b) the public interest;

(c) the interests of persons who may seek access to the service (not just the interests of QR as owner and operator); and

(d) the pricing principles mentioned in section 168A – including not just 168A(a) that QR incorrectly asserts is somehow a 'cornerstone', but principles such as that in 168A(d), namely to 'provide incentives to reduce costs or otherwise improve productivity'.

Glencore continues to have substantial concerns in relation to QR's proposals regarding:

(a) Mt Isa line pricing;

(b) Maintenance obligations;

(c) Investment framework;

(d) Standard Access Agreement; and

(e) Scheduling and planning processes.

Each of those issues has been a concern for Glencore and numerous other stakeholders since the first replacement draft access undertaking was submitted by QR in April 2012.

Accordingly, Glencore submits that the QCA should make a decision refusing to approve the 2015 DAU and determining how it would be appropriate to amend the 2015 DAU.

3 Regulatory framework for consideration of 2015 DAU

QR raises a number of points that Glencore does not agree with regarding QR's interpretation of the regulatory framework which applies to the QCA in determining whether the 2015 DAU is appropriate.

The statements that Glencore principally takes issue with the correctness of:

QR Statement[1]	**Actual position under QCA Act**
In considering what is "appropriate" the QCA cannot reject a draft access undertaking because the QCA or stakeholders would prefer to address the factors in section 138(2) by a different means	The QCA may not refuse to approve a drat access undertaking only because the QCA considers a minor and inconsequential amendment should be made s 138(5) QCA Act. Otherwise the QCA is empowered to determine what is an appropriate undertaking having regard to each of the factors in s 138(2) QCA Act. If the QCA considers that an alternative approach to that proposed by QR is appropriate then subject only to the difference between that position and QR's position being greater than that described in section 138(5) QCA Act, it is clearly open to the QCA to require the undertaking to reflect what it considers the appropriate position.
The requirement in section 168A(a) is a cornerstone requirement … Any decision by the QCA on reference tariffs and other pricing aspects of an undertaking that fails to meet the requirement in section 168A(a) would run contrary to the object of the QCA Act … Anything less should not be approved and cannot be imposed.	The pricing principles in section 168A are just one of the specific factors in section 138(2) which the QCA must have regard to in determining whether it is appropriate to approve a draft access undertaking. It is for the QCA to weigh up the importance of those factors in the context of the relevant draft access undertaking. There is no single factor which is to be regarded as a 'cornerstone' or which somehow prevails over other factors. It follows, that the QCA may consider it appropriate to approve an access undertaking which may not meet a particular pricing principle (where many other of the section 138(2) factors are considered to tend in favour of different outcome), and it is within the QCA's power to approve or refuse to approve an undertaking on that basis.
It is strongly arguable that the QCA's Draft Decision on the 2013 DAU failed to meet these requirements. … the QCA must apply a "fresh set of eyes" and cannot simply re-run the positions it adopted in respect of the 2013 DAU	There is no evidence that the QCA's Draft Decision failed to meet the requirements of the QCA Act. The fact that QR takes issues with the merits of the decision does not mean it is not within the QCA's power. The QCA must look at each new draft access undertaking afresh. However, as the factors to be had regard to are the same, and there is limited changes in the surround circumstances between when the QCA Draft Decision was made and now, it is possible that a "fresh eyes" review will still come to the same result on some or all of the issues under consideration. That would not in any way invalidate the QCA's decision.

[1] QR Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (2015) Volume 1, May 2015, 4-5

4 Mount Isa pricing

4.1 Current floor/ceiling regulation is inadequate

There is no reference tariff that applies to access to the Mt Isa line. As a result, under QR's existing undertaking, access charges are negotiated between QR and access seekers subject to a floor (of incremental cost) and a ceiling (of stand alone cost).

For all of the bulk minerals services contracted by Glencore, rail transport is the only economic mode of transport. Comments in the QR submission (and the proposed Preamble) that QR competes with road haulage providers may well apply to some traffic on QR's network, but road haulage does not provide any competitive constraint on rail costs for bulk minerals.

Consequently Glencore is left to negotiate with a monopoly service provider. Access negotiations are further hampered by the extreme asymmetry of information that exists. When complaints were made about Mt Isa pricing during the previous draft access undertaking process QR either could not, or chose not to, provide any evidence of what the ceiling price might be.[2]

This has made for very difficult negotiations, and a continuing failure to reach agreement on long term pricing, with the ultimate result that Glencore has only been able to agree the extension of access rights on a short-term basis.

That is not an efficient result for Glencore, QR or the State's economy more generally.

The only way to break such an impasse under the current undertaking is to bring an access dispute and have access terms arbitration by the QCA. That is a step that Glencore has come close to taking on numerous occasions but the costs and time delays involve make it, in practice, a ineffective restraint on QR's monopoly power.

4.2 QCA Draft Decision

The November 2015 Draft Decision on QR's June 2013 draft access undertaking (the ***Draft Decision***) was the first major regulatory consideration of pricing on the Mt Isa line.

Importantly the Draft Decision indicated that:[3]

(a) it is in the public interest to ensure that the access and pricing approach supports the long-term growth of mining and other industries and communities served by the rail infrastructure;

(b) The QCA does not consider that Queensland Rail's 2013 DAU adequately addresses stakeholders' concerns about future pricing uncertainty on the Mount Isa line. This uncertainty is not in the public interest, in particular the future economic prosperity of the communities that rely on and service that line; and

(c) on contract renewal users of the Mount Isa line were exposed to QR being in a position to extract monopoly rents.

The QCA's proposed solution is set out in Draft Decision 3.7[4]:

[2] QCA Draft Decision, October 2014 at 53

[3] QCA Draft Decision, October 2014 at 53-54.

[4] QCA Draft Decision, October 2014 at 55

Draft Decision 3.7

The QCA requires Queensland Rail to amend its proposal so that the price for a renewing access holder on the Mount Isa line is limited to no more than:

(a) the tariff agreed between Queensland Rail and its access holder in the expiring access agreement, increased annually by CPI plus 2 percentage points per year of the expiring agreement, plus

(b) the normal regulatory return (consistent with cl. 3.2.3) on incremental capital expenditure incurred to increase capacity on the network, including

(i) spending on infrastructure specifically built for the access holder's service

(ii) a reasonable allocation of incremental spending for all services

with the accumulation of the maximum renewal price for an existing access contract starting on the approval date of this undertaking.

4.3 QR 2015 DAU

QR's proposal in clause 3.3(c) of the 2015 DAU is to apply the price differentiation provisions (in clauses 3.3(a)-(b)) as between the soon to expire access rights and renewal access rights.

QR claims that this 'addresses the QCA's concerns in a different way'. QR also alleged that the QCA did not have the power to implement the proposal from the QCA Draft Decision.

As a non-reference service the way these provisions operate (when clauses 3.3(a) to (c), 3.1.2(b) in respect of the Mount Isa line (assuming for now there is no other user of access rights for the same commodity – being the current situation) is that the methodology, rates and other inputs for calculating Access Charges in respect of the renewal train service may vary:

(a) to reflect differences in the cost and risk to QR of providing the renewal access rights compared to the existing access rights; and

(b) to reflect:

  (i) changes that result in QR no longer being able to commercially provide the renewal access rights at the current access charges

  (ii) changes in the cost and risk to QR of providing the renewal access rights

  (iii) changes in circumstances that have had, or may have, a material affect on the ability of access holders to pay access charges; or

  (iv) limitations on available capacity (and where this circumstance exists QR is permitted to charge the high access charge that it is likely to achieve from the current or likely access seekers).

In order to obtain that 'protection' the renewal access rights must be for the same commodity, the same number of train services and otherwise have in all respects the same description and characteristics as the existing access rights, and the renewal must have been applied for under the renewal provisions of the 2015 DAU.

It should be absolutely clear on reviewing that that any protection from clause 3.3 is illusory, principally because:

(a) many access applications that are in substance renewals will fall outside the narrow confines of the supposed protections (for example due to a slightly different quantity of train services being sought or the renewal being sought outside of the time frame for 'renewal applications' under the 2015 DAU);

(b) even if the access application does meet those parameters, the categories of circumstances which allow QR to charge differently as so broad they could be used to justify a wide range of departures from the existing access rights pricing. For example:

(i) 'changes that result in QR no longer being able to commercially provide the renewal access rights at the current access charges' – is worded in such a way that it is highly uncertain what 'commercially' means and that it could cover inappropriate things like:

(A) QR's costs increasing (due to QR's inefficiency) such that QR management considers higher charges are required;

(B) QR losing another customer on the line (effectivel shifting QR's volume risk to the renewing customer)

(ii) 'changes in circumstances that have had, or may have, a material affect on the ability of access holders to pay access charges' – as this does not refer to a material adverse affect, it seems to be suggesting that if an access holder's capacity to pay increases, QR should be able to charge them more on renewal; or

(iii) 'limitations on available capacity' – by permitted charging the 'maximum access charge' in that scenario, the 2015 DAU completely undermines the certainty renewal rights and pricing was intended to provide (as no access holder can foresee with any certainty whether that scenario is likely in the near future).

4.4 Glencore's analysis and proposal

Glencore supports the need for access charges on the Mount Isa line to be subject to regulatory controls, to prevent future monopoly pricing.

Glencore considers it is clear that the current light handed approach to access pricing on the Mt Isa system does not work – and QR is simply using the wide latitude given to it by the floor/ceiling regulation and the time and cost barriers to access disputes to obtain pricing that reflects its market power rather than meeting the prudent costs of providing the service and a reasonable return of and on capital invested.

For the reasons noted above, Glencore considers that it is also clear that QR's proposed approach does not work.

In relation to the QCA Drat Decision proposal, Glencore considers it is possible that a control on QR's market power could occur by way of a reasonably calculated cap. However, due to the inadequate cost information provided by QR in the past in respect of the Mount Isa line, it is difficult for Glencore to provide an informed position. As part of the QCA's assessment of Mount Isa pricing issues, QR should be required to provide the QCA, haulage operators and major Mount Isa end users with substantially more information on costs of the Mt Isa system (both operational, maintenance and past and future anticipated capital expenditure), aggregate system revenue and aggregate anticipated demand, so the QCA and users can discuss this issue and seek to find a resolution in an informed way.

In the absence of that information and for the purposes of advancing discussion of this matter, Glencore has set out below its views on how to amend the QCA Draft Decision 3.7 to produce an appropriate pricing regime:

(a) The 'base price' to be used in any methodology which references past pricing needs some refinement as:

(i) Basing it on the existing contract price involves providing an increase on pricing levels that already reflect:

(A) QR exercising its monopoly power;

(B) QR earning a return on capital assets that are life expired, under maintained and not optimised for current needs – suggesting the base price needs to be reduced (in a similar way to the suggestions in the QCA Draft Decision regarding the West Moreton system tariff) to reflect the age and characteristics of the Mount Isa line;

(ii) The costs that are theoretically supposed to have justified past pricing may not be prudent, relevant to or similar to the future costs of providing access or even actually incurred in the past (noting that Glencore considers it has been common practice for QR to negotiate a price which notionally reflects a certain component of maintenance costs, without their being any transparency or substantiation that those costs were actually incurred in maintaining the Mount Isa line);

As a result of (i) and (ii) a discount of some degree should be applied to determine a reasonable starting base price;

(iii) Where capacity is contracted on a short term basis the base price referenced should be the last long term access agreement between the parties for the relevant type of traffic rather than the last access agreement. This is important because QR has specifically used the short term of access arrangements to justify a materially higher access charge (which would make an inappropriate 'base price). Glencore believes (based on consultations with QR) that QR agrees with this point.

(b) The rate of escalation needs to be clarified as the draft decision appears to ignore the fact that existing access agreements already provide for escalation of access charges through the term of the contract – such that the indexation (2%+CPI escalation in the QCA's Draft Decision) should only apply from the last year's charges (as escalated under the terms of the contract) rather than on an annual basis which some of the wording in the QCA Draft Decision seems to suggest;

(c) It is not clear to Glencore why the rate of indexation should be more than CPI. QR has made no case for the additional 2% and it seems to produce an arbitrary increase to the revenue earned by QR on each renewal (which is an unjustified windfall gain in an environment where most service providers are having margins cut and there has been no evidence provided by QR that it is appropriate to transition the pricing to a higher amount);

(d) Glencore considers that instead any rate should actually reflect adjustments by CPI-X (incorporating an efficiency factor reduction of costs overtime) – as by escalating a base price without any reference to the underlying costs there is no QCA assessment of prudency in the way there would be if a reference tariff applied;

(e) The proposed cap approach will lock in price differentials for existing customers. For comparable traffics it would seem reasonable for the cap to be the lesser amount produced by the indexation methodology and the lowest price paid for another comparable service;

(f) There would need to be further definition around when capital expenditure was 'specifically built for the access holder's service'. This is important as Glencore considers QR has a history of underspending on maintenance and then claiming that renewal/extensions contracts require incurring further capital.

(g) Any pricing regime needs to be coupled with appropriate regulatory oversight of the standard of the service provided, including:

(i) Greater oversight and control of the maintenance activities on the line (noting that QR has justified existing pricing as including a component for maintenance costs which Glencore is concerned has not been carried out). This should include reporting and substantiation of maintenance carried out, including a independent assessment of the condition of the Mount Isa line;

(ii) A performance regime demonstrating the efficiency of operations, and other issues like operational constraints and outages; and

(iii) Financial outcomes where there are performance issues or the line is not being maintained properly.

Glencore is committed to working with QR, the QCA and any other interested stakeholders to produce workable pricing for the Mt Isa line going forward. If QR is unwilling to cooperate in finding a solution, it may be that a reference tariff for the Mt Isa system is the only way forward

4.5 Valuation methodology

While the capping approach above does not necessarily require fixing on an asset valuation methodology, clause 3.2.3(c) of the 2015 DAU provides that the value of assets (for the purposes of calculating the ceiling tariff) is the depreciated optimised replacement cost methodology (***DORC***).

Glencore considers that a DORC valuation is likely to be an inappropriate methodology for the Mount Isa line, given the old, and dilapidated nature of the line.

Given that QR has failed to provide details of what a DORC valuation would be for other parts of its network outside of the West Moreton system, the QCA should not confine its future decision making by accepting this clause.

Glencore notes the UNIQUEST Report[5] which indicated that both depreciated actual cost and a DORC methodology would be likely to satisfy the QCA's statutory requirements to promote the economically efficient use of the West Moreton system. While the Report did not concern the Mount Isa line or consider other valuation methodologies beyond those two, the clear learning is that it is not appropriate to determine to apply a DORC valuation methodology in advance of considering the relevant rail infrastructure involved.

5 Maintenance

5.1 Mount Isa line concerns

Glencore continues to be concerned that the Mount Isa line is not being properly maintained. This concern is borne out of past practical experience of reaching agreement on access charges on the basis of an allowance for maintenance works, but there being no evidence of the relevant maintenance program having been carried out.

As noted in the QCA's Draft Decision, the Mount Isa line is an 'old, long, low-volume network'[6].

[5] Professor Flavio Menezes, UNIQUEST, A preliminary view: regulatory economics assessment of the proposed Western System asset valuation approaches, 8 April 2015.

[6] QCA Draft Decision, October 2014 at 54.

5.2 Standard Access Agreement maintenance obligation

QR relevantly proposes that clause 6.1 of the Standard Access Agreement provides for the following maintenance obligation:

> **6.1 Maintenance**
>
> (a) Queensland Rail will maintain the Network in a condition such that the Operator can operate Train Services in accordance with this agreement.
>
> (b) Nothing in this agreement obliges Queensland Rail to fund or construct any Extension.

Glencore is concerned that this provision provides insufficient obligation to properly maintain the network and, particularly in light of the experience with the Mount Isa line, needs to be strengthened.

The current QR drafting regarding the maintenance obligation is inadequate because:

(a) The requirement that the Operator can operate Train Services in accordance with this agreement is of limited value once it is realised that the agreement gives QR express and substantial rights to not provide access or only provide access subject to operational restrictions and possession that can be imposed without consent of the access holder; and

(b) It does not provide a sufficient objective standard against which maintenance performance can be measured (see by way of contrast, the current standard access agreement which refers to the maintenance work being such that the infrastructure is consistent with the rollingstock interface standards).

The maintenance obligation should cover at least:

(a) The network being maintained to be consistent with the rollingstock interface standards (agreed as part of the Interface Risk Management Plan)

(b) The network being maintained in a condition such that the Operator can operate Train Services which fully utilise its access rights; and

(c) Otherwise maintaining the network in accordance with Prudent Practices (having regard to the type and volume of train services contracted to access the relevant part of the network).

Clause 13.4 of the Standard Access Agreement should also be deleted, as the exclusion of liability for maintenance means that any contractual maintenance obligations offers no protection to the operators or end users. There is no equivalent of clause 13.4 in the existing standard access agreements, and it is an unjustified alteration of the parties respective risk profiles.

5.3 Appropriate ways to strengthen maintenance obligations

In addition to strengthening the contractual obligation to maintain the rail infrastructure in the standard access agreement, Glencore is also concerned to ensure that the access agreement and undertaking build in a comprehensive framework to ensure maintenance occurs including:

(a) Reporting of maintenance (by actual spend, forecast spend, material maintenance activities carried out and reasons for material variances – separately reported for the Mount Isa line basis);

(b) A KPI regime involving financial adjustments for non-provision of access and operational constraints (noting that Glencore would be keen to discuss with QR and the QCA how to craft a customised Mount Isa line KPI regime); and

(c) An independent condition based assessment of the rail (with a mechanism for the Mt Isa pricing cap to be reduced where the rail infrastructure is not being maintained).

6 Access Agreement

6.1 Application to non-West Moreton access rights

The 2015 DAU contains a Standard Access Agreement which is intended to apply to all services (with the use of alternative clauses) rather than just West Moreton system coal access rights.

Glencore is supportive of that position. It reflects the reality Glencore has experience of negotiating non-coal access rights, where negotiations typically start with the then current coal standard access agreement even though that is not a formal requirement.

6.2 Tripartite format / End user rights

In previous submissions, Glencore has sought a 'split form' access agreement of similar nature to that which exists under the Aurizon Network central Queensland coal region and ARTC Hunter Valley rail access regimes, with a view to Glencore being able to directly control its access rights.

Glencore is willing to accept the propose tripartite model put forward by QR as an alternative way to achieve that aim, but the proposed standard access agreement will require significant changes from the current draft, which only give the 'Operator's Customer' very limited rights and have the Operator's Customer assuming risks to their access rights from the Operator's conduct.

See the commentary on clause 3 of the proposed standard access agreement in Annexure A for more details.

As a related issue, Glencore considers it should be made clearer in the negotiation framework section of the undertaking than an end user like Glencore can make an access application without having to have chosen an above rail operator (which it may wish to do if it is running a competitive tender process to select the preferred haulage provider). In circumstances like that the information to be provided in Schedule B and C as part of the access application process needs to be confined to that which QR really needs to issue an Indicative Access Proposal and can actually be provided by an end user access seeker.

6.3 Access Agreement terms

QR has changed the wording of the standard access agreement quite substantially from that which formed part of its existing undertaking.

Glencore's concern is that as part of those changes, the risk profile of access holders appears to have worsened or deteriorated when compared to the risk profile which exists under the current standard access agreement. There has been no justification for such changes other than simplification, and while simplification may be desirable, it should not be pursued in a way that changes the allocation of risks between the parties.

With a view of trying to provide as complete a picture as possible of Glencore's views of the remainder of the 2015 DAU in the limited time available, Glencore has provided in Annexure A to this submission comments on the various provisions of the Standard Access Agreement.

In the time available these comments cannot be exhaustive. It will be critically important for the QCA to conduct a comprehensive review of the change in risk position which QR is proposing compared to the existing standard access agreement.

7 Renewals

End users like Glencore have significant capital investment in long life assets such as mines, refineries, smelters and port facilities.

The ability to secure renewal rights is critical to end users' willingness to make such investments.

In that context, Glencore has the following concerns with the renewal rights provisions:

(a) Clause 2.9.3(c) limits the renewal rights to coal carrying Train Services and other bulk mineral carrying Train Services. It needs to apply to intermodal services (at least to the extent they support such coal or bulk mineral operations).

(b) The renewal process has proved to be extremely difficult with QR to date as there is a reopening of all of the terms of the access agreement to be renewed. Glencore considers that it would be appropriate and save on negotiating and administration costs if access holders could renew their access agreement on the existing terms other than price (which for Mount Isa would be subject to the capping arrangements proposed above).

8 Other access undertaking issues

With a view of trying to provide as complete a picture as possible of Glencore's views of the remainder of the 2015 DAU in the limited time available, Glencore has provided in Annexure B to this submission an expanded version of the table which appears in Volume 1 of QR's explanatory submissions for the 2015 DAU[7] so that in addition to comparing the QCA Draft Decision and the 2015 DAU, it also provides Glencore's views on each of those matters.

The other matters of principal concern to Glencore are:

(a) That the investment framework does not cut across the maintenance obligation (given the wide definition of Extension which covers enhancements, augmentation and replacements) – Glencore is concerned that this will be used by QR so it does not have to fund maintenance and sustaining capital projects, like the current ongoing resleepering program;

(b) Ensuring a process to establish a robust user funding regime. If this cannot occur as part of this undertaking process, then it is important the undertaking contains the mechanisms required a standard user funding agreement and related undertaking provisions to be submitted (and for the QCA to have related powers to prepare its own funding arrangements where QR fails to submit or does not make the appropriate changes);

(c) Formal master planning as a mandatory requirement for the Mount Isa line – to provide transparency of major maintenance and capital expenditure projects and a better understanding of how different volumes of traffic impacts on such costs;

(d) Greater protections for end users and operators regarding changes to MTPs, DTPs and operational constraints (including requiring consent to changes to the MTP, at least to the extent it results in additional costs or the available train paths being less than what is required to meet a user's contracted access rights); and

(e) Greater protections for end users and operators regarding changes to the operating requirements manual that impose material costs or loss of access rights

In the time available these comments cannot be exhaustive.

9 Previous submissions

As noted earlier in this submission, many of the issues which remain of concern have been raised on a number of occasions in previous draft access undertaking processes. To ensure that the QCA is fully briefed with all relevant material, Glencore's previous submissions have been included in Annexure C of this submission.

[7] Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (2015) Volume 1, May 2015 at 13.

Annexure A – Standard Access Agreement Terms

As a general comment, Glencore is concerned that in simplifying the access agreement and removing the operating requirements manual that the risk positions of the parties to the access agreement have been changed.

Glencore is not opposed to the principle of simplification or the operating documentation being separated, but requests the QCA carefully consider how each clause in the proposed standard access agreement compares to the existing standard access agreement – as it is not appropriate that the risk profiles of each party are shifted.

SAA Clause	Glencore concern
3. Relationship with Operator's Customer	Glencore is willing to accept the proposed tripartite model put forward by QR as an alternative way to achieve end user control of underlying access rights (as Glencore has previously proposed achieving through a split form access agreement), but the proposed standard access agreement will require significant changes from the current draft, which only give the 'Operator's Customer' very limited rights. In addition to the current rights given under clause 3, the Operator's Customer should have: • Control of all capacity transactions (renewals, relinquishment, transfers etc) without requiring Operator consent • Protections against termination due to operator default (the agreement should just be suspended for operator default with the ability for the end user to nominate a different operator) • Payment obligations with QR • Involvement in interface risk management planning (for activities which the Operator's Customer has responsibility for such as loading) • MFN protections (in addition to the operator having the same) The QCA should carefully consider the rights given to the end user/customer in the existing alternative standard access agreements which exist for the Aurizon Network rail network, as they provide a useful guide of the types of rights that end users should hold under such a structure. If QR wants the warranties in clause 3.5 it should be required to provide reciprocal warranties to the Operator and Operator's Customer. These warranties should be given on signing (not continually repeated). Clause 3.5(vii) is excessive and should be deleted as it is is likely to disincentive the provision of information between the parties due to liability concerns.
4. Accreditation	QR should have reciprocal obligations in respect of its accreditation as a railway manager
5. Payment obligations	Glencore considers that the end user should have the payment obligations (but with sufficient information being provided to take up any issues directly with the Pperator and QR) It is not clear to Glencore what the justification for Interim take or pay notices are. They go beyond the agreement, and by creating deemed results have drastic consequences if the Operator/end users overlooks receipt of such a notice. This concept should be deleted entirely.
6. Network management	The maintenance obligation in clause 6.1 needs to be strengthened – see body of Glencore's submissions QR should continue to have some contractual liability for third party works where they have a contractual relationship with the third party (and are therefore better able to manage the risk that the Operator and Operator's Customer). Glencore suggests that QR should be liable to the extent they are able to recover under the third party contract (with obligations to use their best endeavours to recover from the third party).

	6.2 provides QR with excessive control (greater than the existing SAA), which will impose costs on Operators and the Operator's Customer.
7. Train operations	7.3 is excessive and goes beyond anything in the existing SAA.
8. Operating Requirements Manual	The compensation rights should also apply to the Operator's Customer Clause 8.4 should be deleted. QR should not avoid liability for operational changes which impose material costs on others by using the draft amending access undertaking process.
10. Incident, environmental and emergency management plan requirements	Glencore is concerned that clause 10.7 open the ways for 'double-dipping' as presumably the cost of noise mitigation is included in the access charges that are already being paid. The clause needs to prevent double-recovery by QR (which will be very difficult for non-reference services given the opaque way in which prices are currently set).
12. Risk and indemnities	The dangerous goods indemnity in clause 12.3 should be deleted. It is an unjustified change in the risk position from the existing SAAs. It is inappropriate for QR to receive an indemnity for loss it caused or contributes to (which is currently covered). Risks should be borne by the party best able to manage them – and the only party able to manage QR's conduct is QR. Given that Glencore already has concerns with maintenance – another clause
13. Limitations on liability	13.1 Consequential loss exclusion should also cover the indemnities (as it does under the existing SAA). This is a very material and unjustified change in the risk positions of the parties. 13.4 should be deleted. It makes the maintenance obligation in clause 6.1 completely ineffective by making QR largely immune from liability for under maintaining the network (which is already a serious concern in respect of the Mount Isa line) 13.6(d) should be deleted or the threshold of 10% reduced. 10% is a substantial number of train paths not to be providing Glencore considers that a KPI regime should be introduced for QR's non-performance
14. Suspension	It is critical that the Operator's Customer gets notices of suspension so it can seek to take steps to procure the Operator to remedy the issues causing the suspension
15. Default	Change of Control should have the same exceptions / circumstances where QR is required not to unreasonably withhold consent as per assignment (which would reflect the position under the existing SAA). I
17. Security	There should be drafting notes / guidance provided in the SAA regarding not requiring securities from entities of clear financial substance
20. Force Majeure	Clause 20.1 changes the risk profile of QR in respect of FM events significantly. It should reflect the obligations QR has in clause 18.5 of the existing SAA.
21. Reduction and relinquishment of Access Rights	The conduct of the Operator should not result in reduction or relinquishment of access rights of the Operator's Customer
22. Assignment	The Operator should not be able to assign/charge its interest in the agreement without consent of the Operator's Customer
23. Representations and Warranties	If QR seeks these representations and warranties they should be given by QR in favour of both the Operator and Operator's Customer as well. 23(a)(ix) should be deleted. Glencore and the Operators are not satisfied as to the state of the Mount Isa line. It is inappropriate for a standard access agreement to force them to warrant that they are (and thereby protect QR from liability arising from its lack of maintenance). Inspection under 23(c) should occur but should not be linked to this warranty. 23(a)(x) is excessive and disincentives free flow of information between the parties.

27. General	Under 27.18, QR should have responsibility and be liable where its conduct is responsible for the loss of the required land tenure
28. Interpretation	The definition of Confidentiality Exception (relevant to clause 24) needs to include an exception for disclosure to bona fide purchasers of the mining project of the Operator's Customer or shares in the Operator's Customer or one of its holding companies. The definition of Consequential Loss needs to be narrowed to reflect the more appropriate definition in the existing SAA. Broadening what constitutes consequential loss is an unjustified changing in the risk profile created by the exclusion of liability for consequential loss. The definition of Emergency Possession should refer to a 'serious fault' as per the existing SAA.
Schedule 1	Should include Operator's Customer representatives
Schedule 3	While Glencore appreciates that the concept is that Schedule 3 would be renegotiated for non-reference services , it considers that take or pay should be capped on a common ownership basis (so that amounts paid for use of access rights above contract for one set of Glencore access rights are a deduction from take or pay obligations for other Glencore access rights on the Mount Isa line).

Annexure B – Access Undertaking comparison table

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
Part 1: Application and Scope					
		The QCA considers that Queensland Rail's proposed undertaking termination date of 30 June 2017 is in the interests of access seekers and in the public interest (ss. 138(2)(d) and (e) of the QCA Act). On this basis, the QCA proposes to accept Queensland Rail's proposal.	No longer applicable.	Queensland Rail proposes a terminating date of 30 June 2020.	Glencore has no issue with a proposed longer term, but has some concerns that with the major changes that are being proposed that there should either be a shorter term or an power for the QCA to review the undertaking if there are any unforseen inequitable results (similar to clause 1.4(a) of the DBCT Access Undertaking).
1.	1.1	The QCA requires Queensland Rail to amend its proposal to align the definition of access with the definition of rail transport infrastructure in the TI Act and with the definition in Part 10 of the 2008 undertaking.	Accepted	-	Glencore prefers the definition of Access that exists under QR's current access undertaking to make it clearer what below rail services are included within the definition of Access.
2.	1.2	The QCA requires Queensland Rail to amend its proposal to: (a) warrant the accuracy of the online line diagrams; (b) consult all existing access holders and access seekers of any proposed amendments to the line diagrams; (c) follow the Part 6 dispute resolution processes in the event an access holder or access seeker raises a dispute about the accuracy of the line diagrams; (d) update the online line diagrams, subject to the outcome of any dispute resolution process, and notify all access holders and seekers as soon as the line diagrams have been updated; and (e) update the online line diagrams if the QCA identifies any inaccuracy in them (either due to its own investigations or in response to	Partially accepted	Line diagrams are a means of providing information only and in contrast to the 2008 AU, do not define the rail infrastructure subject to access rights. The QCA's proposals create an unwarranted administrative burden given the role now played by the line diagrams. However, in the 2015 DAU, Queensland Rail undertakes to: • publish the line diagrams on its website • use reasonable endeavours to keep the line diagrams up to date and accurate in all material respects • review, and if applicable, amend the line diagrams at	Glencore would be willing to accept QR's drafting of clause 1.2.3 of the 2015 DAU provided it was supplemented by a right for access holders, following QR being given an opportunity to review the line diagrams, to dispute the accuracy of the line diagrams. While it is true that the scope of the undertaking is not defined by reference to the line diagrams, as the line diagrams are supposed to demonstrate the parts of the rail comprising the 'Network' it will facilitate access negotiations if they are correct and frustrate access negotiations if a rail line that should be included is excluded from the diagrams.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		complaints from access holders and access seekers).		intervals of no more than 6 months • review them if requested by the QCA or an Access Seeker or Access Holders • notify the QCA at intervals of no more than 6 months of any amendments to the line diagrams.	
3.	1.3	The QCA requires Queensland Rail to amend its proposal so that the 2013 DAU is consistent with s. 250 of the QCA Act, such that the 2013 DAU applies to all rail transport infrastructure for which Queensland Rail is the railway manager.	Partially accepted	The 2015 DAU applies to Queensland Rail where it is a railway manager except in the circumstance where it is providing railway manager services to the owner of the infrastructure and the terms of its contract with the owner do not allow Queensland Rail to comply with aspects of the 2015 DAU. The exception referred to above will not apply where the owner of the infrastructure is a related body corporate of Queensland Rail. Even where the exception applies access to the relevant services using that infrastructure will be subject to the QCA Act.	Glencore accepts the position proposed by QR in relation to the scope of the undertaking under clause 1.2.1(b)(C) 2015 DAU.
4.	1.4	The QCA requires Queensland Rail to amend its proposal so that it clearly sets out how it will be prevented from unfairly differentiating between access seekers and holders, by: (a) removing the reference to 'in the same circumstances' from cl. 1.3(a); and (b) amending cl. 1.3(b) to specify that, consistent with s. 100 and s. 168C of the QCA Act, Queensland Rail will:	Accepted	-	Glencore is willing to accept the position in QR's clause 1.3 2015 DAU, subject to suggesting it include a reference to the limits on price differentiation in clause 3.3, or also expressly including the requirement not to differentiate an Access Seeker's Access Charges from those of a relevant Reference Train Services except to reflect differences in cost and risk..

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		(i) not engage in conduct for the purposes of preventing or hindering an access seeker's or access holder's access; (ii) not provide access to related operators on more favourable terms than the terms on which it provides access to competitors of related operators; and (iii) ensure all access seekers, irrespective of whether they are a Queensland Rail party or a third party, are provided with a consistent level of service and given an equal opportunity to obtain access rights, subject to the express provisions of the QCA Act, the TI Act and this undertaking.			
5.	1.5	The QCA requires Queensland Rail to amend its proposal so that it is required to implement arrangements for ring-fencing information from its related party above-rail operator, if it enters a market in competition with third parties.	Accepted in principle	See new clause 2.2.3	Glencore is willing to accept the position proposed by QR in respect of clause 2.2.3 2015 DAU, subject to it being amended to allow the QCA to require the undertaking be amended to implement ringfencing provisions where: • QR does not submit a draft amending access undertaking in the time required by the QCA; or • the QCA rejects the draft access undertaking and QR fails to submit a revised draft amending access undertaking reflecting the changes the QCA has required. QR's drafting in clause 2.2.3 2015 DAU is inadequate as, if QR does not submit a draft amending access undertaking with ringfencing provisions acceptable to the QCA, the process will come to a halt following the QCA's rejection (unless QR voluntarily resubmits which neither clause 2.2.3 2015 DAU, as drafted, or the QCA Act

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					would require it to do).
Part 2: Negotiation and Capacity Management					
6.	2.1	The QCA requires Queensland Rail to amend its proposal so that: (a) for the access application form and operating plan template: (i) the undertaking provides that the operating plan template will be published on Queensland Rail's website; (ii) the QCA approves the first version of the access application and operating plan templates published on Queensland Rail's website; (iii) any amendment to a template is undertaken after Queensland Rail reasonably justifies the need for amending it and consults its customers; (iv) any dispute about an amendment is resolved through the dispute resolution process in the undertaking; (v) if an amendment takes effect, Queensland Rail publishes a marked up version of the template on its website and notifies its customers about the amendment; and (vi) Queensland Rail reports separately the yearly number of disputes arising in relation to the access application form and the operating plan template; and (b) Queensland Rail can seek additional information from an access seeker if it can reasonably demonstrate the need.	**Draft Decision 2.1(a)** No longer applicable. **Draft Decision 2.1(b)** Accepted in principle.	**Draft Decision 2.1(a)** The approach in respect of the requirements for an Access Application and an Operating Plan have reverted to the approach taken under the 2008AU. The requirements for an access application and an Operating Plan template have been included as Schedules to the 2015 DAU. **Draft Decision 2.1(b)** Queensland Rail can only request additional information if it acts reasonably and the information is needed for the purpose of preparing an Indicative Access Proposal.	Glencore is willing to accept the approach of listing the requirements for an access application and the operating plan template as scheduled to the access undertaking, subject to resolving a number of concerns with the content of Schedule B and C as included in the 2015 DAU. In particular: • It needs to be made clearer in Schedule B that an end user (such as Glencore) can apply for access (not only rail haulage operators) • Clause 4 Schedule B should be deleted – an access seeker should not have to provide details of the form of SAA being sought (given there is only one SAA) • The information to be provided (i.e. clause 5 of Schedule B) needs to be reduced to that which is critical for QR to do its capacity assessment and to allow an end user to apply for access prior to having contracted a rail operator (which it may do where it is running a tender process to appoint a rail operator). • Similarly Schedule C is mostly information which only a rail operator could complete and there needs to be a way for completion of the operating plan to be delayed to the time when an above rail operator is appointed. The right for QR to request additional information should be tightened up by the first sentence in clause 2.3.1 being amended to read:

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					'Queensland Rail may require the Access Seeker to provide additional or clarified information where that is reasonably necessary for the purposes of preparing an Indicative Access Proposal.'
7.	2.2	The QCA requires Queensland Rail to amend its proposal so that: (a) for rail corridors where no reference tariffs apply, the undertaking specifies the cost and pricing information that Queensland Rail will provide for each corridor to an access seeker consistent with s. 101(2) of the QCA Act and Schedule D of the 2008 undertaking; (b) the undertaking specifies the capacity, technical and operating information that Queensland Rail will provide to an access seeker for each rail corridor it manages consistent with s. 101(2) of the QCA Act and Schedule D of the 2008 undertaking; (c) the undertaking specifies that Queensland Rail will provide additional information to access seekers that it can reasonably provide consistent with s. 101(1) of the QCA Act and Schedule D of the 2008 undertaking, subject to its confidentiality obligations; and (d) Queensland Rail's indicative access proposal (IAP) to an access seeker includes information on the price at which Queensland Rail will provide the service (including the pricing methodology), the rolling stock and other relevant operating characteristics used to develop that IAP consistent with cl. 4.3 of the 2008 undertaking.	Accepted	New Schedule A lists the proposed “Preliminary” Information” and “Capacity Information” to be made available, whether or not a reference tariff applies. Clause 2.7.2(a)(i) has been included based on sections 101(1) and (2) of the QCA Act and equivalent provisions previously approved by the QCA. Clause 2.4.2 is also relevant in addressing the QCA’s draft decision.	Glencore is willing to accept QR's proposed position, subject to clause 2.7.2 being amended to provide for the information reflecting the requirements of section 101 to be disclosed with a specific minimum time period of providing the IAP (if not within the IAP itself). This is important because on QR's drafting, the Preliminary Information does not cover some of the section 101 information, and there is no timeframe in clause 2.7.2 other than 'during the Negotiation Period'. Glencore supports QCA Draft Decision 2.2 that disclosure requirements should reflect at least the requirements of s 101 QCA Act due to QR's continual inadequate disclosure and the fact that s 101 QCA Act is expressed to be 'subject to an approved access undertaking' (so a lesser level of disclosure requirement will undercut the requirements of the QCA Act). In addition, given the inadequacy of what QR has provided in purported compliance with s 101 QCA in recent access negotiations, Glencore continues to consider that the undertaking should expressly provide for greater disclosure than what s

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					101 QCA Act requires (including the types of information mentioned in Glencore's previous submissions), namely: • Information about the price at which the access provider proposed to provide the service, including the way in which the price is calculated (including the values of all inputs into any formula or methodology utilised and where any price is said to be 'market based' how QR has determined the 'market price' for the service) • Information about the costs of providing the service, including the capital, operation and maintenance costs (both on a stand-alone and incremental basis) • Information about the aggregate current and projected future revenue streams arising from the relevant parts of the network • Information about the value of the access provider's assets, including the way in which that value was calculated • An estimate of the spare capacity of the relevant parts of the network, including the way in which that spare capacity is calculated • Where information is provided about future matters (such as escalations, forecasts or estimates of future costs or revenue), the assumptions on which that information is based and the basis for those assumptions. Glencore also considers that the QCA should be given a clear power in the

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					undertaking to direct greater disclosure by QR where they consider that disclosures made to an access seeker do not fully comply with those requirements.
8.	2.3 (a)	The QCA requires Queensland Rail to amend its proposal so that for Preliminary information related to an access application: (a) Queensland Rail provides that information to an access seeker within 10 business days if previously compiled, otherwise 20 business days; (b) Queensland Rail can extend the time for providing preliminary information to an access seeker if it can reasonably justify that extension and the access seeker agrees; (c) Queensland Rail's annual report on compliance with the undertaking includes the time taken to provide preliminary information to access seekers, broken down into less than 10 business days, 10 to 20 days, 21 to 40 days, and more than 40 days.	No longer applicable.	Preliminary Information will be made available on Queensland Rail's website. Timeframes are therefore not relevant. Prior to the Negotiation Period commencing, Capacity Information will be provided within 10 Business Days after being requested. During the Negotiation Period, Capacity Information will be provided on request. Clause 5.2.2 requires Queensland Rail's annual report to include the average time taken to provide Capacity Information.	Glencore supports the Preliminary Information being made available on QR's website. Glencore submits that Capacity Information should be made available as part of the IAP, not as something that has to be requested during the Negotiation Period.
9.	2.3 (b)	The QCA requires Queensland Rail to amend its proposal so that for an IAP and intent to negotiate: (a) Queensland Rail can extend the time for providing the IAP to an access seeker beyond 20 days and an access seeker can extend the time for notifying Queensland Rail of its intent to negotiate, if each party can reasonably justify its decision and the other party agrees to the extended time; (b) Queensland Rail's annual report includes the time taken by Queensland Rail to provide the IAP to an access seeker and by an access seeker to notify its intent to negotiate, broken down into less than 10 business days, 10 to 20	Not accepted – addressed by a different means.	Similar to, but improving on the position in the 2008 AU, the 2015 DAU provides that: • Queensland Rail will use reasonable endeavours to provide the IAP within 20 business days or such longer period as specified in the acknowledgement notice. • A longer period than 20 business days may be proposed by Queensland Rail only in specified circumstances; • The access seeker may	Glencore supports the stricter timelines previously proposed by the QCA. QR's drafting of clause 2.4 gives numerous 'outs' to allow QR to delay the provision of an IAP, including allowing QR to specify an estimated time in the acknowledgement notice which automatically extends the period for responding (subject only to the access seeker raising an access dispute – which is likely to be highly counterproductive to successfully negotiating access). Glencore supports the more detailed reporting previously proposed by the QCA on time taken to respond to IAPs (given that

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		days, 21 to 40 days, and more than 40 days.		dispute before the QCA any proposal by Queensland Rail to provide the IAP in period longer than 20 business days. The 2015 DAU provides the access seeker with a specified reasonable timeframe following the provision of an IAP within which to provide a notice of intent to negotiate.. The 2015 DAU includes an obligation to annually report on the: • number and percentage of IAPs provided within the applicable timeframe; • average delay in providing IAPs by the applicable timeframe.	an average can be misleading with efficient responses 'masking' the number of delayed responses).
10.	2.3 (c)	The QCA requires Queensland Rail to amend its proposal so that for Execution of access agreement: Queensland Rail and an access seeker can agree to a different timeframe within which to execute an access agreement if the party seeking the extension can reasonably justify it.	Accepted in principle	Agreement of the parties alone should be enough given that both parties will be subject to their good faith obligations under the QCA Act.	Glencore prefers the position proposed by the QCA Draft Decision as, allowing the first party in the queue to reach agreement on an extension without justification will adversely impact on the queuing arrangements.
11.	2.3 (d)	Consequences for non-compliance with negotiation timeframes: Queensland Rail must replace 'absolute discretion' in determining the consequence of access seeker's non-compliance with timeframes with the term 'reasonable discretion'.	Accepted in principle	The discretion around consequences for the Access Seeker failing to execute on time has been removed. In accordance with normal contractual principles, if execution does not occur on time, then Queensland Rail's offer will lapse. However, in those circumstances Queensland Rail would remain subject to	Glencore is willing to accept QR's position

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
				negotiation obligations in accordance with the Undertaking.	
12.	2.4	The QCA requires Queensland Rail to amend its proposal so that: (a) the 2013 DAU deletes the clauses for the purpose of ceasing negotiations: (i) passenger safety and passenger operations (cl. 2.6.5); and (ii) frivolous application (cls. 2.6.3(a)(ii)(C) and 2.6.4). (b) for the purpose of ceasing negotiations the circumstance 'unlikely to comply materially with an access agreement' includes the assessment of prudential requirements (cls. 2.6.3(a)(ii)(A)) and 2.6.3(a)(iii)).	**Draft Decision 2.4(a)(i)** Not accepted **Draft Decision 2.4(a)(ii)** Accepted **Draft Decision 2.4(b)** Accepted – see clause 2.8.1(b)	**Draft Decision 2.4(a)(i)** While Queensland Rail has a variety of safety responsibilities, the safety of persons using or intending to use passenger Train Services is paramount to Queensland Rail. Passenger safety is not a matter of choice. The 2015 DAU has removed the right to cease negotiations on the basis of passenger operational issues. The drafting has also been simplified.	Glencore considers that it would be preferable for the undertaking to provide greater guidance on the factors QR is to have regard to in forming the opinion that 'there is no reasonable likelihood of material compliance with the Access Seeker with the terms and conditions of an Access Agreement' (as this is not a view that should be formed lightly and it has serious consequences if it is used to cease negotiations with an access seeker). Clause 2.8.3 also requires less strict application.
13.	2.5	The QCA requires Queensland Rail to amend its proposal to reinstate the mechanism for allocating capacity in the cases of competition for mutually exclusive paths and competitive tendering as contained in cl. 7.4.1 and related clauses of the 2008 undertaking.	Accepted in principle	See clauses 2.6 and 2.9.2.	Glencore remains concerned with QR's proposed approach to dealing with competing access applications. In particular: • QR's proposed principles for reordering the queue (see 2.9.2(h)) provide QR with inappropriate levels of discretion • Competing 'ready and able' access applications which would pay reference tariffs should be prioritised based on date of application, unless one access application is materially differentiated in terms of risk to QR • Difference in NPV contribution or subjective assessments of how favourable an access application is to QR's legitimate business interests, should not be relevant as between access applications which are subject to

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					the Mt Isa pricing rules (see below) • To the extent it does apply, Glencore is concerned with the broad discretion that the reference to QR's legitimate business interests provides
14.	2.6	The QCA requires Queensland Rail to amend its proposal for renewal of access rights so that it places access holders for western system coal train services and Mount Isa bulk mineral train services in front of a queue, provided the relevant access holder (and its customer): (a) retains access rights for an existing mine or a replacement mine as long as the renewed access rights use substantially the same train paths; (b) matches the contract period of the competing access seeker up to 10 years or alternatively the remaining life of its existing mine if less than 10 years (in which case it gets a 'one-off' renewal right); (c) executes an access agreement on terms that are consistent with the standard access agreement (in case of reference train services) or access agreement principles (in case of non-reference train services); (d) in the case of Mount Isa bulk mineral train services, accepts a price consistent with the renewal pricing rule recommended in Section 3.8; and (e) applies for renewal negotiations to begin no less than two years and no more than three years before the expiry of its access agreement, regardless of a competing access application.	Partially accepted	See amended clauses 2.9.3(b) and (c) and clause 2.9.2(m). These clauses give a window of time during which the relevant Renewal Access Seekers have priority regardless of any queue. However, after that window closes it would still be possible for a Renewal Application to move to the top of the queue through the normal application of the queuing rules. Queensland Rail accepts that special rights for renewals are appropriate where the origin and destination for the Train Service (and other characteristics) remain the same – particularly having regard to the substantial long term investments associated with mining operations. However, it is not appropriate for a renewals process to effectively allow an Access Holder to leapfrog access rights to new origins under the guise of a renewal. These circumstances would not commonly be considered a 'renewal' – they relate to different access rights. Treating the circumstances	Glencore supports QCA Draft Decision 2.6, subject to having reservations about the proposed Mt Isa 'renewal pricing rule' (and therefore recommendation 2.6(d)). See Glencore position on Decision 3.7 below for details of Glencore's reservations. Clause 2.9.3 2015 DAU is an improvement on QR's previous positions on renewal. Glencore considers that it should be further amended to include: • A right to renew on the existing terms of a user's access agreement • a process under which QR notifies the access holder of the need to renew (a specified period of days before the Renewal Timeframe where the timeframe is not triggered by a non-renewal application). • the renewal rights should not automatically end on the expiry of the period referred in clause 2.9.3(b)(ii), which should instead refer to the later of three dates, being the two dates listed and 'where an access dispute was commenced before the later of the periods referred to in (1) and (2) above, the earlier of the finalisation of that dispute through the Renewal Access Seeker agreeing to terms of an access

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
				described above as a renewal would operate to potentially unfairly advantage the "renewing" access seeker over other access seekers in a queue. The pricing rule proposed by the QCA for Mt Isa bulk mineral train services pre-determines an access charge under a contract and does so without regard to the pricing principles in section 168A. This is beyond the QCA's power to require. However, Queensland Rail has included clause 3.3(c) in response to the QCA's concern. That clause limits Queensland Rail's discretion to price for renewals by modifying the effect of clauses 3.3(a) and (b) so that, subject to those clauses, the price differentiation principles will be applied as between the existing agreement and the proposed renewed access agreement.	agreement (including, but not limited to, term arbitrated by the QCA) or the dispute is finalised without any access agreement being entered by the Renewal Access Seeker'.
15.	2.7	The QCA requires Queensland Rail to amend its proposal to: (a) include reference to commercial damage in the definition of confidential information as contained in clause 3.3(a) of the 2008 undertaking; and (b) delete clause 2.7.4 that does not oblige Queensland Rail to enter into an access agreement if there was insufficient capacity.	Accepted.	While Queensland Rail has agreed to delete clause 2.7.4, it cannot be compelled to execute an Access Agreement where there is insufficient capacity in the Network to provide the relevant Train Service and no agreement or requirement to extend the facility exists.	Glencore supports the deletion of clause 2.7.4 (as now accepted by QR). QR can be compelled to invest in capacity in order to contract access in certain circumstances through approved access undertakings, access determinations and through agreement.
Part 3: Pricing Principles					

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
16.	3.1	The QCA requires Queensland Rail to amend its proposal to reinstate the hierarchy of pricing principles for developing access charges as contained in cl. 6.1 of the 2008 undertaking.	Partially accepted	If there is to be a hierarchy, the hierarchy proposed by the QCA in the draft decision is not consistent with the QCA Act. Revenue adequacy must be paramount as contemplated by section 168A. Without revenue adequacy, an access provider will not have the ability to provide access, maintain the facility or invest in the facility.	Glencore continues to support reinstating the hierarchy of pricing principles from the 2008 undertaking. Section 168A does not make revenue adequacy paramount and QR's claims that it does are highly misleading. The pricing principles in section 168A are only one of a number of factors the QCA must have regard to in determining whether it is appropriate to approve an undertaking (see s 138(2) QCA Act). There is no provision of the QCA Act which gives them greater weight let alone a position of being paramount. Section 168A then provides a number of principles which there is a clear tension between, of which 168A(a) is only one. As a result QR's position is inconsistent with the balancing of factors that the QCA Act envisages taking place and should be rejected.
17.	3.2	The QCA requires Queensland Rail to amend its proposal so that the pricing principles in the undertaking for developing access charges specify that Queensland Rail can only seek to differentiate access charges between access seekers/holders: (a) where a reference tariff is applicable, to reflect differences in cost or risk to Queensland Rail of providing access for the train service compared to the reference train service; and (b) where there is no reference tariff applicable for the relevant train service type, subject to requirements reinstated from cl. 6.1.1(c) of the 2008 undertaking.	Partially accepted	The 2015 DAU satisfies the QCA's proposal in paragraph 3.2(a). In respect of draft decision 3.2(b), consistent with the 2008 AU, the restriction applies in relation to differentiation between access seekers. Where no reference tariff applies, the list of circumstances in which price differentiation can occur, includes a circumstance where the access can no longer be commercially provided at the	Glencore is willing to accept QR's approach to differentiation from reference services in clause 3.3(b)(i). Glencore is concerned with the width of QR's new provision regarding access no longer being commercially able to be provided – which it considers should be restricted to matters outside of QR's control (to prevent changes in pricing based on QR's own inefficiencies).

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
				current access charge. This broadens the equivalent circumstance in the 2008 AU which concentrated on Transport Service Payments.	
18.	3.3	The QCA requires Queensland Rail to amend its proposal so that it is required to act reasonably when seeking to increase an access charge to offset a reduction in a transport service contract (TSC) payment.	Not accepted	Queensland Rail should not be exposed to a dispute process over whether it is acting reasonably where it is seeking to set an access charge for a service that would previously have been subsidised by a Transport Service Payment. Queensland Rail has an existing obligation under the QCA Act to act in good faith and its right to recover at least its efficient costs of providing the service. If an Access Charge is effectively being subsidised and made commercial by means of a Transport Service Payment and the Transport Service Payment is reduced or eliminated, Queensland Rail should be entitled to set a new access charge taking into account the loss of the Transport Service Payment.	Glencore supports the requirement to act reasonably – this reasonableness requirement should in fact apply to all of 3.3(b)(ii)(B). QR's refusal to meet the low threshold of 'act reasonably' in seeking to increase charges in these circumstances is not justified. In the sorts of circumstances QR refers to the obligation to act reasonably would not be likely to restrict QR's ability to increase the access charges.
19.	3.4	The QCA requires Queensland Rail to amend its proposal so that: (a) It can only require take or pay on the western system up to the amount required to lift its annual revenue to 100% of the target revenue used in developing the western system reference tariffs; and (b) the annual target revenue relating to this	Not accepted	Take or pay is included in access agreements to achieve a number of outcomes. As the QCA has indicated, the most important are to support revenue certainty for the infrastructure provider and to encourage customers to accurately contract for the	No comment – no applicable to Glencore. See Glencore submissions on Mt Isa pricing for detailed comments on take or pay on the Mt Isa line.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		take or pay limit is published with the western system reference tariff in schedule A.		capacity. Queensland Rail considers that the QCA's proposal undermines the effectiveness of the take or pay arrangements in achieving both of these objectives. In its 2015 DAU Queensland Rail is proposing a Reference Tariff well below the price ceiling. In those circumstances there is no justification to limit the revenue that Queensland Rail should be entitled to recover through take or pay and access charges. For a more detailed discussion on this issue see section 2.2.3 of Volume 2 of Queensland Rail's submission on 2015 DAU.	
20.	3.5	The QCA requires Queensland Rail to amend its proposal to remove the requirement that the asset value for determining a ceiling revenue limit be set through a depreciated optimised replacement cost methodology, by deleting cl. 3.2.3(c) and cl. 1.2(a)(ii) in Schedule AA.	Not accepted.	See Volume 2 of Queensland Rail's submission on 2015 DAU.	Glencore strongly believes that it is not appropriate to pre-determine that DORC values should be set as the asset values (for determining a ceiling revenue limit). As is recognised in the UNIQUEST report produced by the QCA (8 April 2015), other methodologies satisfy the QCA's statutory requirements. The Mt Isa line is an old line with assets that are aging, life expired and under maintained. Given QR is unable to demonstrate what the DORC value of the Mt Isa line even is currently, it is clearly inappropriate to be making this sort of assessment at this time.
21.	3.6	The QCA requires Queensland Rail to amend its proposal so that the QCA can require it to submit a proposed reference tariff if the QCA	Not accepted.	The QCA's proposal is effectively seeking a right to require an amendment to the access	Glencore supports QCA Draft Decision 3.6 (and QR's acceptance of it). Glencore has raised concerns with Mt Isa access charges

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		considers it is warranted.		undertaking. The QCA Act does not empower the QCA to force an amendment to an access undertaking in these circumstances.	being imposed by QR on a number of occasions and continues to consider that the ability for the QCA to require submission of a reference tariff is an important protection that should not be removed. There is nothing in the QCA Act which limits the QCA's power in the way QR is asserting. The QCA Act expressly acknowledges that an undertaking can include provisions regarding how charges for access to the service can be calculated and provisions regarding review of the undertaking (s 137(2)(a) and (k) QCA Act) . Where the QCA considers it is appropriate to do so in accordance with section 138(2) it has the power to include a provision of this nature.
22.	3.7	The QCA requires Queensland Rail to amend its proposal so that the price for a renewing access holder on the Mount Isa line is limited to no more than: (a) the tariff agreed between Queensland Rail and its access holder in the expiring access agreement, increased annually by CPI plus 2 percentage points per year of the expiring agreement; plus (b) the normal regulatory return (consistent with cl. 3.2.3) on incremental capital expenditure incurred to increase capacity on the network, including: (i) spending on infrastructure specifically built for the access holder's service; and (ii) a reasonable allocation of incremental spending for all services with the accumulation of the maximum renewal price for an existing	Not accepted – addressed by a different means.	2015 DAU addresses the QCA's concerns in a different way. For a renewing access seeker on the Mt Isa line, Queensland Rail has included clause 3.3(c) which limits Queensland Rail's discretion to price for renewals by modifying the effect of clauses 3.3(a) and (b) so that, subject to those clauses, the price differentiation principles will be applied as between the existing and the proposed renewed access agreement. This effectively means that a price increase can only be applied to a renewing access seeker's access charge where there is an increase	See detailed submissions on this matter in the body of the Glencore submission. Glencore supports the need for access charges on the Mt Isa – Townsville line to be subject to regulatory controls, to prevent future monopoly pricing. Glencore considers it is clear that the current light handed approach to access pricing on the Mt Isa system does not work – and QR is simply using the wide latitude given to it by the floor/ceiling regulation and the time which would be required to have the QCA arbitrate an access dispute to obtain pricing that reflects its market power rather than

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		access contract starting on the approval date of this undertaking.		in risk or cost as between the existing access agreement and the renewing access agreement. Where there is more than one access seeker for the same commodity in the same geographical area, the normal price differentiation principles would apply. The QCA's proposal would in any case be beyond the QCA's powers under the QCA Act. It is, for example, inconsistent with the application of section 168A of the QCA Act.	meeting the prudent costs of providing the service and a reasonable return of and on capital invested. It is possible that a control on QR's market power could occur by way of a reasonably calculated cap. However, due to the inadequate cost information provided by QR in the past in respect of the Mt Isa line, it is difficult for Glencore to provide an informed position. As part of the QCA's assessment of Mt Isa pricing issues, QR should provide the QCA, haulage operators and major Mt Isa end users with substantially more information on costs of the Mt Isa system (both operational, maintenance and past and future anticipated capex), aggregate system revenue and aggregate anticipated demand – so the QCA and users can discuss this issue and seek to find a resolution in an informed way. This is a matter of very high priority for Glencore and Glencore encourages QR to be proactive in finding a solution to this issue, and will constructively engage with any reasonable proposals QR put forward on this issue. Glencore is committed to working with QR, the QCA and any other interested stakeholders to produce workable pricing for

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					the Mt Isa line going forward. If QR is unwilling to cooperate in finding a solution, it may be that a reference tariff for the Mt Isa system is the only way forward.
Part 4: Network Management Principles and Operating Requirements Manual					
23.	4.1	The QCA requires Queensland Rail to amend its proposal so that the network management principles: (a) require Queensland Rail to promptly notify access holders, affected infrastructure service providers and supply chain participants including, where relevant, ports and other below-rail operators, of proposed or implemented changes to the master train plan (MTP) or daily train plan (DTP); (b) only allow Queensland Rail to impose operational constraints without consulting access holders in cases of urgent and emergency possessions; (c) require Queensland Rail use best endeavours to mitigate the impact of possessions and other operating constraints on access holders; (d) require that Queensland Rail secure agreement from access holders where changes to planned possessions in the MTP affect their train service entitlements (TSEs); (e) provide that, where an MTP amendment other than an urgent or emergency possession is disputed by an access holder, the change to the MTP should take effect after the dispute is resolved; (f) require in Schedule B, cl. 1.1(g)(iv) that 'in Queensland Rail's reasonable opinion no access holders are adversely affected by the	Partially accepted.	In relation to draft decision 4.1(a), Queensland Rail is not performing supply chain coordination services for access holders. Coordination services are not part of the declared service. The MTP will be published on the website and any changes will be advised to access holders within a specified timeframe, well before the change takes effect. The DTP will be advised to all access holders at least one day before the relevant train service runs. Once scheduled, Queensland Rail cannot vary the DTP so as to adversely affect the access holder except where an Emergency Possession is required. In relation to draft decision 4.1(b), an obligation to consult as proposed by the QCA is not practical. Not all operational constraints involve a "possession". For instance, there may be an urgent need to impose a speed restriction for safety reasons. In relation to draft decision 4.1(c),	Glencore supports the need for QR to be more engaged in supply chain coordination and alignment activities. The rail network will not operate efficiently unless QR is properly engaged in alignment/coordination activities. Glencore continues to support: • the changes proposed in QCA's previous draft decision 4.1(a) and (g) to facilitate efficient coordination • the changes proposed in QCA's previous draft decision 4.1(b), subject to being willing to accept an extension for operational constraints required for safety reasons to address QR's concern. • the changes proposed in QCA's previous draft decision 4.1(c) – the reasonable endeavours obligation to minimise any material adverse effects should be applied to all operational constraints (not just unscheduled possessions) • the changes proposed in QCA's previous draft decision 4.1(d)-(f) in order to properly protect access holders from adverse impacts arising from unjustified changes.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		modification, and any access holders that may be affected have been notified and consulted'; and (g) amend the definition of 'Infrastructure Service Providers' to include ports and other below-rail operators that are affected by the availability of Queensland Rail's Network		Queensland Rail has agreed in 2015 DAU to use reasonable endeavours to minimise any material adverse effects arising from an unscheduled possession. In relation to draft decision 4.1(d), Queensland Rail agrees to consult with access holders whose train service entitlements will be adversely affected by a change. The change in draft decision 4.1(e) is not agreed. A dispute raised by one access holder should not hold up changes to the MTP. The change proposed in draft decision 4.1(f) is unnecessary as under 2015 DAU Queensland Rail is obliged to act reasonably. In relation to draft decision 4.1(g), Queensland Rail is not providing a supply chain coordination service.	
24.	4.2	The QCA requires Queensland Rail to amend its proposal so that it is required to: (a) publish a complete MTP for each system, either in train graph or tabular form, consistent with those published by ARTC, and update it every six months, or more often at an access holder's request, if the MTP is modified; and (b) provide a complete DTP, showing all services, to an access holder on request.	Partially accepted.	The 2015 DAU obliges Queensland Rail to publish every six months the current MTPs on its website, and to provide MTPs to access holders on request. The DTP will be provided in a complete, un-redacted form to all access holders within one day prior to operation relevant to that DTP. A request for the provision of the DTP is therefore not required.	Glencore supports QCA Draft Decision 4.1, subject to the information also being provided to end users (who can then take appropriate actions such as seeking to align their production with MTPs/DTPs) and providing for updating the MTP that is made publicly available on request of an access holder following a change to the MTP. Glencore considers that it would be useful to have an approved format in which the

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					MTP/DTP is provided
25.	4.3	The QCA requires Queensland Rail to amend its proposal so that it is required to submit a DAAU, if requested by the QCA, to reinstate provisions for cyclic traffic equivalent to those in the 2008 undertaking, if necessary to accommodate an access request, or to address any scheduling and train control issues arising from the integration of its operations with a port or other supply chain entity.	Not accepted.	An access seeker for cyclic traffic is not precluded from submitting an access application. The 2015 DAU applies appropriately to accommodate cyclic traffic. In any case, the QCA's proposal is effectively seeking a right to require an amendment to the access undertaking. The QCA Act does not empower the QCA to force an amendment to an access undertaking in these circumstances.	Glencore supports QCA Draft Decision 4.3. Given the longer term of the undertaking QR is seeking it is appropriate to provide the QCA with some flexibility to resolve issues like this that might arise during the term. As noted elsewhere, provisions regarding review of an undertaking are expressly provided for as something that can be included in an undertaking in section 137 QCA Act.
26.	4.4	The QCA requires Queensland Rail to amend its proposal so that the NMPs in the undertaking clearly specify that they will apply to all services including Queensland Rail's own passenger services.	Accepted.	-	Glencore supports QR's adoption of this position in the NMP in Schedule F.
27.	4.5	The QCA requires Queensland Rail to amend its proposal so that the NMPs and SAA restrict its ability to take pre-emptive action to avoid passenger trains being delayed to peak periods in the metropolitan region.	Accepted.	-	Not applicable to Glencore
28.	4.6	The QCA requires Queensland Rail to amend its proposal so that its NMPs: (a) require it to coordinate its maintenance activities with adjoining network managers so trains operating across both networks face minimal disruption; (b) require Queensland Rail to take into consideration through-running trains to and from adjoining rail infrastructure when developing its MTP; (c) provide for Queensland Rail's amendments to system-wide requirements to have regard to	Partially accepted.	In relation to draft decision 4.6(a) – (c), Queensland Rail agrees to use reasonable endeavours to consult with other railway managers in respect of those matters. (See clause 4.2 of the 2015 DAU.) In respect of draft decision 4(d), to the extent that the consent of an access holder is needed, no change is needed to the drafting proposed by the 2015 DAU as it	Clause 4.2 is an improvement on QR's previous position on this issue. However, it should provide for: • Mandatory consultation with other railway managers (not reasonable endeavours to consult); and • Best endeavours to coordinate maintenance, MTPs and operating requirements with a view to minimising adverse effects in relation to Through-Running Trains. Glencore considers that access holders'

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		those of Aurizon Network, including its NMPs, the approved Capricornia system rules and any other approved system rules, where relevant; and (d) allow access holders to withhold consent to MTP/DTP amendments (with the exception of possession-related changes) by Queensland Rail that cannot be accommodated by the adjoining network manager.		would be reasonable for an access holder to withhold consent where the adjoining network manager cannot accommodate the change.	consent should be required (with exceptions for possession related changes) for changes to the MTP/DTP that cannot be accommodated by the adjoining network manager – as otherwise QR can make changes that result in the access rights relating to Through-Running Trains worthless/impractical.
29.	4.7	The QCA requires Queensland Rail to amend its proposal so that the risk allocation matrix applied to Aurizon Network's 2010 undertaking underpins the principles of the Operational Requirements Manual.	Not accepted.	Queensland Rail is not aware of the risk matrix to which the QCA is referring. Queensland Rail is also not aware of how a risk matrix for a completely different type of business will be applicable to Queensland Rail. Queensland Rail considers that the Operating Requirements Manual reflects an appropriate allocation of risk for its business.	Glencore supports the principle that QR's risk profile should generally be comparable to the risk profile of Queensland Rail under its existing SAA (which is similar to the risk profile of Aurizon Network under its SAA). Glencore has no issue with the Operating Requirements Manual being a separate document – but it needs to be ensured that that separation does not adversely and inappropriately impact on access seekers by the existing risk profile being changed in the process.
30.	4.8	The QCA requires Queensland Rail to amend its proposal so that the risk allocation between Queensland Rail and the operator is balanced. In this respect, the QCA requires Queensland Rail to implement the following amendments to its ORM: (a) Queensland Rail should notify all operators and their major customers of any proposed amendments to the ORM. (b) Queensland Rail should compensate the operator if a proposed amendment causes significant net material financial impacts of 1 % or greater. (c) Queensland Rail should make all amendments disputable, not only if a proposed	Partially accepted.	The matters listed are not appropriate for an access undertaking and have been addressed in the Standard Access Agreement (SAA). 2015 DAU includes clause 4.3 which sets the ORM that applies as at the approval date, obliges Queensland Rail to: • make the then current version of the ORM applicable from time to time available to access seekers and access holders, • include an equivalent of	Glencore strongly supports the need for risk allocations to be balanced. Clause 8 of the SAA is an improvement on QR's previous position on this issue but needs to be amended to: • recognise that change to the ORM may impose costs on an end-user – particularly if it changes loading/veneering requirements (and that the end user should, in those circumstances, receive equivalent compensation to that which the operator receives under clause 8.3); • more clearly provide for a dispute regime (and for changes not to be made

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		amendment 'unfairly differentiates' between operators. (d) Queensland Rail should narrow its liability clause and limit the 'good faith' clause to urgent safety-related amendments.		clause 8 of the SAA (amendments and compensation rights) in all access agreements entered into after the approval date of the 2015 DAU Clause 8 of the SAA sets out the rights and obligations of the parties in relation to amendments to the ORM and compensation rights in respect of amendments. Queensland Rail has taken into account the QCA's draft decision and the position in the 2008 AU in formulating clause 8.	until disputes are resolved, except in the case of urgent safety related changes).
Part 5: Reporting					
31.	5.1	The QCA requires Queensland Rail to amend its proposal so that its quarterly performance reports include information on: (a) the causes of significant changes in operating performance; and (b) the number of operational complaints by access holders, including those about: (i) Queensland Rail's operating requirements manual and related documents, and other documents Queensland Rail posts on its website; and (ii) the application of the network management principles.	Accepted.	-	Glencore is willing to accept the content of the quarterly report proposed in clause 5.1.2. 2015 DAU, but considers the separate reporting related to the Mt Isa line should apply to an extended range of the quarterly reporting information (including 5.1.2(a)(vi)-(ix) in the 2015 DAU)
32.	5.2	The QCA requires Queensland Rail to amend its proposal so that its annual report on the negotiation process includes: (a) the time taken by Queensland Rail to provide preliminary information and issue IAPs to access seekers, and by access seekers to	Draft decision 5.2(a) – See items 9 and 10 above.	-	Glencore supports QCA Draft Decision 5.2. The reporting regime should reflect the severity of the breaches that are occurring so that the QCA can consider whether it should require changes to the negotiation process in future undertakings.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		provide their intent to negotiate, broken down into less than 10 business days, 10 to 20 days, 21 to 40 days and more than 40 days; and (b) the yearly number of disputes arising in relation to the access application form and the operating plan template.	Draft decision 5.2(b) – See item 7 above.		
33.	5.3	The QCA requires Queensland Rail to amend its proposal so that for systems with reference tariffs it reports annually for the relevant financial year on: (a) maintenance costs of its system and scope of maintenance, compared with the maintenance forecasts used to develop the tariff ; (b) operating expenditure, compared with the forecasts used to develop the tariff; (c) capital investment and a roll-forward of its regulatory asset base; and (d) system volumes (broken down by type of traffic).	Partially accepted.	The maintenance costs, scope of maintenance and operating expenditure are reported on under 2015 DAU but without a comparison to forecasts. The QCA will be able to carry out the comparison as it holds the forecast information. The 2105DAU satisfies the requirements in draft decisions 5.3(c). Where a reference tariff applies the requirement in draft decision 5.3 (d) for a breakdown by type of traffic is not applicable. Queensland Rail will report on volumes where reference tariffs apply.	No comment – not applicable to Glencore.
34.	5.4	The QCA requires Queensland Rail to amend its proposal so that for systems without reference tariffs it reports annually for the relevant financial year on: (a) maintenance costs of its system and scope of maintenance performed; (b) operating costs of its system; (c) the capital investment in the previous financial year and expected capital investment over one and five years; (d) volumes, in train paths, net tonnes and gross	Partially accepted.	Queensland Rail will report on the matters listed in draft decisions 5.4(a), (b) and (d) on a regional network basis. (Obviously in respect of (d) only train paths will be reported on in respect of passenger services). In respect of draft decision 5.4(c), Queensland Rail will report on capital investment in the relevant year. Expected capex in a non-	Glencore supports QCA Draft Decision 5.4. Glencore considers that it is critical that the reporting includes the following items that QR is apparently opposing the disclosure of: • The actual scope of maintenance performance • Expected future capital investment • Volumes broken down in the various ways specified in the QCA Draft Decision

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		tonne kilometres (broken down by commodity, where appropriate), provided that, where a system includes multiple corridors, the reporting should include a breakdown by corridor, for all of the above categories of information.		reference tariff based network is not relevant to the provision of access. It is not clear from the QCA's draft decision what "corridors" are being referred to or whether it is practically possible to keep records on that basis.	Each of those items are referred to by QR in access negotiations and on which information has not been provided in the past. A negotiate-arbitrate model only works where the access seeker has adequate information, and Glencore is concerned that without reporting obligations of this nature, the current negotiations on the Mt Isa line are characterised by asymmetric information. Expected capex is considered highly relevant to the Mt Isa line – as it is used by QR to justify higher charges. If such capex is not occurring then that should be taken into account. Glencore also considers that as well as actuals, forecasts should be reported against (at least on the Mt Isa system) – as the price cap methodology proposed by the QCA is effectively pricing forward from a year that involved an estimate of forecast operation and maintenance. Glencore also continues to consider that: • Cancellations and operational constraints should be reported on for the Mt Isa line; and • A condition based assessment should be required of the Mt Isa line (as part of ensuring maintenance is actually being carried out).

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
35.	5.5	The QCA requires Queensland Rail to amend its proposal so that the regulatory audit requirements: (a) allow the QCA, acting reasonably, to require an audit of compliance with any aspect of the undertaking or QCA Act; and (b) allow the QCA to publish a report from an auditor that includes not just the auditor's opinion, but also enough information on the audit process and conclusions for access holders and seekers and other interested parties to understand how that conclusion was reached.	Partially accepted.	Queensland Rail has included in 2015AU clause 5.3.3 which expressly acknowledges Queensland Rail's obligations under section 150AA of the QCA Act and that the QCA has power under that section to require Queensland Rail to provide information regarding Queensland Rail's compliance with the undertaking. A third party audit right is not prescribed by the QCA Act and is not necessary given section 150AA. Clause 5.3.4(d) of 2015 DAU addresses draft decision 5.5(b).	Glencore supports the requirement for the undertaking to give the QCA a right to require an audit of QR's compliance with any aspects of the approved access undertaking or the QCA Act. That goes further than s 150AA which only gives a power to require stated information to be made available, rather than to do an audit where there are concerns. An audit regime is a normal part of any regulatory regime and an appropriate mechanism for a regulator to ensure appropriate compliance is occurring. Clause 5.3.4(d) of the 2015 DAU does not really address the issue in 5.5(b) of the QCA Draft Decision – as clause 5.3.4(d) only relates to audits of the quarterly and annual report. This is a wider issue relating to audits of QR's compliance more generally.
Part 6: Administrative Provisions					
36.	6.1	The QCA requires Queensland Rail to amend its proposal so that if Queensland Rail and an access seeker or holder select a particular dispute resolution option under the undertaking, that decision is binding, and the parties cannot subsequently elect to change the nature or outcome of the dispute resolution process, unless they appeal to the QCA on the grounds there has been a manifest error.	Accepted.	-	Glencore Hope is willing to accept QR's 2015 DAU in this regard (i.e. clause 6.1.1).
37.	6.2	The QCA requires Queensland Rail to amend its proposal so that it will provide tariff-related reports for the western system to access seekers, as set out in the 2013 undertaking, backdated to the start of the undertaking period,	No longer applicable.	Queensland Rail is not proposing to backdate the application of the reference tariff and therefore the backdating of reports is not relevant.	Not applicable to Glencore

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		once the undertaking has been approved.			
38.	6.3	The QCA requires Queensland Rail to amend its proposal so that the provisions on QCA decision-making apply to both Queensland Rail and other relevant parties (cl. 6.2).	Accepted	-	Glencore accepts QR's 2015 DAU in this regard (i.e. clause 6.2).
Part 7: Standard Access Agreements					
39.	7.1	The QCA requires Queensland Rail to amend its proposed access agreement principles to restore the access rights provisions (cl. 1) contained in Schedule E of the Aurizon Network 2010 access undertaking.	No longer applicable – addressed by a different means.	The SAA addresses this issue - see clauses 1.1, 1.2(b), 2, 4, 6.3(e), 7.3(a)(v) and 7.4(a)(v).	Glencore is willing to have Schedule E deleted (as noted above) provided the SAA works for all access types.
40.	7.2	The QCA requires Queensland Rail to amend its proposed access agreement principles and restore the infrastructure management (cl. 6) and maintenance risk allocation provisions contained in Schedule E of the Aurizon Network 2010 access undertaking.	Partially accepted.	The SAA includes a provision obliging Queensland Rail to maintain the network to allow contracted train services to run in accordance with the access agreement. Queensland Rail is also obliged to comply with the IRMP. The combination of these two obligations provide appropriate protection for access holders and addresses the QCA's proposal.	Glencore supports QCA Draft Decision 7.2 – see comments on Decision 7.1 above. Glencore's comments on the Standard Access Agreement address its views on this issue. In respect of the Mt Isa line, Glencore considers the maintenance obligation needs to go substantially further than QR's position, particularly if a position is adopted on pricing under which future pricing is calculated by reference to past pricing (which was justified as including costs for maintenance activities that Glencore suspects have not been conducted).
41.	7.3	The QCA requires Queensland Rail to amend its proposal so that it deletes the risk and indemnity provisions in its access agreement principles and restore the risk and indemnity provisions (cl. 14) contained in Schedule E of the Aurizon Network 2010 access undertaking.	Partially accepted.	Queensland Rail has proposed a revised set of risk and indemnity provisions in its SAA taking into account the QCA's proposal – see clause 12 of the SAA.	Glencore supports QCA Draft Decision 7.3 – see comments on Decision 7.1 above. Glencore's comments on the Standard Access Agreement address its views on this issue
42.	7.4	The QCA requires Queensland Rail to amend its proposal so that it deletes the limitation of	Partially accepted.	Queensland Rail has proposed revised limitation of liability	Glencore supports QCA Draft Decision 7.4 –

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		liability provisions in its access agreement principles and restores the liability provisions (cl. 15) contained in Schedule E of the Aurizon Network 2010 access undertaking.		provisions in its SAA taking into account the QCA's proposal – see clause 13 of the SAA.	see comments on Decision 7.1 above. Glencore's comments on the Standard Access Agreement address its views on this issue
43.	7.5	The QCA requires Queensland Rail to amend its proposal so that it restores the operational, maintenance, inspection and liability provisions in the same way they apply to dangerous goods (cl. 5, 6, 12, 14 and 15) contained in Schedule E of Aurizon Network's 2010 access undertaking.	Not accepted	The clauses referred to in the QCA's draft decision from Aurizon Network's undertaking do not deal with dangerous goods. It is not clear what is being referred to. In any case, Queensland Rail has proposed new indemnity and liability provisions in its SAA.	Glencore supports QCA Draft Decision 7.5 – see comments on Decision 7.1 above. Glencore's comments on the Standard Access Agreement address its views on this issue.
44.	7.6	The QCA requires Queensland Rail to amend its proposal and restore the dangerous goods and liability provisions for train services (cl. 14 and 15) contained in Schedule E of Aurizon Network's 2010 access undertaking. The QCA invites Queensland Rail to propose a different liability regime for mixed goods train services and to provide supporting evidence to substantiate any proposed amendments based on cost and risk differences when compared to the liability regime for unit trains.	Partially accepted	The SAA submitted as part of 2015 DAU proposes a different liability regime – see clauses 12 and 13.	Glencore supports QCA Draft Decision 7.6 – see comments on Decision 7.1 above. Glencore's comments on the Standard Access Agreement address its views on the dangerous goods provisions.
45.	7.7	The QCA requires Queensland Rail to amend its proposal so that it removes any specific reference to noise mitigation provisions and restores the environmental protection provisions (cl. 8) contained in Schedule E of Aurizon Network's 2010 access undertaking	Not accepted	The 2008 AU, upon which the current SAA drafting on this issue is based, dealt with noise mitigation. Queensland Rail has proposed changes to the SAA (e.g. by removing the limitation tied to 'prudent practices'). However, the currently proposed drafting is appropriate to deal with the noise mitigation issue. It is inappropriate to simply default to Aurizon Network's position on any	Glencore supports QCA Draft Decision 7.7 – see comments on Decision 7.1 above. Glencore is willing to have Schedule E deleted (as noted below) provided the SAA works for all access types. See Glencore's comments on the Standard Access Agreement address its views on the noise mitigation provisions.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
				given issue – Queensland Rail is entitled to adopt an access undertaking that is appropriate to its own circumstances and legitimate business interests.	
46.	7.8	The QCA requires Queensland Rail to amend its proposal so that it restores the entirety of the access agreement principles contained in Schedule E of Aurizon Network's 2010 access undertaking.	No longer applicable	The 2015 DAU no longer has an equivalent schedule .	This is acceptable to Glencore provided the standard access agreement works for all access types.
47.	7.9	The QCA requires Queensland Rail to amend its SAA so that it is consistent with: (a) Aurizon Network's Operator Access Agreement; and (b) the QCA's recommendations on other aspects of the 2013 DAU.	No longer applicable	The SAA is now a tri-partite agreement and addresses the relevant issues. In any case the SAA reflects the matters that are relevant to Queensland Rail's business, not Aurizon Network's business.	Please see Glencore's detailed comments on the proposed SAA. Glencore is willing to accept QR's proposed tri-partite format subject to the role of the end user/customer in the SAA being expanded to provide it with proper control over the capacity being contracted. The SAA needs to be consistent with the approved access undertaking.
48.	7.10	The QCA requires Queensland Rail to amend its proposal so that it retains the dangerous goods provisions in Aurizon Network's Operator Access Agreement (cl. 8.3) in Queensland Rail's SAA to apply to non-coal traffics on its network.	Not accepted	The SAA provisions on dangerous goods are appropriate for Queensland Rail's business.	Glencore supports QCA Draft Decision 7.10. QR has not justified why the proposed provisions are appropriate for QR's business.
49.	7.11	The QCA requires Queensland Rail to amend its proposal so that it uses an amended cl. 13.1 to enable rail operators to obtain insurance from an insurance company with an insurance financial rating of A or better by Standard and Poor's or, a rating which most closely corresponds to that rating by an agency or person which is recognised in global financial markets as a major ratings agency.	No change required	Clause 15.2 (now 16.2) of the SAA does exactly what the QCA requires in draft decision 7.11.	Glencore is willing to accept QR's approach in clause 16.2.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
50.	7.12	The QCA requires Queensland Rail to amend its proposal so that it adopts schedule D of the ARTC 2011 access undertaking for the KPIs for inclusion in schedule 5 of the SAA.	Not accepted	ARTC's KPIs are a matter for it. KPIs attaching to contractual performance issues should be addressed contractually. They need to be symmetrical and therefore the subject of negotiation on a case-by-case basis. It is also necessary to consider the impact of the recent High Court decision in *ANZ v Andrews* on any regime which imposes adverse financial outcomes based on performance. It is not appropriate to adopt a KPI regime based on adverse financial outcomes without proper consideration of the outcome of that case.	Glencore supports QCA's Draft Decision 7.12, but considers that it should be extended to access rights which are outside the scope of the SAA (which only covers the Western System coal access rights). At a minimum the KPI regime should include services on the Mt Isa line as well. These KPIs should be reported under the undertaking, and should have financial consequences under the standard access agreement. Glencore firmly believes this has the potential to correct some of the past behaviour it has been most concerned about on the Mt Isa line. Glencore have reviewed the ARTC KPIs and have sought to provide a set of KPIs of that type of nature that would be appropriate for the Mt Isa system (as provided at the end of this document). *ANZ v Andrews* is a decision about penalties where charges were found not to reflect a reasonable estimate of the loss arising from non-performance of certain obligation – it does not stand for the proposition that KPIs are penalties or in any way prohibited. Glencore supports a KPI regime that reflects a reasonable estimate of the loss caused to Glencore by QR's non-performance.
51.	7.13	The QCA requires Queensland Rail to amend its proposal to identify what clauses in the revised SAA do not apply to non-coal traffics.	No longer applicable	The proposed SAA applies to all train services.	Glencore supports the QR approach of a single standard access agreement for all train services, subject to resolve the concerns Glencore has in respect of the standard access agreement terms that are

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					proposed.
52.	7.14	The QCA requires Queensland Rail to amend its proposal so that it: (a) includes a new section in its access agreement principles (Schedule C) to mirror the connecting infrastructure principles outlined in cl. 8.3 of Aurizon Network's 2010 access undertaking; and (b) amends cl. 2.8 of the 2013 DAU to provide scope for the QCA to give Queensland Rail a notice requiring it to develop a SAA and/or proposed standard connection agreement that is consistent with the 2013 DAU.	Not accepted	The connection of private infrastructure is not part of the declared service. There is no legal requirement to have provisions in the undertaking dealing with it so as to enliven a dispute process that would not otherwise apply. The requirement to include a right for the QCA to require development of a SAA is not needed because one is submitted as part of 2015 DAU. In any case, the QCA does not have power to require an amendment to an access undertaking in the proposed circumstances.	Glencore supports QCA Draft Decision 7.14. There are a number of connections relevant to Glencore and certainty and protections regarding the terms of those connections (and charges that might be associated with them) is an important matter. Glencore considers that connection of private infrastructure is a clear part of providing access to the declared service. Without such a connection it may not be possible for many access seekers to practically access the declared service where QR declines to build the required balloon loop infrastructure on reasonable terms. As noted elsewhere, this position is within the QCA's power. Section 137(2)(k) specifically recognises that provisions regarding the review of an undertaking can be included within undertakings.
Part 8: Western System Tariff					
53.	8.1	The QCA requires Queensland Rail to amend its proposal to make Schedule AA in the 2013 DAU that relates to the maintenance of regulatory asset base, consistent with Schedule A in Aurizon Network's 2010 undertaking.	Partially accepted	Schedule E of 2015 DAU responds to the specific issues raised in the QCA's draft decision. It is not appropriate for Queensland Rail to simply adopt the schedule of another below rail provider as its own.	Not applicable to Glencore
54.	8.2	The QCA requires Queensland Rail to amend its proposal to include a western system coal tariff of $14.29/'000gtk, based on the assumptions and inputs set out in this Chapter 8. The tariff will be levied on the basis of: (a) for trains originating in the western system:	Not accepted	See the discussion on the Reference Tariff in Volume 1 and Volume 2 of Queensland Rail's submission in support of 2015 DAU.	Not applicable to Glencore

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		(i) an AT1 tariff component of $7.15/'000gtk; and (ii) an AT2 tariff component of $2,518.89 per train path for the western system and $1,089.42 per train path for the metropolitan system (including the $98.18 metropolitan asset tariff); and (b) for trains originating in the metropolitan system: (i) an AT1 tariff component of $14.29/'000gtk; and (ii) an AT2 tariff component of $98.18/train path (the metropolitan asset tariff). For the purposes of the take or pay mechanism discussed in Section 3.5 of this draft decision, the annual target revenue for 2013–14 for the western system is $38.8 million and for the metropolitan system it is $17.2 million.			
Part 9: Investment Framework, Planning and Coordination					
55.	9.1	The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl. 1.4.1) to: (a) remove all discretionary references in Queensland Rail's decision to extend; and (b) include an obligation on Queensland Rail to extend the network regardless of which party funds the extension.	Not accepted	In 2015 DAU Queensland Rail has reduced the number of instances in which Queensland Rail can exercise a discretion in relation to extensions. 2015 DAU obliges Queensland Rail to apply the undertaking consistently to all access seekers. Queensland Rail is also subject to the prohibitions on unfair differentiation in the QCA Act.	Glencore supports QCA Draft Decision 9.1. Providing certainty regarding the ability to expand (particularly in an environment where government willingness to fund capital expansions is likely to be limited) is critically important. If user funding is going to be proposed as the 'answer' to where QR is not investing – it needs to be made clearly that QR can be compelled to invest where user funding is provided for an Extension.
56.	9.2	The QCA requires Queensland Rail to amend the extension provisions in its proposal (cl. 1.4.1) to:	Partially accepted	Queensland Rail will negotiate with access seekers and their customers who wish to fund an	Glencore supports QCA Draft Decision 9.2. If QR is going to insist upon not being

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		(a) provide for third-party funding of an extension to the network; and (b) have regard to, as far as it is relevant to Queensland Rail, the SUFA developed, or which is being developed, by Aurizon Network.		extension but cannot be compelled to negotiate funding arrangements under a regulated regime with a third party. It is not appropriate to adopt a third party's SUFA documents, particularly in circumstances where it is not clear which version of SUFA the QCA is referring to.	obliged to fund expansions (and the QCA considers it is appropriate to accept that), it is critical that a workable user funding regime and investment framework is provided. If the QCA is willing to accept a SUFA not being an immediate part of the undertaking, the QCA should have a clear power to require one to be submitted by a certain time during the term of the next undertaking. Glencore reiterates the point made in its earlier submissions that the restrictions which QR is relying on (in s 119 QCA Act) apply to access determinations – not the content of an access undertaking, and the QCA will need to seriously consider whether it is appropriate to impose those same restrictions in an undertaking when the QCA Act does not require that.
57.	9.3	The QCA requires Queensland Rail to amend its proposed extensions provisions so that its proposal (cl. 1.4.1) includes clear, objective and transparent financial tests to be applied to investors in user funded extension projects.	Accepted	-	Glencore supports QCA Draft Decision 9.3 (for the reasons set out in Glencore's positions on Decisions 9.1 and 9.2). The tests in 1.4.2(b)(vii) need to be made objective rather than based on QR's opinion.
58.	9.4	The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl. 1.4.1) to: (a) remove Queensland Rail's discretion to decide if an Access Agreement's terms and conditions are satisfactory to Queensland Rail where an extension is being funded by an	Partially accepted	The 2015 DAU removes the discretion referred to in draft decision 9.4(a). The 2015 DAU obliges Queensland Rail to negotiate funding arrangements with the access seeker or its customer	Glencore supports QCA Draft Decision 9.5 (for the reasons set out in Glencore's positions on Decisions 9.1 and 9.2). Glencore continues to have the concern (evident in the QCA's Draft Decision) that QR retains too great a level of discretion in

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		access seeker or access seeker's customer or nominee; (b) acknowledge that an access seeker or an access seeker's customer or nominee can fund the design, development and construction of an extension with the execution of a funding agreement; (c) acknowledge that an access seeker or an access seeker's customer will fund the management, maintenance and operation of the network (inclusive of the extension) with the execution of an access agreement; and (d) oblige Queensland Rail to extend the network if funding and access agreements have been executed.		where Queensland Rail is unwilling to fund an extension itself. For the reasons set out in item 57 it is not appropriate to extend this obligation to the access seeker's nominee. Under the 2015 DAU the access charges will cover the costs of managing, maintaining and operating a funded extension. The draft decision 9.4(d) is inappropriate. The funding agreement may be subject to conditions precedent and in any case, this is a contractual matter, not a matter for the undertaking.	relation to user funding (and thereby when Extensions can occur in circumstances where it refuses to fund them) and very limited obligations to assist an access seeker which needs investment in an Extension to obtain the required access. In particular: • The carve out from QR having any obligations to satisfy the conditions in clause 1.4.2(b) that is found in 1.4.2(f) is very limiting, given that many conditions (such as obtaining Authorisations and land) will be highly dependent on QR; • The criteria in clause 1.4.2(b) should be objective standards rather than the results of QR's opinions. This is particularly the case for 1.4.2(b)(vii). This is particularly important so that an access seeker has the potential to bring a dispute with QR's assessment in relation to this issue (which would be much harder under QR's current drafting). • Clause 1.4.2(d) is insufficient, providing QR with substantially too much discretion regarding when provision of user funding means that QR should be compelled to develop an Extension. This should provide that a Funding Agreement for Extensions must (as a mandatory obligation) include a requirement for QR to Extend the Network in accordance with the terms of that Funding Agreement
59.	9.5	The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl.	Partially accepted	In relation to draft decision 9.5(a), the discretions that appeared in	Glencore supports QCA Draft Decision 9.5 (for the reasons set out in Glencore's

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		1.4.1) to: (a) remove all discretionary language applied in decisions on whether an extension complies with the extension preconditions; (b) give Queensland Rail and an access seeker joint responsibility for complying with all the preconditions set for an extension; and (c) oblige the access seeker to reimburse all of Queensland Rail's reasonable costs expended in assisting (sic) the extension project complies with the extension preconditions.		2013 DAU have either been removed or made subject to a requirement for Queensland Rail to act reasonably in the exercise of that discretion. In respect of draft decision 9(b), 2015 DAU expressly contemplates that either the access seeker or Queensland Rail is to satisfy the relevant pre-condition. Draft decision 9.5(c) has the potential effect of imposing an extension cost on Queensland Rail. An access provider cannot be obliged by the QCA to accept any costs associated with extending the facility.	positions on Decisions 9.1 and 9.2), subject to noting that it has concerns about how QR's reasonable costs would be measured – this should be clarified to only be specified types of costs (like required land acquisitions) rather than access seekers funding QR's general staff costs and corporate overhead. The proposed clause 1.4.2(e) most resolves the point about resolving preconditions.
60.	9.6	The QCA requires Queensland Rail to amend its proposal so that it inserts a new clause in the access undertaking (potentially in Part 4 of the access undertaking) to oblige Queensland Rail to maintain the operational integrity of its network consistent with the: (a) Network Management Principles; (b) Operating Requirements Manual; and (c) access rights contracted with access holders.	Partially accepted	The SAA proposed by Queensland Rail obliges it to: • maintain the network so as to allow contracted services to run; • comply with the NMP, the ORM and IRMP. The most appropriate place for these types of obligations is the access agreements.	Glencore is willing to accept the maintenance obligation being principally established by the SAA (rather than the undertaking). However, Glencore continues to be concerned about past maintenance standards for the Mt Isa line and considers that the maintenance obligations needs to be stronger. Glencore proposes a combination of approaches: • a KPI regime based on tonnes lost to possession or operational constraints • a condition based assessment to ensure that planned maintenance is occurring (and a financial adjustment to tariffs if it

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					is not) • a contractual requirement to maintain the rail in accordance with good industry practice.
61.	9.7	The QCA requires Queensland Rail to amend the extension provisions in its proposal to: (a) include a new schedule which is similar to Schedule J of Aurizon Network's 2010 access undertaking; and (b) require any funding agreement negotiated between Queensland Rail and an access seeker or an access seeker's customer or nominee to be consistent with this new schedule.	Not accepted	Clause 1.4 of 2015 DAU addresses the majority of the QCA's requirements and the inclusion of a "Schedule J" from Aurizon Network's 2010 Undertaking is not warranted. Queensland Rail's business, is not the same as Aurizon Network's coal centric business. It is disproportionate to require Queensland Rail to adopt the prescriptive regime that applies to Aurizon Network. For example, having regard to the differences between Queensland Rail and Aurizon Network in terms of the nature of their respective rail infrastructure, customer bases and the likely mid-term need for extensions , a requirement for Queensland Rail to incur the cost and time needed to develop a standard funding agreement in accordance with a "Schedule J" is simply not justified. In any case, many of the matters contained in Schedule J of the Aurizon Network undertaking are already expressly dealt with in the main body of the 2015 DAU. There is no need to include them	QR is seeking a lighter handed investment framework than what is ideal. To the extent the QCA was minded to accept that, it will be critically important that the QCA has the power to require a more detailed investment framework to be submitted during the term of the undertaking where it considers that is warranted (either by increased demand for new access or due to unanticipated flaws in the terms of the undertaking as approved). The need for this is heightened by the longer term for the undertaking that QR is seeking.

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
				again in a “Schedule J” equivalent in the 2015 DAU.	
62.	9.8	The QCA requires Queensland Rail to amend its proposal so that the funding agreement provisions in its proposal (cls. 1.4.2 and 1.4.3): (a) remove all discretionary language; (b) establish the methodology for the rental stream from an investment, with mandatory distribution of rental returns to investors; (c) enable an investor to obtain an independent audit of the rental methodology and the returns paid over the economic life of the asset; (d) includes clauses consistent with cl. 6.5.2 and related clauses of the 2010 Aurizon Network undertaking to enable Queensland Rail and investors acting reasonably to include Access Conditions to an extension to mitigate the financial risks associated with an extension and (e) enable third-party investors in the rail network to trigger the regulatory pre-approval processes to be included in Schedule AA to gain certainty over their investment returns.	Partially accepted	2015DUA’s drafting of clause 1.4.3 accepts the QCA’s draft decisions 9.8(a) to (c). In relation to draft decision 9.8(d), there are no access condition provisions in 2015 DAU. 2015 DAU does not regulate any third party investor relationships.	Glencore supports QCA Draft Decision 9.8 (for the reasons set out in Glencore's positions on Decisions 9.1 and 9.2). For the avoidance of any doubt, Glencore considers that all the access conditions related clauses in Aurizon's current undertaking should be included – not just clause 6.5.2.
63.	9.9	The QCA requires Queensland Rail to amend its proposal so that it inserts a new section in the extension provisions (following cl. 1.4.3) which outlines the capacity and investment process Queensland Rail will follow to facilitate extensions to the network. This new section must include the following elements: (a) an annual master planning process for each of the major corridors in Queensland Rail's network in consultation with relevant stakeholders; (b) a reasonable staged pathway through which an access seeker or an access seeker's	Partially accepted	Clause 1.4.6 of the 2015 DAU sets out requirements for master planning and extension coordination. Any approved plan will be made available on the Queensland Rail website and any feedback from stakeholders will be considered. Master planning is not a matter which the QCA Act regulates. Clauses 1.4.7 to 1.4.8 of the 2015 DAU deal with the subject matter of draft decisions 9.9(b) and (c).	Glencore supports QCA Draft Decision 9.9 (for the reasons set out in Glencore's positions on Decisions 9.1 and 9.2). There needs to be a master planning process for the Mt Isa line to provide visibility and transparency to end users of the potential future capital requirements and a useful trigger for consultation with operators and end users. Information about what is truly deferred maintenance and what is genuinely new capital investment has proved very difficult to obtain in previous

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
		customer or nominee can require Queensland Rail to undertake/oversight the concept, prefeasibility and feasibility stages of an extension project; (c) study funding principles for access seekers to fund all of Queensland Rail's reasonable costs in managing/conducting each study stage of an extension project leading up to the execution of a SUFA and an access agreement; and (d) a regulatory pre-approval process through which Queensland Rail, an access seeker or an access seeker's customer or nominee can obtain QCA pre-approval to an extension to the network.		Clause 1.4.9 provides an obligation on Queensland Rail to seek pre-approval of the cost of a proposed extension for inclusion in the RAB at the request of an access seeker or its customer.	access negotiations. Clause 1.4.6 is insufficient in respect of required consultations. Past experience indicates a need to make planning and consultation with operators and major end users mandatory. Glencore also has some concerns with QR's study funding principles (in clause 1.4.8), which seem to have the result of including study costs in the regulatory asset base where the Extension does not proceed. For user funded studies, the costs should only be included in the regulatory asset base if the Extension proceeds, otherwise they should be funded by the funding user.
64.	9.10	The QCA requires Queensland Rail to amend its proposal so that the funding agreement provisions (cl. 1.4.2) include a review trigger to allow the QCA to: (a) reconsider the capacity and investment framework during the term of the undertaking and require Queensland Rail to submit an amended capacity and investment framework; (b) require Queensland Rail submit a SUFA and Standard Study Funding Agreement to the QCA for approval; and (c) to prepare an amended capacity and investment framework and SUFA (the framework documents) if Queensland Rail fails to submit these framework documents or the framework documents submitted by Queensland Rail are not approved by the QCA.	Not accepted	See the comments in item 62. It is also beyond the QCA's power to require an amendment of the access undertaking in the circumstances detailed in draft decision 9.10.	Glencore supports QCA Draft Decision 9.10. Given this is the first true QR undertaking since its separation from Aurizon, QR is seeking to exclude protections which exist in the Aurizon system (a more detailed investment framework, development of a SUFA etc) and QR is now seeking a longer than anticipated term to this undertaking, it is appropriate for the QCA to have the power to reopen these matters. Glencore does not agree this is beyond the QCA's power. Section 137(2) of the QCA Act specifically recognises that the undertaking can contain provisions regarding review of the undertaking. It is also highly appropriate to include a

QCA Draft Decision			QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	GLENCORE Position
					review mechanism where the QCA is convinced that QR should not be obliged to provide a SUFA or more detailed user funding regime – as if that judgment turns out to be flawed, it is highly preferable for the resulting issues to be resolved mid-term rather than having to wait for the next undertaking approval process.

Annexure C – Previous Glencore submissions

Submission 1 on Queensland Rail's 2013 Draft Access Undertaking

1. Introduction

Xstrata Queensland Limited (***Xstrata***) is providing this submission in respect of the Xstrata Copper and Xstrata Zinc operations which currently utilise access to the Queensland Rail (***QR***) rail network from Xstrata's Mount Isa and Ernest Henry operations to the port of Townsville.

The efficient, certain and reasonably priced provision of access to those parts of QR's network remains a critical part of ensuring that long term investments that Xstrata has made, and continues to make, in copper, zinc, magnetite and lead operations remain economic.

Accordingly Xstrata previously:

- participated in the consultation processes undertaken by QR; and
- made submissions to the Queensland Competition Authority (***QCA***) regarding consideration of Queensland Rail's, now withdrawn, 2012 draft access undertaking (the ***2012 DAU***).

Xstrata appreciates QR and the QCA now engaging with Xstrata in respect of the draft access undertaking that has ultimately been submitted by QR (the ***2013 DAU***).

Xstrata previously made submissions that the QCA should refuse to approve the 2012 DAU. While Xstrata acknowledges that the 2013 DAU has been improved from the 2012 DAU in some respects, many of the detrimental aspects have not been altered and the 2013 DAU should still be recognised as stripping access seekers and access holders of protections they have under QR's current access undertaking.

Recent experiences, both in terms of operation of the Mount Isa line and negotiation of access rights, have only heightened Xstrata's concerns about how access to QR's network is regulated now and in the future.

Xstrata considers the QCA should refuse to approve the 2013 DAU.

2. Scope of this Submission

Xstrata notes that the QCA is hosting workshops on 5 issues (above rail operational issues, Western System pricing, the proposed standard access agreement, Mount Isa pricing and investment framework matters) and has provided an extension for submissions on those matters until 3 May 2013.

Xstrata has concerns regarding the 2013 DAU in relation to a number of those matters and will be putting in a further submission on those topics (such that this submission will need to be read in conjunction with that subsequent submission to gain a full appreciation of Xstrata's concerns in respect of the 2013 DAU). Xstrata particularly notes that as the Schedule C principles reflect the same issues as the proposed standard access agreement, it intends to raise issues regarding both items in the next submission.

3. Executive Summary

Within the scope of the issues covered by this submission Xstrata has the following substantial concerns with the 2013 DAU:

- the Mount Isa network and Xstrata's bulk minerals services are being stripped of a number of the protections that they have under the existing access undertaking;
- the negotiation framework in the 2013 DAU remains insufficiently robust to protect access seekers from abuse of QR's monopoly position, particularly in relation to:
    - protections for renewals of existing access rights;
    - limiting the access conditions which can be sought to those which are reasonably required to mitigate the risks of the provision of access; and
    - the terms imposed in respect of connections to the network; and
- there is a lack of transparency (during access negotiations, reporting, no transparent planning regime, and through inappropriate limits on the proposed information production and audit powers of the QCA);
- inadequate protections in respect of changes to the network covered by the undertaking; and
- other detrimental changes, including to the network management principles and definition of Queensland Rail Cause.

Details of these and other issues are set out in sections 4 to 7 of this submission.

4. Appropriate regulation of a varied network

Much of QR's resistance to the protections which Xstrata previously proposed in submissions to the 2012 DAU appears to be based on two premises:

- that QR competes with non-rail transport and is therefore not in a position to abuse monopoly power (such that only very 'light handed' regulation is required); and
- that QR's network services a substantial variety of train services (some of which would not be commercially viable without government support) and that the level of prescription therefore needs to be much less than would occur in a largely single commodity network.

In respect of the Mount Isa line, Xstrata fundamentally disagrees with QR's statements in its submission (and the preamble to the 2013 DAU) that non-rail transport is competitive. For the type of bulk minerals train services primarily operated for Xstrata, there is no other mode of transport that can effectively be cost competitive with rail transport, placing QR in an effectively monopolistic position (at least in respect of Xstrata's services).

On the other hand, clearly it is true that QR's network has varied traffic (some of which other transport modes might be competitive for and some of which might require government support). However, that does not mean that it is appropriate for all access seekers and access holders to receive 'lowest common denominator' treatment.

Where there are a few parts of the QR network or particular train services which have substantially different characteristics (i.e. Western system coal traffics and bulk mineral services on the Mt Isa line being the most evident examples), Xstrata considers it is clearly appropriate to treat them differently.

Consequently, where the QCA has any concerns about positions Xstrata is proposing applying to QR's network generally, Xstrata would request the QCA consider adopting them for a particular customer type or particular sections of the network.

5. Regime must be as robust as it would be for private ownership

Some comfort that QR may not engage in monopolistic behaviour could arguably be taken from QR's position as a government owned business. However, it is clear from recent announcements of the State that privatisation of State assets is being considered. As a profitable part of QR's network, privatisation of the Mount Isa line is possible (and the 2013 DAU would not impose any restrictions on a change in ownership). Accordingly, the 2013 DAU should not be approved in a less robust manner on the assumption of continuing government ownership.

6. Negotiation framework

6.1 Information to be provided during negotiations

Xstrata is concerned that QR provides insufficient information to access seekers (for non-reference services) in access negotiations in terms of costs and pricing. That has been Xstrata's experience in current (and to a lesser degree previous) access negotiations.

Xstrata is particularly frustrated with the complete lack of transparency provided in access negotiations regarding:

- the rate of return being sought; and
- the costs involved in providing the access services.

Rectifying this asymmetry of information is an important part of making a negotiate-arbitrate model effective (as otherwise it may often not be evident to an access seeker whether the terms they are being offered are unreasonable and warrant commencing an arbitration process). Xstrata objects to such non-disclosure being justified on the basis that pricing is 'market based' rather than 'cost based' (as noted in section 5.2 of QR's submission) – when (as noted above) on the Mount Isa line QR is effectively the only supplier such that it is the entity setting the 'market price'.

Xstrata notes that section 101 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***) imposes certain disclosure obligations on QR (as the provider of a declared service) and that the disclosures required pursuant to clause 2.6.2(a)(v) of 2013 DAU fall well short of those requirements. As the disclosure requirements in s 101 of the QCA Act are subject to any approved access undertaking, Xstrata considers it is critical that it is put beyond doubt that clause 2.6.2 does not restrict the pricing and cost information that QR is required to disclose to access seekers.

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2, being amended to either:

- expressly reflect the requirements of s 101 of the QCA Act (at least in respect of disclosure of information about pricing, costs and the value of the relevant assets); or
- make it clear that the disclosure requirements in clause 2.6.2 are in addition to those pursuant to s 101 of the QCA Act.

6.2 Connection Agreements

New mine or port developments will often require a connection agreement to connect private infrastructure to the existing network in order to make use of the access rights sought.

Xstrata considers that clause 2.6.2(b) (which merely envisages negotiation of connection occurring in parallel with negotiation of access) is not sufficiently robust to prevent the connection agreement being an impediment to gaining access on reasonable terms. This concern is what led to the inclusion of robust provisions regarding connection in Aurizon Network's access undertaking which applies to the central Queensland coal region rail network (the ***Aurizon Undertaking***).

Xstrata is particularly concerned about:

- QR seeking to use connection agreements as a way of gaining additional access revenue (which is likely to be subject to less regulatory scrutiny than access charges); and
- QR requiring that connecting infrastructure and private infrastructure be of a standard in excess of that part of the QR network to which it is proposed to be connected.

Clause 8.3 of the Aurizon Undertaking and the QCA's recently released final decision on the Standard Rail Connection Agreement to apply under the Aurizon Undertaking provide good precedents for the sorts of protections that are necessary for both access seekers and the network owner.

Xstrata considers that it would also be appropriate to include in the 2013 DAU a right for the QCA to require development of a Standard Rail Connection Agreement for the purposes of connection to QR's network if it considered it appropriate for that to occur (such that if the principles provided ultimately prove not to be sufficiently robust the QCA would not need to wait under the next access undertaking before providing more protections for access seekers/holders seeking connection).

Xstrata submits the 2013 DAU should not be approved without the following:

- incorporating a clear right to connect private infrastructure to the network if certain minimum preconditions are met (similar to those provided for in the Aurizon Undertaking and Standard Rail Connection Agreement);
- obligations on QR to facilitate connection in a timely manner where those minimum preconditions for connection are met;

- obligations on QR to provide appropriate interface arrangements with any different rail infrastructure manager on the private infrastructure where those minimum preconditions for connection are met;
- controls on the costs that can be recovered / the price that can be charged by Queensland Rail in respect of connection to the network (equivalent to those in the Aurizon Undertaking Standard Rail Connection Agreement);
- a clear right to bring disputes about connection agreements to the QCA for arbitration; and
- a right for the QCA to seek to require development of a Standard Rail Connection Agreement during the term of QR's access undertaking.

6.3 Renewal rights

The protections for continuation of existing access rights provided in clause 2.7.3 of the 2013 DAU are only available where there is an applicable reference tariff for the relevant train services. Consequently, no such protections are available other than to a few coal customers on the Western System.

Other major users of the network have made substantial investments in facilities which are dependent on long term access (beyond the typical 10 year term of an access agreement). In Xstrata's case this includes investments in mines, refineries, smelters and port facilities.

Upon negotiation for renewal of access agreements is when an entity having made such upstream or downstream investment is most exposed to the monopoly power of the network owner (as the investment is a sunk cost and non-renewal is generally not a realistic option). Consequently, it is appropriate to provide users who have made major investments of this type (and are high volume, high value customers of QR) protections in seeking to extend their access rights.

The current position on renewal does not appropriately reflect:

- Xstrata's past contributions to the Mount Isa line; or
- the significance of Xstrata's utilisation of the line (in terms of providing a large volume of business to QR and the resulting economies of scale which benefit other users of the line) and the critical nature of ongoing secure access for Xstrata's business.

In addition the renewal rights that are provided for in clause 2.7.3 of the 2013 DAU remain flawed as:

- to obtain a renewal, an existing access holder can be required to apply (with only 20 Business Days notice) for new access at any time during the term of their access agreement. For example, on the first day of a 10 year access agreement, an Access Holder can be required to make a decision about whether to apply for access rights for up to another 10 years beyond its existing term (clause 2.7.3(d)); and
- it does not provide a right of renewal on the existing terms of the access holder's access agreement and expressly rejects QR being required to agree to entry into

such an agreement (clause 2.7.3(e)), making it possible that a failure to reach agreement on an extension prior to the time periods noted in clause 2.7.3 and the resulting potential inability to extend access rights, can arise from QR requesting onerous terms for an extension rather than the access holder failing to promptly seek an extended term (i.e. it incentivises QR to seek a bidding war between an existing access holder and a new applicant – such that the renewal rights provides very limited actual benefits over the 'most favourable' to QR test proposed as the nom under clause 2.7.2(a)-(b)).

Xstrata acknowledges that there should be some period prior to expiry of the term of an Access Agreement before which the Access Holder needs to apply for a renewal if they want to exercise renewal rights so that QR has an opportunity to contract the capacity to a third party to the extent the renewal right is not going to be exercised by the existing Access Holder. That period should be set having regard to the likely timing for contracting the capacity to an alternative access seeker (or constructing an expansion in the event of the existing Access Holder seeking to exercise its renewal rights). Xstrata considers an appropriate period is 2 years prior to expiry of an existing Access Agreement (being the time frame the QCA has previously considered appropriate for the same reasons in a similar context in the Aurizon Undertaking – see clause 7.4(d) Aurizon Undertaking).

Provided the period is set reasonably it seems unlikely that new access seekers would apply for access prior to that time in any case.

If improved renewal rights are not provided for existing access holders who have invested substantial capital in long term investments dependent on long term access, it will have a chilling impact on future investment of that nature (which seems contrary to the public interest and promotion of competition in upstream and downstream markets).

Xstrata submits the 2013 DAU should not be approved without the renewal regime being amended to reflect the following:

- renewal rights being available to (at a minimum) other bulk minerals producers (or their nominated haulage operators) in addition to reference tariff services (both a ***Renewal Service***);
- up until 2 years prior to expiry of an Access Agreement for a Renewal Service QR should not be able to contract capacity which would only become available if the Renewal Service was not renewed; and
- an Access Holder should have a right (if they applied prior to the date 2 years prior to expiry of the existing Access Agreement) to renew for a further term on the terms of the existing Access Agreement other than price – with price to be determined by any applicable reference tariff, or agreement or, in the absence of a tariff and failing agreement, by QCA arbitration.

(It would of course remain open to QR and a renewal Access Holder to negotiate different terms, but existing Access Holders should have an enforceable right to a particular set of terms).

6.4 Access Conditions

There are no restrictions in the 2013 DAU on the circumstances in which QR can request access conditions or the extent of access conditions which it can require.

Xstrata requests that the QCA require QR to incorporate similar protections to those that exist in the Aurizon Undertaking (or at least QR's existing undertaking), particularly the general principle in clause 6.5.2 of the Aurizon Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s). Any access conditions which do not meet criteria of that nature are an exercise of monopoly power that any approved undertaking should be designed to prevent.

Without such a protection, it would be open to QR to undermine the terms of access the undertaking appears to provide, by requiring access conditions such as:

- additional fees which bear no relationship to the costs or risks involved in provision of access and that raise the total cost of access above the limits on access charges provided in Part 3 of the 2013 DAU; or
- agreements not to raise access disputes with the QCA.

In theory the appropriateness of access conditions could be left to be resolved by the QCA arbitrating access disputes, but a guiding principle regarding the types of access conditions which would be appropriate would be useful in both preventing such disputes and in guiding the outcome of any such arbitration before the QCA.

Finally, Xstrata notes the user funding and rebate provisions which overlap to a degree with access conditions, but notes it is possible for access conditions to be imposed in a manner that would not be covered by those clauses (i.e. where upfront payments are required without being recognised as a contribution to a particular extension).

Xstrata submits that the 2013 DAU should not be approved without being amended to include the restrictions on access conditions in at least QR's existing access undertaking (if not the comprehensive regime in the Aurizon Undertaking), including at least:

- a prohibition on seeking access conditions that are not reasonably required in order to mitigate QR's exposure to the financial risks associated with providing access for the access seeker's proposed train services (including the clear circumstances in which such access conditions are not reasonable); and
- a rebate regime where subsequent access holders gain the benefit of infrastructure enhancements underwritten by an access condition imposed on a previous access holder.

6.5 Payment of negotiating costs

Xstrata considers that it is not reasonable for Queensland Rail to always have a right to recover its costs of negotiations with an Access Seeker whenever it gives a Negotiation Cessation Notice (which 2.6.3(c) of the 2013 DAU currently provides). This right should be restricted to where the access application is frivolous or the Access Seeker has no genuine intention of obtaining the Access Rights requested. The costs of unsuccessful negotiations

in other circumstances is part of the ordinary course of business of a multi-user railway which Queensland Rail should consider in setting prices (and the QCA should take into account in approving any reference tariffs). Access Seeker's already bear their own costs of negotiation and consequently are economically incentivised not to make unnecessary access applications.

Xstrata submits that the 2013 DAU should not be approved without clause 2.6.3(c) of the 2013 DAU being amended such that an access seeker is only required to pay QR's costs of negotiations where a negotiation cessation notice is given on the basis of the access application being frivolous or the access seeker having no genuine intention of obtaining the Access Rights requested.

7. Other detrimental issues

7.1 Line diagrams

Xstrata is concerned that clause 1.2.3 of the 2013 DAU creates the potential for QR to unilaterally remove parts of its rail from the 'Network' which would be the subject of the undertaking. There are no protections which prevent QR from removing parts of the rail network which are currently in use and no dispute regime for inappropriate changes. Xstrata would encourage the QCA to consider the equivalent clause in the Aurizon Undertaking (3.8.1) which provides both such protections.

Xstrata submits the 2013 DAU should not be approved without clause 1.2.3 being amended to include:

- a restriction on removing rail transport infrastructure from the rail diagrams which is utilised for contracted access rights; and;
- a right for access seekers/holders to dispute whether rail transport infrastructure should have been removed from the rail diagrams.

7.2 Reporting and system master planning

Xstrata notes its support for the proposed separate reporting for the Mt Isa Reporting Area. However, those reports should extend to cover greater information about:

- operational constraints and major sources of cancellations in that part of the network;
- the plans to resolve those operational constraints and causes of cancellations; and
- the progress being made on those rectification plans compared to proposed timing.

Such information would be more likely to highlight the underlying causes of any issues being experienced (and thereby guide more effective responses from QR and other stakeholders) compared to the proposed content for reports (which really reflect the symptoms not the cause).

In addition, Xstrata has long had concerns about the condition of the Mount Isa network and inadequate maintenance (with a complete lack of transparency regarding what maintenance activities are actually being conducted and whether they are appropriate to

ensuring that the network can meet the contracted train services). Xstrata suggests that it would be appropriate for an independent condition based assessment of the rail infrastructure to be undertaken (at least of the profitable and high volume parts of the network) similar in nature to the obligations imposed in clause 5 Schedule A Aurizon Undertaking, with rail infrastructure found to be in an inappropriate condition for the relevant contracted train services being required to be rectified by QR.

A more robust and transparent system master planning regime would also provide more warning to access holder of capacity and operational constraints, possible options to rectify performance of the line and cost and lead time estimates. This sort of planning should already be occurring internally within QR in any case, such that making this more transparent to access holders should not be a major burden.

Xstrata submits the 2013 DAU should not be approved without being amended so that:

- the quarterly reports cover more information about current operational constraints and major sources of cancellations, the plans to resolve those constraints and sources of cancellations, and the progress being made on those rectification plans compared to proposed timing;
- there is an independent condition based assessment of the rail infrastructure undertaken (at least of the profitable and high volume parts of the network) with rail infrastructure found to be in an inappropriate condition for the relevant contracted train services being required to be rectified; and
- there is a system master planning regime for each reporting area.

7.3 Queensland Rail Cause

Xstrata is concerned with widening of the definition of Queensland Rail Cause arising from the addition of 'or any other person'. That exclusion means that where the non-provision of access is 'in any way' (i.e. irrespective of how minor the contribution) attributable to 'any other person' access holders will have to pay take or pay components of access charges. This effectively imposes nearly the entire risk of non-provision of access upon access holders, and removes important economic incentives for QR to ensure access is being provided as contracted.

Xstrata submits the 2013 DAU should not be approved without the reference to 'or any person' in the definition of Queensland Rail Cause being deleted.

7.4 Amendment to Network Management Principles

The 2013 DAU contains modifications to the Network Management Principles (Schedule B) which provide for a number of variations which are clearly detrimental to access holders. For example:

- the master train plan would be able to be varied without consultation to accommodate operational constraints (whereas previously if the variation would have resulted in a scheduled train service not being met it required consultation with the relevant access holder and to the extent the modification was not within

the scope of the access holder's train service entitlement, agreement with that access holder); and

- the daily train plan would be able to be varied from the master train plan in ways that would result in an access holder's scheduled train services not being met subject only to consultation (whereas previously, if the modification was not within the scope of the access holder's train service entitlement, agreement with that access holder was required).

Xstrata appreciates those changes will provide greater flexibility to QR, but considers it inappropriate for QR to have such wide discretion to not provide contracted access rights due to operational constraints (when QR is refusing to accept anything like a higher maintenance standard or more transparency over its maintenance activities).

Xstrata submits the 2013 DAU should not be approved without the following changes to the Network Management Principles being reversed:

- inclusion of 1.1(g)(ii) and deletion of 1.1(h)(i)(C); and
- amendments to 1.2(f)(ii).

7.5 QCA Information requests and audit regime

It is critical to the effectiveness of a regulatory regime that the regulator has sufficient mandatory information production powers and audit powers to both assess compliance with the requirements of the undertaking and to determine how to exercise the powers the regulator has under the undertaking.

In that regard, clause 5.3.2(a) of the 2013 DAU is defective as the purpose for which the QCA can obtain documents is limited to information that 'the QCA reasonably requires for the purpose of complying with this Undertaking'. Clause 9.5 of the Aurizon Undertaking is a useful precedent the QCA should consider.

Xstrata submits the 2013 DAU should not be approved without clause 5.3.2(a) being amended as follows:

Subject to clause 5.3.2(b), the QCA may, by written notice, request Queensland Rail to provide information or a document that the QCA reasonably requires for the purpose of:

(i) performing its obligations or functions in accordance ~~complying~~ with this Undertaking, the QCA Act, or an Access Agreement; or

(ii) determining whether it should exercise powers in this Undertaking or the QCA Act, such as requiring the conduct of an audit or seeking to enforce a provision of this Undertaking.

Similarly the new audit regime in clause 5.3.3 solely relates to inaccuracies in the quarterly or annual reports. Clause 9.8 of the Aurizon Undertaking is a useful precedent the QCA should consider.

Xstrata submits the 2013 DAU should not be approved without clause 5.3.3(a) either being supplemented or replaced with an audit rights regarding whether any specific conduct or decisions of QR comply with the undertaking (similar to clause 9.8 of the Aurizon Undertaking).

7.6 Lack of capacity management provisions

Xstrata is concerned that critical issues such as resumption, relinquishment and transfer of access rights have been removed from the undertaking and placed in the SAA (particular in the context of Schedule C providing very limited protections in relation to these issues).

Xstrata submits the 2013 DAU should not be approved without resumption, relinquishment and transfer of access rights being includes as matters regulated under the access undertaking (as minimum protections which access holders and QR can negotiate different arrangements for in access agreements if they consider appropriate).

8. Contacting Xstrata

If you have any queries in relation to this submission or Xstrata can provide any further assistance in relation to the process of considering the 2013 DAU please do not hesitate to contact Mark Roberts on [redacted] or Merv Sharkey on [redacted]

Submission 2 on Queensland Rail's 2013 Draft Access Undertaking

1. Introduction

1.1 Xstrata and its participation in the regulatory process

Xstrata Queensland Limited (***Xstrata***) is providing this submission in respect of the Xstrata Copper and Xstrata Zinc operations which currently utilise access to the Queensland Rail (***QR***) below rail network from Xstrata's Mount Isa and Ernest Henry operations to the port of Townsville.

The efficient, certain and reasonably priced provision of access to those parts of QR's network remains a critical part of ensuring that long term investments that Xstrata has made, and continues to make, in copper, zinc, magnetite and lead operations remain economic.

Accordingly Xstrata has actively participated in the consultation and regulatory processes to this point, including:

- participating in the consultation processes undertaken by QR;
- making submissions to the Queensland Competition Authority (***QCA***) regarding consideration of Queensland Rail's, now withdrawn, 2012 draft access undertaking (the ***2012 DAU***);
- making an initial submission to the QCA regarding consideration of Queensland Rail's 2013 draft access undertaking (the ***Initial Submission***); and
- attending the four QCA hosted workshops on the issues covered in this submission.

Xstrata appreciates QR and the QCA continuing to engage with Xstrata in respect of the draft access undertaking that has ultimately been submitted by QR (the ***2013 DAU***).

1.2 Suggested way forward in light of continuing issues

It was clear from the recent QCA workshops that stakeholders have numerous remaining concerns with the 2013 DAU.

In relation to the issues within the scope of this submission, Xstrata notes QR's indications in the workshops that it was 'willing to take away' many of the issues. However, QR has been unwilling or unable to indicate what variations it would be willing to make at the time this submission was written. Unfortunately that has left Xstrata with no option but to make detailed submissions about the numerous defects in the 2013 DAU (including on points that it appeared QR may be willing to concede).

QR has had substantial opportunities through the 2012 DAU and 2013 DAU process to date to respond to the numerous stakeholder concerns that have not been addressed. In light of QR's unwillingness to address clear defects in the 2013 DAU without compulsion from the QCA, Xstrata submits that the QCA should simply proceed to a draft decision

refusing to approve the 2013 DAU and setting out the manner in which the QCA requires the 2013 DAU be amended.

2. Scope of this Submission

The Initial Submission was intended to cover Xstrata's concerns regarding the 2013 DAU other than in relation to the five issues which were the subject of recent QCA workshops (above rail operational issues, Western System pricing, the proposed standard access agreement, Mount Isa pricing and investment framework matters).

This submission therefore only relates to Xstrata's concerns in respect of:

- Mount Isa pricing;
- above rail operational issues;
- investment framework matters;
- the proposed standard access agreement (***SAA***) (and the principles in Schedule C); and
- related matters discussed in the QCA workshops.

Accordingly this submission needs to be read in conjunction with Xstrata's Initial Submission to gain a full appreciation of Xstrata's concerns in respect of the 2013 DAU.

3. Executive Summary

Xstrata considers that the QCA should refuse to approve the 2013 DAU in its current form.

In respect of the topics covered by this submission its primary concerns are:

Mount Isa pricing (section 4):

- the 2013 DAU requires insufficient transparency and disclosure from QR in access negotiations, creating an information asymmetry in negotiations that prevents the negotiate-arbitrate model from restraining QR setting access charges in a way that abuses its monopoly power;
- the information asymmetry needs to be fixed by way of greater disclosure obligations on QR in access negotiations;
- it is inappropriate to set DORC valuation as the pricing methodology when QR does not know the current DORC valuation of most parts of its network and no information has been provided about how that may impact on access charges for various users;
- the proposed Margin above the Risk Free Rate is excessive when compared to the risk profile QR is proposing to accept in the 2013 DAU; and
- QR's incentives to conduct maintenance and provide contracted volumes are insufficient, and this should be fixed by providing economic incentives through a 80% cap on take or pay obligations and prohibitions on any exclusion of claims for

non-provision of access until a specified threshold of contracted services have not been operated.

Above rail operational issues (section 5):

- the consultation and dispute regime in relation to amendments to the Operating Requirements Manual should extend to end users (i.e. haulage customers);
- amendments to protocols, standards and other documents (other than legislation) referred to in the Operating Requirements Manual should be treated as amendments to the Operating Requirements Manual;
- all amendments to the Operating Requirements Manual should be subject to the consultation regime;
- the grounds for when amendments to the Operating Requirements Manual should be excluded from the dispute regime should be narrower;
- the grounds for when amendments should be able to be overturned should be wider and all cover amendments which materially increase the costs of access to Access Holders or end users, or which are likely to prevent or materially hinder utilisation of a contracted Train Service Entitlement;
- there is no provision for compensation for above-rail operators – which is likely to result in operators having to seek to pass on 'network change risk' to end users via cost pass throughs or higher haulage charges;

Investment framework (section 6):

- there should be an obligation to invest in limited cases – to ensure the network can meet contracted train service entitlements and where certain feasibility, safety and other requirements are protected and the terms of the user funding have been agreed or arbitrated;
- the user funding principles need to be more balanced to protect Users given user funding is being put forward as the method by which users can restrain QR from achieving monopoly pricing in connection with an expansion;
- there needs to be greater protections around the access conditions that can be sought by QR;
- the undertaking should include a master planning regime;
- the undertaking should include robust and balanced principles to apply to negotiation of connection agreements;

Proposed standard access agreement (SAA) and Schedule C (sections 7, 8 and 9):

- there should be either a standard access agreement for bulk minerals concentrate services on the Mount Isa line or provision in the undertaking for which clauses of the SAA would apply to such services and the different positions that would apply in respect of any remaining clauses;
- the Schedule C principles are so high level as to provide no protection in relation to a number of critical issues;

- there should be an end user access agreement (under which an end user can contract access rights without having to have primary liability for operational matters);
- the proposed dangerous goods liability regime should not apply to Class 9 Miscellaneous Dangerous Goods (or at least copper and zinc concentrates) and should not apply where the claim or loss was caused or contributed to by QR; and
- there are numerous other issues with detailed provisions of the SAA, including particularly QR's proposals for a reduced maintenance obligation and substantially reduced risk profile in relation to liabilities and indemnities.

4. Mount Isa pricing

4.1 The proposed negotiate-arbitrate model

QR has proposed in the 2013 DAU that there only be reference tariffs in relation to access rights relating to coal mines using the Western System. Consequently there is no reference tariff that will apply to access to train services utilising the Mount Isa line.

As Xstrata indicated at the QCA Mount Isa pricing workshop, it considers it would be appropriate for there to be no reference tariff, *provided QR makes the changes to its approach to pricing and transparency in access negotiations (as noted below) which are critically required to make the negotiate-arbitrate model more effective at preventing QR's abuse of its monopoly power*.

4.2 Mount Isa line

The issues in this section are raised in the context of access charges for services using the Mount Isa line, which QR acknowledges is a profitable line where it is generally setting access charges having regard to its assessment of the ceiling price.

For services where there is no or low risk of QR exercising its monopoly power in relation to pricing (i.e. those being priced below the floor price or subsidised by the State government or where reference tariffs would apply), Xstrata can understand the QCA forming the view that the additional disclosures proposed in section 4.3 of this submission should not apply.

4.3 Transparency and Asymmetric Information

A negotiate-arbitrate model will only be effective at preventing a monopoly access provider from setting access charges in a manner which constitutes an abuse of monopoly power if the access seeker has enough information to determine whether QR's proposed pricing is a reasonable price or an abuse of monopoly power.

It is clear that the 2013 DAU would not require QR to disclose sufficient information to access seekers to effectively make that judgement. The closest the 2013 DAU comes to useful disclosure obligations in this regard are:

- clause 2.6.2(a)(v) which provides for QR to provide the 'methodology for calculating the Access Charges (including any applicable rates or other inputs for formulae)'; and
- clause 2.6.2(a)(i), which provides for QR to provide 'additional information relevant to the negotiations, as requested by the Access Seeker (acting reasonably)' providing doing so does not breach QR's confidentiality obligations and the information is 'ordinarily and freely available' to QR.

While at first glance those disclosure obligations may appear useful. However, Xstrata considers those apparent protections are illusory and fall substantially short of the level of dislcosure required by section 101 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***). Xstrata is particularly concerned given that section 101 of the QCA Act is 'subject to an approved access undertaking' and considers there is a substantial risk that the lesser disclosure obligations being proposed could, if approved, be read as limiting the disclosures required under section 101 of the QCA Act.

What QR considers constitutes the 'methodology for calculating the Access Charges' is unclear. In negotiations to date, there appears to have been little discernable methodology, rather simply a price that QR considers 'reasonable'. Xstrata remains concerned this paragraph will produce little more than a price with assertions it is based on a 'market price' (which is fairly nonsensical in the context of a monopoly service provider who itself sets the market) or is 'below the ceiling price'.

The extent of the ability to request information is also extremely uncertain (particularly due to being limited to information that is 'ordinarily and freely available to Queensland Rail'). It became evident in the workshops that despite being willing to assert that pricing was 'below the ceiling price' in negotiations, QR is in fact unable to demonstrate with any real certainty the asset value or stand alone costs which would be necessary to accurately determine the ceiling price for an individual access seeker.

Consequently, without amendments access seekers will face the challenge in access pricing negotiations of asymmetric information (i.e. a much lesser awareness of relevant information like the costs involved in providing access, the values of assets utilised and the rate of return being sought, than QR).

If that is not corrected that will result in two likely consequences:

- access seekers accepting pricing that constitutes an abuse of monopoly power due to not understanding the basis upon which the price was derived; and
- access seekers having to bring pricing arbitrations as a matter of course because that is the only way in which it can be certain of gaining a reasonable price.

The fact that arbitration is theoretically always available is not sufficient protection, as even if access seekers wanted to bring pricing arbitrations, many access seekers would not pursue this course due to the costs, delay and complexities which would be involved in such an arbitration.

Whether QR may voluntarily disclose more information to make the negotiate-arbitrate model effective (as QR hinted at the workshops) is irrelevant. Xstrata's experience to date

is that QR has not even been making the disclosures legally required by section 101 of the QCA Act and it is inappropriate for a regulator to simply be relying on the goodwill of a regulated entity on an issue which, if not fixed, completely undermines the validity of the proposed approach to regulating QR's pricing.

Consequently Xstrata considers it is evident that for the negotiate-arbitrate framework to be sufficiently robust to allow access seekers to make informed judgements about pricing it needs to provide an express list of the information required (including information of the type required under section 101 of the QCA Act).

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2 being amended to expressly require provision of the following information:

- information about the price at which the access provider proposed to provide the service, including the way in which the price is calculated (including the values of all inputs into any formula or methodology utilised);
- information about the costs of providing the service, including the capital, operation and maintenance costs (both on a stand alone and incremental basis);
- information about the aggregate current and projected future revenue streams arising from the relevant parts of the network;
- information about the value of the access provider's assets, including the way in which that value calculated;
- an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated; and
- where information is provided about future matters (such as escalations, forecasts or estimates of future costs or revenue), the assumptions on which that information is based and the basis for those assumptions.

4.4 Valuation methodology

Clause 3.2.3(c) seeks to prescribe the Depreciated Optimised Replacement Cost methodology (***DORC***) as the asset valuation method to be used in determining the ceiling price for access charges.

It is however clear that QR does not actually know with any real certainty what the current DORC valuation of any of the parts of its network is (with the potential exception of the Western system).

There are numerous possible valuation methods that could be used (and which methodology is suitable will depend on factors like the nature and age of the infrastructure and its likely future use). QR has been quick to point out the varied nature of its network, and presumably that has the potential to result in different valuation methods being appropriate for different parts of its network.

In that context, it seems highly inappropriate for the QCA to bind itself to applying a DORC valuation methodology in future pricing arbitrations where it is completely unclear whether that will be appropriate for the part of the network to which a future dispute relates and what the consequences for access charges payable by access seekers would actually be.

Therefore Xstrata considers that clause 3.2.3(c) should simply be deleted and the ceiling revenue limit formula should simply refer to the 'value of assets' without specifying the valuation methodology. That will allow the QCA to make an informed decision about the proper valuation methodology in the event of future pricing arbitrations occurring.

Xstrata submits the 2013 DAU should not be approved without:

- clause 3.2.3(c) being deleted; and
- the references to asset values being assessed in accordance with clause 3.2.3(c) being deleted from clause 3.2.3(a).

4.5 Weighted average cost of capital (WACC)

Xstrata notes that the WACC requested is not dissimilar to the weighted average cost of capital used for the purposes of the Aurizon Network's access undertaking which applies to its central Queensland coal region network (the ***Aurizon Access Undertaking***). However, if the Authority is minded to accept any of the reduction in risk profile for QR that would result from accepting QR's position on other aspects noted in this submission (particularly the positions on liabilities and indemnities noted in section 9.5), then Xstrata considers that the WACC should be closer to the risk free rate (i.e. the 'Margin' should be reduced from that proposed by QR).

It should also be clarified that paragraph (b) of the WACC definition also provides a nominal post-tax rate (consistent with paragraph (a)).

Xstrata submits the 2013 DAU should not be approved unless the liability and indemnity regime provided for in the standard access agreement is returned to that which currently applies to QR (under the existing standard access agreement and the equivalents of the Schedule C principles).

If there is any reduction in QR's risk profile that is accepted the 'Margin' should be reduced from the 4.77% rate suggested to reflect the reduction in risk accepted by the QCA.

Paragraph (b) of the definition of WACC should also specifically provide a nominal post-tax rate.

4.6 Providing the right economic incentives – take or pays caps and allowable thresholds for non-provision of access

Xstrata is concerned that the investment framework and maintenance obligations proposed in the 2013 DAU establish a regime which will reduce QR's (already insufficient) incentives to properly maintain the Mount Isa line. Even under the current regulatory arrangements, the Mount Isa line appears to have been under maintained with increasing speed restrictions and outages (and at each contract renewal requests for further funding of deferred maintenance activities by higher access charges or upfront capital investments in maintenance activities).

One way of seeking to fix this would be to provide QR with greater economic incentives to provide the contracted volume. A 100% take or pay access agreement 'blunts' the economic incentives of the service provider to meet contracted volume (particularly when

coupled with a fixed price that QR gains irrespective of whether QR saves costs by not carrying out maintenance activities which were assumed at the time of contracting access).

Therefore, Xstrata submits that unless there is a very substantial increase in the maintenance obligations (including transparency on reporting what maintenance activities are being conducted and an obligation to invest in such maintenance activities), the access charges for the Mount Isa line should be modified in the following ways:

- a cap on take or pay of 80% (being the rate which is proposed to apply to the Western System trains services); and
- prohibition of any concept equivalent to 11.6(d) of the SAA (which excludes liability for non-provision of access unless the total number of cancelled train services exceeds 10% of the contracted train services for the month).

Xstrata submits the 2013 DAU should not be approved unless it contains a cap on take or pay obligations of 80%, and a prohibition on any exclusion of claims for non-provision of access until a specified threshold (either in number, value or proportion) of contracted services have not been operated (at least for access charges on the Mount Isa line).

5. Above rail operational issues

5.1 Amendments to the Operating Requirements Manual – recognition of end users

QR proposes to consolidate a number of above rail operational documents into the Operating Requirements Manual (the ***ORM***). As a result the ORM is the key document in relation to the above rail operational requirements that have to be complied with by users of the network.

Access holders and end users will contract for long periods, generally 10 years, on the basis of assumptions about the above rail operating requirements that will apply during that contract period. While amendments to the ORM will be necessary for time to time, amendments made part way through the terms of an access agreement and related haulage agreement will clearly have the potential to adversely impact both above rail operators and the end user's they provide haulage services to.

QR's proposed clause 4.2 of the 2013 DAU does not given any recognition to impacts on end users. However, where haulage is being contracted partly based on assumption about above rail operational issues, and haulage agreements may pass through to end users all or part of any additional access related costs, it is hard to see why end users are any less likely to be detrimentally affected.

Accordingly Xstrata submits that the notification and consultation regime regarding amendments in clause 4.2.2 needs to be amended to include end users.

Xstrata submits the 2013 DAU should not be approved without:

- clause 4.2.2(c) being amended so that 'materially adversely affect an Access Holder' is replaced with 'materially adversely affect an Access Holder or its Customer'

- clause 4.2.2(f)(i) being amended so that 'notify all Access Holders and Access Seekers' is replaced with 'notify all Access Holders, ~~and~~ Access Seekers and Customers'
- consequential changes being made to other provisions in 4.2.2 and 4.2.3 such that all references to Access Holders or Access Seekers also include their Customers

If the QCA considers the above amendments impose too greater a burden on QR, Xstrata could accept that it may be reasonable for the references to 'Customer' being restricted to 'Major Customers' defined by reference to having contracted with operators a reasonable minimum number of train services per annum.

5.2 Amendments to the Operating Requirements Manual – clarifying what constitutes an amendment

The ORM contains reference to a number of standards and protocols – which can be critically important to the access provided. For example, clause 6.7(b) of the ORM requires operators to comply with the Network Business Master Train Plan Protocols, the Network Business Daily Train Plan Protocols and the Network Business Possession Planning Protocols. Those protocols are critical to determine what train services are actually scheduled.

Xstrata considers it should be made absolutely clear that amendments to those documents are also within the scope of the provisions regarding amendments to the ORM (as technically it could be argued that if the content of such a protocol changes the ORM has not changed as it still just requires compliance with the same protocol).

Xstrata submits the 2013 DAU should not be approved without the following new paragraph being included in clause 4.2.2:

(h) For the avoidance of doubt, an amendment to a standard, protocol or other document (other than legislation) referred to in the Operating Requirements Manual will be deemed to be an amendment of the Operating Requirements Manual for the purposes of clause 4.2.2 to 4.2.4.

5.3 Grounds for amendments being excluded from the consultation and dispute regimes

Clause 4.2.2(b) and Clause 4.2.3(a) have the effect of excluding from the consultation and dispute regimes respectively amendments to the ORM made on certain grounds.

Xstrata does not understand why consultation is something that should be avoided even where based on grounds like safety or Material Change (which includes changes in law). Many 'safety changes' are based on achieving a particular outcome and there is likely to be multiple ways in which that outcome could be achieved. Consultation with above rail operators and end users may in fact result in a more efficient change being made which achieves the desired safety outcome but with lesser costs or disruption.

Consequently Xstrata considers the exclusion of certain amendments from the consultation provisions should be removed.

In relation to disputes, Xstrata considers that:

- clause 4.2.3 needs to be redrafted to ensure that it is possible to dispute whether the grounds in clause 4.2.3(a) do effectively exist (as the clause as currently drafted could be read as excluding the entire dispute regime as soon as QR asserts the amendments were based on such a ground); and
- clause 4.2.3(a)(iii) needs to be entirely deleted or made much narrower in scope – as its current drafting would allow (outside of the dispute regime) pretty much any change that QR wishes to make. If there are particular changes envisaged, or particularly sensitive parts of the network (such as the Brisbane metropolitan system due to the passenger services operated on that part of the network), then it may be appropriate to retain something like this paragraph but restrict it to a particular change envisaged as being implemented during the regulatory term or changes to a particular sensitive region of the network. If that was proposed the reasonableness of that narrower exclusion could be considered as part of this regulatory process.

Xstrata submits the 2013 DAU should not be approved without:

- clause 4.2.2(b) being deleted;
- clause 4.2.3(a)(iii) being deleted (or amended to only apply to particular changes anticipated to be implemented during the regulatory term or only apply to train services utilising a particularly sensitive part of the network – to the extent the QCA considers such charges/parts of the network justify an exclusion); and
- clause 4.2.3(a) being amended to clarify that it is open to dispute whether amendments were made on the grounds referred to in that clause.

5.4 Disputes about amendments to the Operating Requirements Manual

Ultimately the only real protection for above rail operators and end users of detrimental changes to the ORM is a robust dispute process.

The proposed dispute process in clause 4.2.3 is not robust as before a dispute can be brought it requires as a threshold issue that the amendment 'Unfairly Differentiates' (see clause 4.2.3(b)(ii)). Unfairly Differentiates is defined to mean unfairly differentiates between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders. That test is solely concerned with preserving a level playing field between above rail operators.

As a consequence of that threshold, many amendments which would be appropriate to dispute are outside the scope of the dispute regime, particularly being:

- amendments which materially increase costs to all above rail operators;
- amendments which materially increase costs to end users; and
- amendments which prevent or materially hinder a particular access holder or relevant end user being able to utilise contracted train services.

As noted above, Xstrata is also concerned that clause 4.2.3(a) could be read as excluding from the dispute regime any amendments that QR merely asserts would fall within one of

the circumstances referred to in clause 4.2.3(a), when it should presumably remain open to dispute whether amendments were in fact based on such grounds.

Xstrata submits the 2013 DAU should not be approved without:

- it being made clear that it is possible to dispute whether the amendments were made on the grounds referred to in clause 4.2.3(a) were the basis for the amendments (and it is only if they are found to be the grounds for the amendments that the amendments cannot be overturned);
- the references in clause 4.2.3 to 'Unfairly Differentiates' being replaced with 'Unfairly Impacts'
- a new definition of 'Unfairly Impacts' being inserted as follows:

Unfairly Impacts means where the proposed amendments to the Operating Requirements Manual would have, or be likely to have, one or more of the following effects:

(a) unfairly differentiating between Access Holders in providing Access in a way that has a material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders;

(b) materially increasing the costs of access to an Access Holders or a Customer; or

(c) preventing or materially hindering an Access Holder's utilisation of a contracted Train Service Entitlement (taking into account any resulting impacts of the amendments on the prospects of the Customer's utilisation of its haulage rights with the Access Holder).

5.5 Compensation for above rail operators for changes to the ORM and QR's liability

Xstrata is not currently an above rail operator, but has an interest in above rail operators pricing their haulage services competitively and efficiently. If above rail operators have to take on greater risks of changes to QR requirements occurring which require further above rail investment during the term of a haulage agreement that may result in them either seeking to pass this through to the end user in the haulage agreement or (if the operator assumes the risk) inefficiently having to price in a degree of network change risk.

Consequently, Xstrata submits that the existing position regarding compensation for changes to Systemwide Requirements (as it appears in the existing standard access agreement) should continue to apply.

Clause 4.2.4 (which basically excludes all liability for changes to the ORM which QR believed were in compliance, even if they in fact were not) would need to be amended to reflect that position. Clause 4.2.4 is far too wide in any case – as QR should know the ground on which the change is being made, and a primary purpose of the consultation process is to determine whether a proposed change would be non-compliant. Consequently clause 4.2.4 should either be deleted or limited to urgent safety based changes (where there arguably might be insufficient time to identify the consequential impacts of such changes).

Xstrata submits the 2013 DAU should not be approved without reintroducing the existing provisions regarding compensation for changes to 'Systemwide Requirements' in the

existing standard access agreement so they apply to amendments to the Operating Requirements Manual (and amending clause 4.2.4 to be consistent with that position).

Clause 4.2.4 should either be deleted in its entirety or amended to reflect the provisions regarding compensation for changes to Systemwide Requirements and otherwise limited to only applying to 'urgent safety based changes'.

5.6 Network Management Principles

As noted in the section 7.4 of the Initial Submission, Xstrata has substantial concerns with changes to the Network Management Principles which give QR even greater rights to impose operational constraints without consultation or agreement with the adversely affected access holder. Where changes are being made to the master or daily train plan that are effectively taking away contracted services. That is not a step which should be taken lightly (given QR's capacity modelling will already have made allowances for the impacts of such constraints) such that it is appropriate that such changes require consultation and agreement.

Xstrata submits the 2013 DAU should not be approved without reversing the changes to clauses 1.1(g), 1.1(h) and 1.1(f)(ii) which were made compared to the 2012 DAU.

5.7 Content of the Operating Requirements Manual

Xstrata understands that both operators have concerns with aspects of QR's proposed content for the ORM. Xstrata considers it is likely to share many, if not all, of those concerns. If it would assist the QCA, Xstrata would be happy to subsequently identify the concerns raised by operators about the ORM that it shared.

6. Investment framework matters

6.1 Extent of an obligation to invest

Clause 1.4.1 of the 2013 DAU provides extremely limited circumstances in which QR can be required to invest in an Extension. Given the number of items on which QR's opinion, satisfaction or discretion is involved – the current clause 1.4.1 effectively gives QR complete discretion as to whether it should be required to make an investment in an Extension.

Queensland Rail's supporting submission indicates that these limitations are based on the restrictions in section 119 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***). That is incorrect. Firstly, Xstrata notes that that section does not restrict what can be included in the terms of an access undertaking, rather it restricts the decisions the QCA can make in an access determination. The terms of the QCA Act concerned with the content of undertakings (s 137) and enforcement of undertakings (s 152) contain no such restrictions. In fact s 119(4) expressly provides for consistency with a requirement imposed under an approved access undertaking submitted in the way the 2013 DAU was to empower the QCA to require an extension despite the access seeker not having funded the Extension. Secondly, the limitations Queensland Rail proposes in clause 1.4.1 go well beyond those imposed by section 119 QCA Act in any case.

Xstrata is concerned that for profitable lines where access holders or end users have the ability and potential willingness to fund Extensions, the position proposed by QR will lead to a tendency to defer and delay proper maintenance costs, knowing that:

- access charges on its network are generally fixed at a certain rate without any 'look through' or 'adjustment' for actual maintenance costs or network performance; and
- the end user or Access Holder has made long term investments requiring continuing access, such that they will effectively be forced to finance upgrade (or previously deferred maintenance) of the mainline at the next renewal.

To mitigate those issues, Xstrata considers it would be appropriate for the 2013 DAU to impose a clear obligation on QR to invest in:

- Extensions required to maintain the line at sufficient capacity to meet contracted access rights;
- Extensions where the requirements in clause 1.4.1(a)(vii), (viii), (ix) and either:
  - QR is willing to fund the Extension; or
  - user funding agreements have been entered in respect of the Extension (either by agreement or following the end user or access holder accepting entry into a user funding agreement on the terms arbitrated by the QCA under the dispute regime).

Xstrata's particular concerns with clause 1.4.1 are that:

- in 1.4.1(a)(iii)(A) it should be made clear that:
  - providing funding 'in advance' only requires providing funding in a staged manner as construction progresses (not providing all funding for the Extension in one lump sum before construction starts);
  - 'terms and conditions satisfactory to Queensland Rail' should be 'terms and conditions reasonably satisfactory to Queensland';
- the requirement in clause 1.4.1(a)(iv) that Queensland Rail bears no cost or risk in relation to constructing, owning, operating or managing the Extension:
  - is clearly inappropriate for certain Extensions (see section 6.2 of this submission);
  - is inconsistent with every access agreement QR has previously signed which involves it bearing a degree (albeit very limited) or risk in relation to operation and management of the Network;
  - goes well beyond the prohibition in s 119(2) QCA Act against requiring the access provider to 'pay some or all of the costs of extending the facility';
  - is already covered to the extent that it is legitimate, by the reference in 1.4.1(a)(vii) to not 'adversely affect Queensland Rail's legitimate business interests';

and should therefore be limited to ensuring QR bears no costs of constructing the Extension;

- obtaining Authorisations and land access (1.4.1(a)(v) and (vi)) is something which should be done by QR (because it is going to be difficult and more costly (if not impossible), for an operator or end user to obtain authorisation for conduct to be carried out by QR itself);
- the matters in clause 1.4.1(a)(vii) should be tests to be satisfied objectively – not matters determined in Queensland Rail's opinion;
- it is not clear what clause 1.4.1(a)(vii)(C) adds to clause 1.4.1(a)(iv)(B);
- the requirement in clause 1.4.1(a)(vii)(D) that there is no adverse affect on Capacity should be qualified so that a minor degree of incidental disruptions during construction and development are permitted – otherwise it will nearly be impossible for an Extension to meet this requirement;
- 1.4.1(a)(viii) presumably only needs to refer to access agreements having been executed (and if QR has executed them they should not then be able to disown them by alleged they are not on terms and conditions satisfactory to QR, which is what the current drafting suggests);
- it will not always be appropriate to require that 100% of the additional capacity created by the Extension is contracted, such that 1.4.1(a)(viii) should be amended so that it is satisfied if the access charges reflect a return on 100% of the Extension (potentially diminishing or allowing for a rebate when future users are contracted);
- as it is, it is not clear to Xstrata than QR would be required to accept investment on the basis of arbitrated user funding terms.

Xstrata is conscious that section 119(1) prohibits the QCA from making an access determination that is inconsistent with an approved access undertaking for a declared service. As the dispute provisions in this undertaking rely on the QCA utilising those access determination powers, if the QCA approves an undertaking including clause 1.4.1 in its current form, Xstrata is concerned that the QCA will have effectively prevented itself being able to make a future determination regarding the terms on which an Extension can proceed if an access dispute arises and Queensland Rail refuses to do so on the basis of one of the discretions provided to it by clause 1.4.1.

Clause 1.4.5(a) would be completely inconsistent with the changes noted above and would also need to be deleted.

Xstrata submits the 2013 DAU should not be approved without a positive obligation on QR to invest in:

- Extensions required to maintain the line at sufficient capacity to meet contracted access rights; and
- Extensions where the requirements in clause 1.4.1(a)(vii) (amended as noted below), (viii), (ix) are met and either QR is willing to fund the Extension or user

funding agreements have been entered in respect of the Extension (on agreed or arbitrated terms).

Clause 1.4.1(a)(iii)(A) should be amended so:

- it is clearer that providing funding 'in advance' only requires providing funding in a staged manner (not providing all funding for the Extension in one lump sum before construction starts;
- 'terms and conditions satisfactory to Queensland Rail' is replaced with 'terms and conditions reasonably satisfactory to Queensland

Clause 1.4.1(a)(iv) should be limiting to QR not bearing any cost in relation to constructing the Extension.

Clause 1.4.1(a)(vii) should be amended so (A)-(F) are matters to be satisfied objectively, not matters to be determined in QR's opinion.

Clause 1.4.1(a)(vii)(D) should permit an adverse impact on the capacity provided it is merely incidental disruptions during construction and development.

Clause 1.4.1(a)(viii) should delete the words 'on terms and conditions satisfactory to Queensland Rail' and should be amended so that it is satisfied if the access charges reflect a return on 100% of the Extension (potentially diminishing or allowing for a rebate when future users are contracted) even if the capacity contracted is not equal to exactly 100% of the additional capacity created.

Clause 1.4.1(a)(v), (vi), (vii)(C), and (x) and clause 1.4.5(a) should be deleted.

6.2 Insufficient recognition of the different types of Extensions

Extension is defined as 'includes an enhancement, expansion, augmentation, duplication or replacement of all or part of the Network (excluding Private Infrastructure)'. It is evident that will include a wider variety of infrastructure, including:

- separate infrastructure – such as a rail spur or elongation of the network; and
- upgrades to the mainline – resleepering, changes in signalling, duplication or a passing loop.

Clause 1.4.1 to 1.4.3 seem to have been drafted to suit the former type, and as a consequence are highly inappropriate for the second type.

In particular a provision that QR bears no cost or risk in relation to operating or managing upgrades to the mainline is completely inconsistent with QR's obligations under access agreements (which provide a specific liability regime which covers operating and managing the network). It is also clear from 1.4.3(b)(iv) that QR wants to continue to receive funds in relation to owning, operating, managing or investing in the network (i.e. it is seemingly seeking a position of no risk, but continued reward).

Xstrata considers that, given the complexity of a set of principles sufficiently adapted to these two different forms of Extension, the baseline principle should be appropriate to the upgrades to the mainline category, and then it is left as a matter for individual funding

agreements to negotiate additional issues particularly where the Extension is identifiably separate infrastructure.

Clearly both of those types of Extension should be subject to the user funding regime.

6.3 One-sided nature of proposed principles for user funding

Given the current pressure on the State's budget it cannot be assumed that QR will be willing to fund Extensions even where a private below rail operator would consider it economically feasible to do so. In addition a provider of natural monopoly infrastructure has an economic incentive to limit capacity in order to generate monopoly returns (unmitigated in Queensland Rail's case by the potential for a vertically integrated haulage business to also gain haulage revenue from any such Extension). As the QCA recognised in its decisions on the Aurizon Access Undertaking, user funding arrangements assist in mitigating these risks by providing a degree of countervailing power to access seekers.

Consequently, in order to ensure that the capacity of the Network continues to expand where justified by new demand, it is important that there is a robust user funding model.

Clause 1.4.1(b) 2013 DAU merely provides an obligation to use reasonable endeavours to negotiate a user funding agreement. At a bare minimum clause 1.4.1(b) should reflect clause 7.5 of the ARTC's Hunter Valley Access Undertaking which provides for good faith negotiations and an express power for the regulator to arbitrate the terms of user funding arrangements where agreement is not reached.

The difficulty with such a provision is that, as has become evident during the process occurring under the Aurizon Access Undertaking to submit a form of standard user funding agreement, the detailed terms of a user funding agreement can have a substantial impact on whether user funding provides a credible and economically efficient alternative for access seekers.

Given the complexities of user funding, Xstrata considers it may be appropriate for QR's undertaking to be limited to principles (similar to the approach included in the 2013 DAU), *provided those principles are even handed* – which the provisions of the 2013 DAU are not.

Xstrata submits the 2013 DAU should not be approved without the principles requires in clause 1.4.2 being amended as follows:

Without limitation to clauses 1.4.1 and clauses 1.4.3 to 1.4.6, a Funding Agreement must, unless otherwise agreed by Queensland Rail and the relevant User:

(a) be consistent with the terms of this Undertaking;

(b) not provide for Queensland Rail to obtain a greater return on capital than that included in Access Charges in accordance with this Undertaking (subject to the User having audit rights to demonstrate compliance with this principle);

(c) result in the transaction between structured in a reasonable way that does not adversely affect Queensland Rail or the User in respect of tax, duty and accounting treatments

(d) ensure Queensland Rail's and the User's legislative business interests are protected and not adversely affected;

(e) not result in Queensland Rail bearing any cost ~~or risk:~~

~~(i) in relation to constructing, owning, operating or managing~~ an Extension~~; or~~

~~(ii) as a result of the structure or terms of the Funding Agreement;~~

(f) require Queensland Rail to use reasonable endeavours to ensure that an Extension is:

(i) constructed efficiently and in accordance with Prudent Practices taking into account all of the relevant circumstances (including Queensland Rail's relevant safety and construction requirements);

(ii) operating and managed by Queensland Rail in a manner that is consistent with Queensland Rail's operation and management of the Network but subject to all of the relevant circumstances (including the specific operational and management needs of the Extension and the needs of existing Access Holders); and

(g) satisfy the requirements set out in clause 1.4.3.

6.4 Rebates

While Xstrata considers the approach to rebates to be generally acceptable, it is concerned about what will be interpreted as constituting an 'adverse affect' on QR (under 1.4.3(b)(ii)) – as in one sense, having to pay any rebates is 'adverse' to QR.

The other provisions in 1.4.3 seem to cover the possible adverse effects which might legitimately result in payment of a rebate not being made, such that clause 1.4.3(b)(ii) should be deleted.

Xstrata submits the 2013 DAU should not be approved without clause 1.4.3(b)(ii) being deleted.

6.5 Access Conditions

There are no restrictions in the 2013 DAU on the circumstances in which QR can request access conditions or the extent of access conditions which it can require.

Xstrata requests that the QCA require QR to incorporate similar protections to those that exist in the Aurizon Undertaking, particularly the general principle in clause 6.5.2 of the Aurizon Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s). Any access conditions which do not meet criteria of that nature are an exercise of monopoly power that any approved undertaking should be designed to prevent.

Without such a protection, it would be open to Queensland Rail to undermine the terms of access the undertaking appears to provide, by requiring access conditions such as:

- additional fees which bear no relationship to the costs or risks involved in provision of access and that raise the total cost of access above the limits on access charges provided in the 2013 DAU; or

- agreements not to raise access disputes with the QCA.

The user funding and rebate provisions included in the 2013 DAU do not resolve these issues – as non-financial access conditions are an issue as well, and financial access conditions that are not related to investment in a particular piece of infrastructure would not be captured by the proposed user funding and rebate regime.

In theory the appropriateness of access conditions could be left to be resolved by the QCA arbitrating access disputes, but a guiding principle regarding the types of access conditions which would be appropriate would be useful in both preventing such disputes and in guiding the outcome of any such arbitration before the QCA.

Xstrata submits the 2013 DAU should not be approved without inclusion of similar protections to those that exist in the Aurizon Access Undertaking regarding access conditions, particularly the general principle in clause 6.5.2 Aurizon Access Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s).

6.6 Master planning regime

As noted above, Xstrata is increasingly concerned that there has been insufficient investment in the Mount Isa line. It is concerned that investments identified in QR's public planning documents as investments that QR is committed to undertaking as part of maintaining the line, seem to morph into requests for funding for the same investments which are then rebranded as being necessary to meet a particular access request.

Xstrata considers that to arrest the declining performance of the line it is necessary for the undertaking to prescribe a Master Planning regime which would involve:

- publication of performance metrics for the Mount Isa line (and other lines subject to the regime) in terms of cancellations, outages and speed restrictions ;
- reporting on the cause of cancellations, outages and speed restrictions;
- consultations with the operators and customer groups about the issues and potential methods of rectifying those issues;
- proposed investments and maintenance activities to rectify those issues; and
- reporting on progress of previously proposed investments and maintenance activities – and outcomes in terms of improvements in performance of the line.

This is not intended to be a way of forcing QR to make investments in expansion capacity – rather it is a way of making transparent what QR is actually doing in terms of sustaining capital expenditure and maintenance programs. If such reporting reveals continuing under-investment that is something that can be addressed further in the next regulatory term.

Xstrata submits the 2013 DAU should not be approved without including a master planning regime which would involve:

- publication of performance metrics for the Mount Isa line (and other lines subject to the regime) in terms of cancellations, outages and speed restrictions ;

- reporting on the cause of cancellations, outages and speed restrictions;
- consultations with the operators and customer groups about the issues and potential methods of rectifying those issues;
- proposed investments and maintenance activities to rectify those issues; and
- reporting on progress of previously proposed investments and maintenance activities and outcomes in terms of improvements in performance of the line.

6.7 Connection Agreement

Any new mine developments will often require a connection agreement to connect a mine spur to the existing network in order to make any use of the access rights sought. Xstrata considers that clause 2.6.2(b) is not sufficiently robust to prevent the connection agreement being an impediment to gaining access on reasonable terms, because:

- it only applies during the negotiation period (when there are circumstances where a connection agreement could need to be negotiated part way through the term of an access agreement – such as on the expiry of an existing connection agreement); and
- it provides no guidance or limits regarding the terms of a connection agreement.

Given connection agreements are negotiated in a context where the entity connecting the private infrastructure has no choice but to connect to the network, QR is in the position of a monopolist and, without limitations in the undertaking, could force the private infrastructure owner to accept terms reflecting that monopoly power.

At a minimum, Xstrata suggests the 2013 DAU should include the following set of principles for connections (based on what the QCA considered appropriate in clause 8.3 of the Aurizon Access Undertaking and the recently approved Standard Rail Connection Agreement for connection to Aurizon's below rail coal network.

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2(b) being deleted and replaced with the following clause:

(a) Queensland Rail will, on request by an owner of existing or proposed rail transport infrastructure (the **Private Infrastructure**) to connect (or keep connected) the Private Infrastructure to the Network, negotiate the terms of an arrangement with the Private Infrastructure Owner for the connection of Private Infrastructure to the Network (the **Connection Agreement**).

(b) Any Connection Agreement must be consistent with the following principles unless otherwise agreed by the Private Infrastructure Owner and Queensland Rail:

(i) the connecting infrastructure meets the technical specifications reasonably required by Queensland Rail for connection to the Network;

(ii) the connecting infrastructure has been constructed to a standard appropriate to the nature of the traffic and the current service standards of the adjoining Network, and there is no adverse impact on safety;

(iii) the connecting infrastructure will not, by virtue of its existence, reduce capacity or supply chain capacity; and

(iv) the Private Infrastructure owner meets the reasonable and efficient initial and continued costs associated with constructing and maintaining the connecting infrastructure (but is not required to pay any margin, profit or additional return to Queensland Rail in respect of the connection),

provided that the Private Infrastructure and any connecting infrastructure cannot be required to be of a standard or to be of any condition which exceeds the standards and condition of the relevant parts of the Network.

(c) Unless otherwise agreed by the Private Infrastructure owner and Queensland Rail:

(i) Queensland Rail has the right to design, project manage, construct, commission, maintain, upgrade and in any other way manage the connecting infrastructure;

(ii) Queensland Rail must:

(A) consult with the Private Infrastructure owner regarding the design of the connecting infrastructure;

(B) use its best endeavours to construct and commission the connecting infrastructure in an efficient and timely manner; and

(C) use its best endeavours to align the scheduling of train services between the Private Infrastructure and the Network.

(d) For clarity, a dispute in relation to the terms of a Connection Agreement is subject to the dispute resolution process under clause 6.1..

If the QCA is not minded to prescribe principles at this stage, then Xstrata considers it will be necessary to include a provision similar to clause 8.4 of the Aurizon Access Undertaking obliging QR to submit a form of standard connection agreement (and related amendments to the access undertaking) during the term of the access undertaking.

7. Scope of Proposed Standard Access Agreement and Schedule C Principles

7.1 No Standard Access Agreement applicable to Xstrata

The standard access agreement proposed in connection with the 2013 DAU is proposed to only apply to coal access rights in respect of the Western System.

Xstrata acknowledges that this is a similar position to what exists under the existing undertaking. However, in past negotiations, Xstrata's experience was that only having a coal standard access agreement provided other users with the 'worst of both worlds', where on occasion the access provider would insist terms had to remain consistent with the standard coal access agreement, but would equally insist on diverging from those terms where it commercially suited them to do so. The Schedule C principles are

supposed to provide protection for other access seekers to which the SAA does not apply, but for the reasons discussed in section 7.2 of this submission they do not do so.

Accordingly, Xstrata considers that more needs to be done to address the access terms which will be provided to other access seekers. Xstrata submits that a change in approach is now warranted given this undertaking is restricted in its application to the Queensland Rail network, and Xstrata's non-coal below rail access rights now represent a much more significant proportion of the network to which access is being regulated than ever before.

Xstrata considers there are basically two ways in which this can be appropriately resolved, being either:

- requiring a new standard access agreement for certain other major types of train services (say bulk minerals concentrates on the Mount Isa line); or
- providing for clauses of the SAA which are to apply to all traffics (as mandatory clauses) and then for certain other major types of train services (such as bulk minerals concentrates on the Mount Isa line) setting out the different positions that are proposed to apply.

Xstrata's experience with past negotiation of access rights for the Mount Isa line is that the then current coal standard access agreement basically provided the access provider's starting point subject to a small number of amendments customised to the product for which train services were being sought. Consequently, providing for the extra variables for certain different types of freight (under either of the approach suggested above) would not be a major imposition.

Xstrata submits the 2013 DAU should not be approved without either:

- a standard access agreement being provided for bulk minerals concentrate services on the Mount Isa line; or
- the undertaking providing which clauses of the SAA would apply to bulk minerals concentrate services on the Mount Isa line and then Schedule C or other provisions of the undertaking setting out the different positions that would be proposed to apply in access agreements for such services.

7.2 Schedule C Principles not sufficiently robust

Xstrata acknowledges the existence of clause 2.7.5(c) and Schedule C, which provides some protections regarding the terms of access which can be requested for other types of train services, but has a number of concerns with the limits of that Schedule.

Many of those concerns also occur in the terms of the SAA and are therefore discussed in section 9 of this submission below, but those concerns equally arise in Schedule C where the same position is expressed in a summarised form.

In addition to those issues, the principles in Schedule C suffer from often being so high level they provide no protections for access seekers in relation to a number of critical issues. For example:

- there is no actual right to carry dangerous goods (even if the reasonable requirements in 8.1(b) and (c) are complied with), rather it is entirely dependent on

receiving agreement/prior permission from QCA - effectively providing no limitations on what Queensland Rail can ask for as a condition of such agreement or permission;

- the liability position is actually worse than in the SAA due to:
    - clause 12(a) Schedule C simply providing 'the liabilities of the parties for default will be limited or excluded as agreed in the Access Agreement' (which evidently provides absolutely no protection); and
    - important issues like liability caps, exceptions to which that cap does not apply, and the circumstances in which Queensland Rail will be liable for non-provision of access in the event of train cancellations caused by its breach or negligence not being fully specified;
- events of default and rights of suspension and termination are simply left to be agreed (clause 13 Schedule C);
- the length of a force majeure event which gives rise to a right to terminate is only described as being 'prolonged' (clause 18(c) Schedule C); and
- the criteria for resumption of access rights are left to be agreed with the only limitation being that the criteria are objective (clause 19.1 Schedule C).

Xstrata understands that QR's concern with making Schedule C more prescriptive is that it applies to all train services (other than those to which the SAA applies). While QR may need some level of flexibility in relation to the term of access provided to various services, it is not appropriate for high volume/high value services where QR has monopoly power (such as bulk minerals concentrates services on the Mount Isa line) to receive such limited protections.

This should be resolved in the manner referred to in section 7.1 of this submission.

7.3 No 'End user' Access Agreement

The QCA (in respect of the central Queensland coal network) and the ACCC (in respect of the Hunter Valley) have considered it appropriate for end users to have a right to hold access rights directly themselves (without having to contract in relation to above rail operational matters).

The need for such arrangements is driven by issues, which equally apply in the Queensland Rail context, including:

- the promotion of greater competition in the above rail haulage market which such a structure provides (by the end user being able to change the nominated operator for particular access rights);
- the desirability of having the below rail access provider having a contractual relationship with both the end user (in respect of capacity and pricing) and the rail operator (in relation to operational issues); and

- removing the risk to access seeker's that they will lose their access rights when, through no wrongdoing of their own, the operator breaches an access agreement with the below rail access providers.

Xstrata considers that the same rights should be provided to end users in respect of the Queensland Rail network – particularly where the 2013 DAU provides for only 'Access Holders' or 'Operators' to have input into certain matters.

To reduce the regulatory burden imposed on Queensland Rail in preparing a standard access agreement under which an end user could directly hold the relevant access rights (and a related operational agreement for entry by haulage operators nominated to utilise those access rights), Xstrata would accept that it may be appropriate for the timing for development of such an agreement to occur to be after it is anticipated the new standard access agreements of this nature under the Aurizon Undertaking would be settled (as Xstrata anticipates the terms of those arrangements, or the alternative models discussed in developing those arrangements, may provide a useful starting point).

If the QCA considers there does not need to be an end user access agreement, then at a minimum there needs to be:

- a process for an end user to initiate a transfer of access rights from one operator to another (similar to what exists in clause 7.3.7 of the Aurizon Undertaking, but allowing for changes of operator in a substantially shorter timeframe); and
- rights for end users to be able to maintain access rights (even if only by nominating another operator to assume those rights) where an operator's default would otherwise cause such access rights to be terminated.

Xstrata submits the 2013 DAU should not be approved without a form of access agreement under which end users can contract access rights without having to assume primary responsibility for above rail matters.

8. Dangerous Goods

8.1 Scope of Dangerous Goods to which special liability regime applies

QR continues to propose a different liability regime in respect of all 'Dangerous Goods', albeit now only in respect of 'Mixed Trains'.

Xstrata acknowledges this is an improvement on the 2012 DAU. However, as Xstrata has previously noted, 'Dangerous Goods' includes a wide variety of goods which vary substantially in terms of the risks and potential damage which might result from an incident. It is not restricted to those goods which QR mentions in its submissions (such as explosives, cyanide and radioactive materials).

Train services relating to the following materials (which are currently operated on behalf of Xstrata) are treated as being services that carry dangerous goods:

- Mt Isa copper concentrate;
- Ernest Henry copper concentrate;

- Mt Isa zinc concentrate.

Each of those goods are currently considered Class 9 Miscellaneous Dangerous Goods. These copper and zinc concentrates do not explode on contact with oxygen or flame and are classified as dangerous goods solely because of the effects they can have if left in water for substantial periods of time (rather than any immediate fatal effects on humans or wildlife). If they were spilled from trains onto land there is no immediate serious health risk or risk of material property damage and the spill can generally be cleaned up using common equipment (such as a front loader) to recover the spilled product.

For a dangerous good to be a Class 9 Miscellaneous Dangerous Good it must not fall within the other 8 classes (explosives, gases, flammable liquids, flammable solids, oxidising agents and organic peroxides, toxic and infectious substances, radioactive substances and corrosive substances). It is fairly evident those other classes are of a generally higher risk profile than Class 9 Miscellaneous Dangerous Goods.

Xstrata considers the rationales QR has put forward for the differing risk treatment of Dangerous Goods (in terms of major loss or damage being caused due to the goods nature as a Dangerous Good) simply have no application to these minerals concentrates. Accordingly Xstrata submits that Class 9 Miscellaneous Dangerous Goods generally (or at least the specific minerals concentrates referred to above) should be removed from any special liability regime proposed to apply to dangerous goods (and therefore subject to the standard liability regime which applies to other train services).

Xstrata submits the 2013 DAU should not be approved without the Dangerous Goods liability regime proposed in the 2013 DAU (clause 11(a)(iv) Schedule C) not applying to Class 9 Miscellaneous Dangerous Goods generally, or at a minimum, any minerals concentrates within that Class.

8.2 Special liability regime should not apply where caused by QR

Irrespective of the scope of goods covered by the proposed 'Dangerous Goods' liability regime, Xstrata continues to consider it highly inappropriate for access holders or end users to be liable for any portion of the liability arising from an incident caused by the negligence or default of QR.

In accordance with the general principle that the risk should be assumed by the party best able to control the risk, it is clear that risks arising from QR's negligence or default should not be borne by other parties. Haulage operators or end users will not be able to gain insurance against QR's negligence or default.

Xstrata could accept as appropriate, subject to the amendments proposed in clause 8.1 and 8.2 of this submission being accepted, that access holders should be liable for the incremental loss on 'Mixed Trains' – *where the loss was not in any way caused or contributed to by Queensland Rail*.

Xstrata submits the 2013 DAU should not be approved without the Dangerous Goods liability regime proposed in the 2013 DAU (clause 11(a)(iv) Schedule C) being limited to only applying where the claim or loss was not in any way caused or contributed to, by any act or omission of Queensland Rail (or its officers, employees, contractors or agents).

9. Terms of Proposed Standard Access Agreement

9.1 Relevance to Xstrata

While Xstrata understands that the Standard Access Agreement (***SAA***) is proposed to only apply to coal train services on the Western System, Xstrata is making comments on the standard access agreement in the hope that:

- a standard access agreement will be developed for other types of train services ;
- if a standard access agreement is not developed for other types of train services, the principles in Schedule C will be amended to address the issues noted in this section 9; and
- as noted above, Xstrata anticipates that any QCA approved SAA will form the starting point for negotiations even for train services to which it does not apply – such that all potential access seekers have an interest in its terms.

9.2 Lack of renewal rights

Xstrata remains severely disappointed by the lack of renewal rights. This is a step backwards from the renewal provisions of the existing arrangements. As noted in the Initial Submission, the limited protections in clause 2.7.3 2013 DAU for extension of existing access rights are fundamentally flawed in their current form.

By damaging existing access holder's certainty of obtaining future access rights the proposed arrangements have the potential to impede investment in mine developments and industrial facilities which involve large sunk costs with a view to obtaining a return on equity across a period substantially longer than the likely term of an access agreement.

Xstrata submits the 2013 DAU should not be approved without the renewal rights being provided for as set out in section 6.3 of the Initial Submission.

9.3 Maintenance obligations

Xstrata is concerned that the maintenance obligation in clause 5.1 SAA is insufficient as it does not provide a sufficient objective standard against which maintenance performance can be measured (see by way of contrast, the current standard access agreements and the QR Network standard access agreements, which all also refer to the maintenance work being such that the infrastructure is consistent with the rollingstock interface standards).

The current QR drafting only requires that the Network be maintained in a condition 'such that the Operator can operate Train Services in accordance with this agreement'. In the context of an agreement which gives QR express and substantial rights to not provide access or only provide access subject to operational restrictions that can be imposed without consent of the access holder – reference to being able to operate 'in accordance with this agreement' provides absolutely no assurance of the network being maintained to any level.

Xstrata submits the 2013 DAU should not be approved without clause 5.1 of the SAA being replaced with the following:

5 Network management

5.1 Maintenance

Queensland Rail must carry out Maintenance Work on the Network such that:

(a) the Network is consistent with the Rollingstock Interface Standards;

(b) the Operator can operate Train Services in accordance with their Scheduled Times; and

(c) the Network is otherwise maintained in accordance with Prudent Practices, having regard to the train services contracted to access the various parts of the Network.

The suggested drafting would involve the deletion of the definition of 'Rail Infrastructure Operations' and utilise the following new defined terms:

Enhancement means the improvement, upgrading or other variation of the whole or any part of the Network which enhances the capabilities of the Network and any major replacement programme for elements of the Network.

Maintenance Work means any work involving repairs to, renewal, replacement and associated alternations or removal of, the whole or any part of the Network (other than Enhancements) and include any related inspections or investigation of all or any part of the Network.

Rollingstock Interface Standards means those rollingstock interface standards agreed as part of the Interface Risk Assessment and included in the Interface Risk Management.

9.4 Operational Constraints

The SAA included in the 2013 DAU involves deletion of the previous clause 5.2 which provided important protections to Access Holders in relation to the imposition of operational constraints.

Xstrata submits the 2013 DAU should not be approved without the following clause being included in the SAA (and equivalent principles in Schedule C):

5.2 Operational Constraints

Queensland Rail may impose such Operational Constraints as it considers necessary for the protection of any person or any property (including the Network) or to facilitate the performance of Maintenance Work or Enhancements, provided that in exercising its rights under this Clause 5.2 Queensland Rail must:

(a) use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing alternate Scheduled Times having regard to the Operator's and End User's reasonable requirements); and

(b) comply with the relevant procedures specified in the Interface Risk Management Plan.

The suggested drafting would involve utilising the following definition:

End User means the customer for haulage services provided by the Access Holder utilising the Access Rights.

9.5 Liabilities and Indemnities

Queensland Rail is proposing to substantially worsen the risk allocation and liability position for access holders compared to the current standard access agreements.

In particular:

- the indemnity in the current standard access agreement provided by Queensland Rail in respect of property damage and personal injury or death caused by the wilful default or deliberate or negligent acts or omissions of Queensland Rail or its staff has been removed;
- the indemnity provided by the operator is significantly wider than that previously provided – which was restricted to property damage and personal injury or death caused by the wilful default or negligence of the operator or its staff (10.1 SAA);
- very wide exclusions of liability, additional to those which are in the current standard access agreement (and which apply irrespective of whether caused by QR's own default or negligence), have been introduced in clause 11.2, including an exclusion of all liability for any loss of anything carried by a Train Service (11.2 SAA);
- the threshold below which claims cannot be made has increased to $500,000 (see 11.4 SAA);
- the exclusions from the circumstances in which Queensland Rail will be liable for non-provision of access makes the prospects of Queensland Rail ever being liable for non-provision of access extremely remote. In particular:
    - the requirement that 10% or more train services are not provided in a month before any claim can be made has the effect of only providing an access holder with a reasonable degree of certainty regarding 90% of its train services being provided. This threshold is also being proposed in addition to (not instead of) the financial limit before a claim can be made under clause 11.4(a). If Queensland Rail wishes to insist on this such that an access holder has only really securely contracted 90% of its train services, take or pay should never be paid unless less than 90% of contracted train services are utilised; and
    - where the 'Claim Event' does not constitute Queensland Rail Cause (see 11.6(e) SAA) liability is excluded. However part (d) of the definition of Queensland Rail Cause will result in QR not being liable for non-provision of access arising from QR's actions other than where those actions were complying with an obligation in accordance with the access agreement, access undertaking or applicable law.

Xstrata considers the previous risk allocations should be maintained (including having these specific changes reversed) as the existing risk profile was already a heavily

negotiated one that the QCA had determined to be appropriate in previous regulatory decisions. The fact that these liability provisions only directly impact on the operator rather than end users (under the current form of the SAA) does not protect end users as it merely means that the operator will be seeking to pass many of these risks to end users via back to back provisions in the haulage arrangement.

If the QCA considers a change in the risk profile is appropriate, then presumably there should also be a commensurate very substantial reduction in the revenue derived from access charges reflecting that reduced risk profile (by a substantial reduction in the 'Margin' permitted above the 'Undertaking Risk-free Rate').

Xstrata submits the 2013 DAU should not be approved unless the liability and indemnity provisions are returned to their current form under the existing SAA applicable to QR.

9.6 Rights of suspension

Xstrata considers that the qualifications on Queensland Rail's right to suspend access rights which exist in the current standard access agreement should be reinstated in clause 12.1 SAA. For example:

- there used to be a 7 day grace period in relation to failure to pay access charges – now administrative errors which result in late payment by 1 day can result in suspension without further notice; and
- the failure to comply with a train service description automatically provides a right to suspend when it previously only did so if it adversely affected other operators or caused or was likely to cause an increased risk to the safety of any person or material risk to property.

While Xstrata appreciates that suspension is obviously a lesser remedy than termination, which should be exercisable for events which may fall short of providing a right to terminate, it should still not be something that is exercised without cause due to the substantial disruption it will result in for the user's operations. Minor failures to comply with train service descriptions are not an abnormal occurrence, and it is unjustified and incredibly onerous to provide that such circumstances create a risk of suspension when it is not adversely affecting others or creating additional material risks.

In addition, where the access holder is a rail haulage operator – the end user should be given notice of suspension under clause 12 SAA at the same time as the operator (so the end user has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach which has given Queensland Rail the right to suspend).

Xstrata submits the 2013 DAU should not be approved without the qualifications on QR's right to suspend access rights which exist in the current standard access agreement being reinstated in clause 12.1 SAA.

Clause 12.1 should also require QR to give notice of the suspension to the End User at the same time as the operator (so the end user has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach which has given QR the right to suspend prior to a right of termination by QR arising).

9.7 Rights of termination

Xstrata has a number of concerns about the circumstances in which the access rights can be terminated. In particular:

- where the access holder is a rail haulage operator – the end user should be given notice of an default under clause 13.3 of the SAA (so it has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach);
- an operator's failure to comply with a train service description is now an event which may give rise to termination (clause 13.1(h) SAA) without the qualifications in the previous standard access agreement about the failure having to be 'in any material respect', such that immaterial non-compliances which happen regularly create a risk of termination.
- an operator's suspension of its accreditation is an event which may give rise to termination (clause 13.1(j) SAA) when by its very nature the suspension may be lifted such that the access agreement should remain on foot (albeit be suspended) in the interim.

At a more general level, the risk of access rights being terminated due to operator non-compliance, is a serious business risk for end users like Xstrata that have made significant investments (in mining projects and industrial facilities and in entering take or pay rail haulage contracts and port user agreements) on the basis of certainty of access rights. This is not a risk that can be adequately mitigated through provisions of a haulage agreement. Consequently, if operator default is going to remain a cause for termination:

- there needs to be a right for end users such as Xstrata to maintain the existing access rights where the breach is an issue of the operator's conduct not being contributed to by the end user (potentially through a deemed assignment or by nominating a new haulage operator) – so that the innocent end user could recommence utilising the access rights upon having contracted a different haulage provider; and
- the requirement in the current standard access agreement that the operator first be suspended before any termination right is exercised should be reinstated.

Xstrata notes that many of these issues are removed if it was possible for end users to directly contract to obtain access rights as Xstrata has suggested.

Xstrata submits the 2013 DAU should not be approved without:

- clause 13.3 being amended to provide for QR to give any notices of default under clause 13.3 of the SAA to the end user as well (so it has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach);
- the undertaking providing a right for end users such as Xstrata to maintain the existing access rights where the breach is an issue of the operator's conduct not being contributed to by the end user (potentially through a deemed assignment or by nominating a new haulage operator) – so that the innocent end user could

recommence utilising the access rights upon having contracted a different haulage provider;

- clause 13.1(h) SAA being amended to only apply to failures to comply with the Train Service Description 'in any material respect';
- clause 13.1(j) SAA being amended by deleting the referenced to 'suspended'; and
- including in clause 13.1 the requirement in the current standard access agreement that the operator first be suspended before any termination right is exercised.

9.8 Disputes being determined by QR

QR is proposing (clause 17.5 SAA) that it should be entitled to determine certain disputes to which it is a party. Clearly one party to a dispute being able to determine the outcome will not produce an independent determination.

Either this clause should be deleted in its entirety or any ability of QR to determine the dispute should be an interim determination which only applies until the dispute is subsequently finally resolved by a decision of an Expert, the Rail Safety Regulator, court order or agreement of the parties.

Xstrata submits the 2013 DAU should not be approved without either deleting clause 17.5 in its entirety or limiting any determination by QR to binding the Parties for any interim period unless and until the dispute is resolved by a decision of an Expert, the Rail Safety Regulator, court order or agreement of the parties.

9.9 Repair or replacement following a Force Majeure Event

QR is proposing that it have no obligation to fund the repair or replacement of any part of the network that is necessary for the Operator's train services and is damaged or destroyed by a Force Majeure Event (see clause 18(b) of Schedule C and 18.1(d) of the SAA).

Xstrata considers that Queensland Rail should be obliged to:

- fund all repair and reinstatement below an appropriate materiality threshold (either by dollar value or where the access charges payable in respect of train services utilising the relevant parts of the network make it economic to do so);
- apply recoveries under any insurance policies, or from claims against third parties, relating to the relevant force majeure event to fund the repair or reinstatement works (as where QR is making such recoveries rather than having to provide its own funding, it is difficult to see why they should not be used for reinstatement);
- otherwise, make the user funding process available to the Operator (and relevant End User(s)) in accordance with the provisions of the access undertaking).

Xstrata notes that an end user is in a much worse bargaining position to negotiate funding arrangements in relation to reinstatement (as opposed to an expansion), as the related investment in a mine or industrial facility will already be a sunk cost – such that without very robust user funding arrangements it can easily be held hostage by a monopoly below rail access provider asking for onerous terms before it conducts the repairs or replacement. Given the amount of financial costs that will be involved for users such as Xstrata in the

event of non-provision of access following a force majeure event, it is critical that the standard user funding agreement principles are available in this scenario (and as robust as they can be) such that an agreement for such funding can be quickly negotiated and executed so that the reinstatement works can begin as expeditiously as possible.

Xstrata submits the 2013 DAU should not be approved without:

- QR being obliged to fund all repair and reinstatement below an appropriate materiality threshold (either by dollar value or where the access charges payable in respect of train services utilising the relevant parts of the network make it economic to do so); and
- QR being obliged to apply recoveries under any insurance policies, or from claims against third parties, relating to the relevant force majeure event to fund the repair or reinstatement works;
- the user funding process under the undertaking being available to the Operator and relevant End Users where QR refuses to fund the repair or replacement of the Network following damage or destruction by a Force Majeure Event.

9.10 Termination for prolonged force majeure

Xstrata considers that the termination for force majeure provision (clause 18.2 SAA) should revert to the current standard access agreement wording which provides a right to the party not affected by the force majeure to terminate, as opposed to providing either party with a right to terminate.

Given that Queensland Rail has proposed that it not be required to conduct repair or rectification works after a force majeure event, and it would not be required to provide access during the force majeure event, it would seem that it would not be seriously adversely affected by the agreement continuing under a force majeure scenario. Whereas a user such as Xstrata will face significant costs (through take or pay haulage and port user arrangements) and a significant fall in revenue (through loss sales of product) and should have the right to require the agreement to continue if it was to incur those costs while there might be some prospect of rectifying the situation even if it will take more than 3 months to resolve the situation.

Xstrata submits the 2013 DAU should not be approved without clause 18.2 being amended so that it is only the party not affected by the Force Majeure Event which has a right to terminate.

9.11 Resumption threshold

Xstrata notes that QR is proposing amending the threshold for resumption to a failure to operate all Train Services on Scheduled Train Paths for 7 or more weeks out of any 12 consecutive weeks. Xstrata considers that a reasonable resumption threshold to also apply to services on the Mount Isa line.

In all cases Xstrata considers the Access Holder should have an opportunity to show a sustained demand for the relevant access rights (as applies under Queensland Rail's current access undertaking), so temporary difficulties do not have the potential to result in a

loss of access rights. Where the access agreement is a take or pay contract it is difficult to see the justification for not having some more protection for the end user for temporary non-utilisation of access rights where it does have a sustained demand for those access rights.

Xstrata submits the 2013 DAU should not be approved without:

- the resumption threshold in clause 19.1 of the SAA being replicated in the Schedule C principles (at least in relation to services on the Mount Isa line); and
- clause 19.1 and Schedule C providing for the access holder to have an opportunity to prevent resumption by demonstrating a sustained demand for the relevant access rights.

9.12 Representations and warranties regarding standard and suitability of the network

Clause 21(a)(viii) of the SAA seeks to require the Operator to represent a warranty as to the standard and suitability of the network and the ability of its rolling stock to safely interface with and operate on the Network.

If any party should be warranting as to the standard and suitability of the network it should be QR as the owner, operator and maintainer of the Network who is clearly best placed to assess its standard and suitability.

Xstrata submits the 2013 DAU should not be approved without clause 21(a)(viii) of the SAA being deleted (and potentially a similar representation or warranty should instead be given by QR to the Operator).

9.13 Queensland Rail Cause

As noted in section 7.3 of the Initial Submission, Xstrata is concerned with the widening of the definition of Queensland Rail Cause (and consequential narrowing of the circumstances in which QR does not receive take or pay revenue when it has not provide the contracted access).

Xstrata's particular concern is with the addition of 'or any other person', which has the result that where the non-provision of access is 'in any way' (i.e. irrespective of how minor the contribution) attributable to 'any other person' access holders will have to pay take or pay components of access charges. This effectively imposes nearly the entire risk of non-provision of access upon access holders, and removes important economic incentives for QR to ensure access is being provided as contracted.

QR has indicated this was only intended to cover where third parties were legally entitled to come onto the network without QR's control. Xstrata has its doubts as to the extent of such circumstances and considers the 'any other person' wording should just be deleted. However, if QR can provide the QCA with sufficient evidence of such rights existing, then the wording should be tightened to address that particular issue as set out below:

Xstrata submits the 2013 DAU should not be approved without the reference to 'or any person' in the definition of Queensland Rail Cause being deleted.

However, if QR can provide definite examples of this issue those words could instead be deleted and replaced with 'any person conducting Third Party Works over which QR has no legal or contractual rights to control the risks which may be posed in respect of availability of the Network'

10. Contacting Xstrata

If you have any queries in relation to this submission or Xstrata can provide any further assistance in relation to the process of considering the 2013 DAU please do not hesitate to contact Mark Roberts on [redacted] or Merv Sharkey on [redacted].