

# GLENCORE

## Submission to the Queensland Competition Authority

Glencore is pleased to make this submission to the Queensland Competition Authority (QCA) in relation to issues raised in the QCA's August 2016 Draft Decision in respect of Aurizon Network's Amended 2014 draft access undertaking ("Draft Decision").

### Executive Summary

Glencore continues to support the positions set out in its previous submissions in respect of Aurizon Network's 2014 draft access undertaking ("UT4") and, to the extent not inconsistent with those, the submissions of the Queensland Resources Council.

This submission addresses the Draft Decision in respect of the Wiggins Island Rail Project ("WIRP") reference tariffs.

Glencore continues to consider that the only decision which can be considered appropriate under section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) ("QCA Act") is for the WIRP reference tariffs to be reduced to reflect the return Aurizon Network receives under the Wiggins Island Rail Project Deed (2011) ("WIRP Deed"), which is beyond the return on investment commensurate with the regulatory and commercial risks involved in providing access to the access holders which have executed a WIRP Deed ("WIRP Users").

For the reasons set out in Glencore's earlier submission (and the enclosed Allens' advice), the QCA clearly has power to adjust the WIRP reference tariffs as proposed.

The principal reasons that it is appropriate to adjust the WIRP reference tariffs in the way proposed by Glencore are:

- The WIRP Deed Access Conditions (through the WIRP Fee and the related annual adjustment) result in Aurizon earning revenue substantially above that required for Aurizon to meet the efficient costs of providing access and earn a return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service;
- There are numerous adverse consequences arising from Aurizon Network earning monopoly profits in that way including:
  - inefficient use of the WIRP infrastructure;
  - inefficient investment decisions in respect of upstream coal markets (in relation to development and expansion of coal mines) and, as a result in numerous related markets; and
  - adverse impacts on public interest issues (like employment, royalties to the government, and reductions in related economic activity) due to the damage caused to the coal industry and the lessening of its ability to withstand price shocks.
- The QCA's conclusions rely heavily on inappropriate and unreasonable weight being given to the importance of regulatory certainty (and a misinterpretation of what regulatory certainty requires in this context).
- While Glencore acknowledges that regulatory certainty is typically a matter that is in the public interest, regulatory certainty does not justify absolute adherence to previous decisions (particularly where those decisions are acknowledged as not being a full review of the merits as

the QCA is obliged to undertake in connection with the consideration of a draft access undertaking).

Accordingly, Glencore requests that the QCA critically reconsider its Draft Decision in respect of the WIRP Deed Access Conditions and require the UT4 WIRP reference tariffs to be adjusted to reflect the monopoly profits Aurizon Network is deriving from the WIRP Fee (and the related annual adjustment).

## **1 Regulatory Certainty**

The Draft Decision relies heavily on an asserted need for regulatory certainty as the principal reason for rejecting the proposed revisions to the WIRP reference tariffs based on the monopoly profits Aurizon Network is deriving from the WIRP Deed.

Glencore considers that the Draft Decision:

- places inappropriate and unreasonable weight on the importance of regulatory certainty; and
- misinterprets what regulatory certainty requires in this context.

### **(a) Regulatory certainty and what it means**

Glencore acknowledges that regulatory certainty is broadly desirable. However, what is desirable is regulatory certainty in the sense that it is important for:

- the results of regulatory decision making to be consistent with the requirements of the QCA Act and relevant regulatory framework; and
- the regulator's approach to considering major policy matters to be predictable (which is not the same as absolute predictability of outcome across multiple regulatory periods).

Regulatory certainty does not require that a regulator should never alter its view in relation to any particular subject. The very fact that each time the QCA considers a draft access undertaking under section 138(2) QCA Act it must determine whether it is appropriate to approve that undertaking means that the QCA is bound to consider the merits afresh with each new undertaking. That obligation means that the most fundamental issues to Aurizon Network's investment and return (such as the weighted average cost of capital to be applied) are reconsidered. Similarly, the non-tariff changes which the QCA proposes to approve between the current undertaking ("UT3") and the proposed undertaking ("UT4") are very substantial in both form and substance. In that context, it should be clear that a reconsideration of WIRP reference tariffs is, in a relative sense, a lesser issue that is well within the scope of the QCA's discretion to adjust the treatment of.

It necessarily follows from the obligation to consider the merits of a new draft access undertaking afresh, that there will be circumstances where it will be appropriate for the QCA to make a decision that may be different from a previous decision. The most evident example of that will be a change in circumstances that was not foreseen or anticipated at the time of the earlier decision.

In the context of access undertakings, all stakeholders anticipate that all important issues will be reconsidered as part of consideration of the replacement undertaking. If an infrastructure provider wishes to obtain longer term certainty regarding the treatment of regulatory issues, it can seek to have a longer term access undertaking approved, with clear examples of that occurring:

- the 10 year term being sought by ARTC for its Hunter Valley Access Undertaking; and
- the NBN Co special access undertaking which was approved by the ACCC in 2013 having a term until 2040.

As an alternative, under the QCA Act regime, an infrastructure provider can also seek a binding ruling about how matters will be treated in future draft access undertakings.

Given the obligation to consider the merits afresh, a strict deference to previous decisions, without due regard to whether that remains appropriate, is a failure to comply with the QCA's statutory obligations. That is particularly the case where the decision that is being asserted to be being followed was a very constrained exercise that the QCA fully accepts was a 'limited merits review' where it did not consider the reasonableness of the access conditions being proposed or whether they were actually in the public interest (as opposed to the much lower threshold of being not contrary to the public interest). The QCA, seemingly feeling itself bound (at least in a practical sense) to follow that previous decision, is effectively entrenching a decision that is no longer appropriate.

Glencore notes the QCA's statements in its final decision in respect of the WIRP Access Conditions (May 2012) at page 9:

*However, the approval criteria do not provide for the Authority to consider the reasonableness of the access conditions directly*

...

*the prospect of QR Network earning returns in excess of the risks and costs faced is not a matter for the Authority's consideration when, as in this case, the access conditions have been agreed with the access seekers. Nevertheless, this could mean that the costs of transporting coal in Queensland are in excess of efficient costs. This has the potential to be adverse to the public interest as it may limit the size of the coal industry in Queensland by making it more difficult for the industry to withstand price shocks or competition from alternative coal basin.*

It is clear from that statement that the previous decision did not involve consideration of many of the key factors that the QCA is obliged to take into account in determining the appropriateness of UT4. To use it as a guide for the UT4 decision represents taking account of an irrelevant consideration. The QCA is now under a statutory obligation to reconsider those key factors (and this time give appropriate weight to them in a way that the UT3 access conditions provisions did not previously allow).

Finally, Glencore notes that regulatory certainty supports the principle that the QCA has typically (and clearly should continue to) set tariffs in a way that reflects regulated infrastructure service providers earning a return that meets their efficient costs and provide a return on their investments that is commensurate with their risks involved in providing the service. That approach is expressly incorporated into the regulatory framework by being one of the pricing principles in section 168A QCA Act (which in turn is referred to as a mandatory factor to have regard to under section 138(2) QCA Act). It is clear from the Draft Decision that the QCA appreciates the WIRP Deed results in Aurizon Network earning above that return. However, that significant departure from previous regulatory practice has seemingly been given little or no weight.

**(b) The irrelevance of the timing of this issue being raised in the UT4 process**

Glencore is aware of concerns about the practical difficulties presented by the timing of this issue being raised 'late' in the UT4 process. However, Glencore's submissions are not late submissions of the type the QCA is permitted to not take into account under section 168B(3) QCA Act. Accordingly, the QCA usual obligation to give full and thorough consideration to the merits of the issues raised remains unqualified.

Glencore is genuinely concerned that the Draft Decision reflects an absolute adherence to not just the 2012 WIRP Deed access conditions decision, but also a deep reluctance to change previous draft decisions the QCA has made in respect of UT4. If the proposed changes are not properly considered due to the administrative difficulty of considering them at this point in the process, there will have been a denial of procedural fairness. The requirement for an undertaking to only be approved if it is appropriate is not qualified by what is administratively convenient.

To the extent that the QCA has concerns with an ability to make a decision of this complexity in the time remaining prior to approval of the remainder of UT4 (and any potential delay to the approval of UT4 more generally), Glencore suggests the QCA give consideration to including clauses in UT4 which provide for a decision on this matter to be made in the next undertaking with an appropriate adjustment payable to WIRP Users if WIRP reference tariffs are subsequently adjusted on that basis.

**(c) The limited relevance of contractual arrangements**

As noted in Glencore's earlier submission:

*It might be argued that as a concluded contract, the WIRP Deed should never again be subject to any regulatory review. We do not accept that this would be an appropriate view for the QCA to take. The regulatory approval was given for the UT3 Access Undertaking period based on the circumstances which then existed. Different circumstances now apply. Glencore does not believe that simply by entering into a long term contract (such as the WIRP Deed) which extends for a number of regulatory periods, Aurizon Network should be able to exclude regulatory oversight of the matters which are governed by such agreement for all regulatory periods other than during the first regulatory period. Further, Glencore does not believe that the QCA's approval of the WIRP Deed Access Conditions was intended to have the effect of excluding future re-examination of the matter.*

The QCA has acknowledged in previous decisions that contractual arrangements cannot bind the QCA in determining what is appropriate. In particular, in the recent Draft Decision in relation to the Dalrymple Bay Coal Terminal draft access undertaking (at page 233) the QCA noted that:

*if contractual obligations could constrain the QCA or limit the efficacy of regulatory decisions under the QCA Act, regulated entities (and their customers, for that matter) would enter into contractual agreements to defeat inconvenient or undesirable regulatory decisions. This is clearly not the intent of section 138(2)(c).*

The contractual arrangements between stakeholders are a separate matter from the appropriate regulatory treatment. Aurizon Network and the WIRP Users knew that was the case when the WIRP Deed was negotiated. Regulation is clearly something imposed by the QCA Act statutory framework – not a private decision that required the agreement of Aurizon Network and the WIRP Users. It was therefore unnecessary to state that it was subject to regulatory review, and the fact that it does not expressly state that is not evidence that the parties intended to immunise the WIRP Deed from regulatory consideration forever.

Contractual arrangements can still be taken into account, and Glencore notes that there are already examples of other contractual arrangements, being taken into account in relation to setting system allowable revenue. By way of example, the return under rebate deeds which Aurizon Network has previously employed for contributions to infrastructure development, are referred to in Aurizon Network's amended draft access undertaking in Schedule F clause 4.3(c)(vii) as an adjustment to the calculation of System Allowable Revenue – replicating the arrangements that exist in the current access undertaking in that regard. It is unclear why the QCA considers it is appropriate to make adjustments for that form of contractual arrangement but not the WIRP Deed.

**(d) The limited relevance of subjective intentions of the parties**

The QCA has invited stakeholders (at page 9 Draft Decision) to provide evidence:

- on whether or not Aurizon Network and access holders executed WIRP Deeds with the expectation that the access conditions would be subject to future reassessment as part of assessment of subsequent draft access undertaking; and

- to the effect that the regulatory treatment of the WIRP access conditions by QCA, as approved by QCA under UT3, was not intended to survive the expiry of UT3 or have any long-term effect beyond UT3.

It is not clear to Glencore why the subjective intent of the parties to the WIRP Deeds is relevant, when the QCA has clearly acknowledged that its decisions are not constrained by the contractual arrangements of stakeholders. It is also practically difficult at this point many years after the WIRP Deeds were executed to produce clear evidence of the subjective intent of the stakeholders in respect of future regulatory treatment (given both personnel changes and the widely held perception at the time that the regulatory framework had failed to protect access seekers from Aurizon Network's monopolistic behavior in respect of WIRP). That difficulty is compounded by virtue of the WIRP Deed having been collectively negotiated (such that it is possible, if not likely, that individual stakeholders may have held very different expectations).

It is also not clear why the subjective views of the parties about how the access conditions approval operated is relevant, rather than the objective requirements of the regulatory framework to be applied by the QCA under the QCA Act and the applicable access undertaking. Glencore is concerned with the suggestion that the interpretation of how a previously regulatory decision under the undertaking should operate can somehow be impacted by the subjective views of individual stakeholders. That would not only create mass uncertainty as to how undertakings should be interpreted – it would also result in an evidential nightmare of stakeholders tendering alleged evidence of what they considered particular terms of an undertaking were to mean at the time of earlier decisions.

When the regulatory framework is considered, it is clear that an objective and reasonable observer would have expected all issues (including applicable WIRP reference tariffs) to be reconsidered as part of UT4 – rather than the QCA having bound itself in respect of future matters in a way that the QCA Act itself does not envisage is possible outside of the binding ruling mechanism. The very fact that there is transitional provisions in the various iterations of the Aurizon Network undertaking demonstrates that the application of past events is something the QCA has considered at each undertaking replacement.

**(e) Weight to be given to regulatory certainty**

Finally, Glencore notes that the appropriate weight to be given to regulatory certainty is obviously also dependent on the context of the draft access undertaking being considered.

For example, regulatory certainty was first raised by the QCA as an important issue in respect of the Blackwater electric transaction draft amending access undertakings submitted by Aurizon Network in 2011 and 2013. That was in the context of a major change to tariff structures that was proposed by Aurizon Network part way through a regulatory period. While, it is open under the QCA Act to a regulated service provider to seek amendment part way through a regulatory period, there was not an expectation of material changes occurring outside of the complete review which occurs on assessment of a new replacement undertaking. Whereas, by contrast, there is a clear expectation that tariffs will be adjusted with each new undertaking (which is all that is being proposed here).

As noted in the Allens' advice enclosed with Glencore's earlier submission, to the extent that a service provider wishes to obtain a once and for all binding determination of the QCA – there is a specific ruling mechanism under the QCA Act. It would be a misinterpretation of the QCA's statutory powers and obligations for the QCA to regard itself as bound by its previous decision in respect of the WIRP Deed Access Conditions, or to give such weight to regulatory certainty that even clear monopoly pricing is approved as appropriate on the basis of providing such regulatory certainty.

Regulatory certainty also needs to be weighed against the need for appropriate flexibility to appropriately apply a regulator's discretion. This point is aptly made in *The Trouble with Regulatory Precedent* (Nayager

and Wilson, 2015), accessible at the following address:  
<https://www.accc.gov.au/system/files/Network%20-%20December%202015.pdf>) as follows:

*In Australian economic regulatory proceedings, a call for regulators to strictly follow something referred to as regulatory precedent – seemingly an expectation or requirement for the strict application of past decisions in current decision-making processes – is sometimes heard.*

*At one level this might simply be interpreted as a reasonable desire for a degree of certainty in the application of regulatory practice and principles. In the extreme, or if applied without caution, the concept of regulatory precedent may extend to a quest for certainty of specific outcomes, merely because those same regulatory outcomes were observed in their past and regardless of their practical applicability to the problem of the day.*

*The term regulatory precedent in that strict sense appears to be based, at least in part, on the doctrine of legal precedent. However, adoption or adaptation of the legal doctrine in its narrowest and strictest form into the world of economic regulation may well lead economic regulators into a self-referencing cycle of simply repeating prior decisions. It may therefore reduce the effectiveness of economic regulation in enhancing consumer welfare.*

*It is right for economic regulators to be aware of and have regard to past (and current) regulatory practice – but to elevate that practice to the status of a binding precedent is to be avoided.*

Similarly, a Commissioner of the ACCC has previously stated (Willett, 2009, accessible at the following address):

[https://www.accc.gov.au/system/files/20090611\\_Willett\\_Competition%20regulation%20in%20a%20changing%20environment\\_Broadband%20Australia%20conference.pdf](https://www.accc.gov.au/system/files/20090611_Willett_Competition%20regulation%20in%20a%20changing%20environment_Broadband%20Australia%20conference.pdf):

*Of course, while regulatory certainty is important, it is also necessary for regulation to remain well targeted and to ensure that the regulator remains responsive to market developments*

In this context, the 'problem of the day' that Aurizon Network's access undertaking needs to target is the adverse impacts of Aurizon Network earning monopoly profits from arrangements negotiated in an environment where the regulatory framework failed to provide any protection against that monopolistic behaviour. To prevent that problem being resolved by strictly following a decision made under different criteria in the context of solving a different problem (the investment hold-up behavior of Aurizon Network occurring in the absence of any sufficient regulatory protections) is a poor and inappropriate policy outcome.

## **2. Response to QCA application of the section 138(2) factors**

As noted in its most recent submission, Glencore considers that it is clear from the factors the QCA is required to have regard to under section 138(2) QCA Act that it would be inappropriate to approve UT4 without the adjustments to the tariffs applicable to WIRP Users set out in this submission.

The table below sets out, in respect to the factors in section 138(2) QCA Act, the QCA's reasoning in the Draft Decision and Glencore's comments on the QCA proposed application of those factors.

<b>Statutory factor in section 138(2)</b>	<b>QCA Draft Decision analysis</b>	<b>Glencore Comments</b>
(a) The object of Part 5 of the QCA Act – to promote the	We consider that if we undermined the effect of the approval of the access	What Glencore is proposing does not 'undermine' the prior approval. Aurizon Network has had the benefit of those access

Statutory factor in section 138(2)	QCA Draft Decision analysis	Glencore Comments
<p>economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets</p>	<p>conditions in UT4, as effectively proposed by Glencore, this would undermine regulatory certainty. In turn this would increase investment risk and would not promote future economically efficient investment in significant infrastructure by Aurizon Network. Under-investment by Aurizon Network would not be conducive to promoting effective competition in upstream and downstream markets. At the same time, we need to balance this consideration against the need for economically efficient operation of, and use of, such infrastructure.</p>	<p>conditions for the period since approval and there has been no request to make retrospective adjustments to past payments (rather the request is to make changes to the proposed future WIRP reference tariffs)..</p> <p>Glencore acknowledges that regulatory certainty, may theoretically have an impact on future investment in significant infrastructure. However, as discussed earlier in this decision, a proper understanding of regulatory certainty (both in what it requires and the appropriate weight to be given to it) does not support the conclusions reached by the QCA.</p> <p>As recognised in the QCA's Final Decision in respect of UT4 (Volume 1 at 13): <i>A return that generates windfall gains or monopoly profits would be inconsistent with economically efficient investment, operation and use of a regulated network and has the potential to have both upstream and downstream investment impacts.</i> The WIRP Fee is a clear example of such monopoly profits, and it is clearly inconsistent with efficient operation and use of infrastructure. If regulatory certainty is going to be relied on, the QCA needs to clearly demonstrate why regulatory certainty does not support a regulatory approach of continuing to prevent windfall gains or monopoly profits.</p>
<p>(b) The legitimate business interests of the owner or operator of the service</p>	<p>We note that the access conditions were intended to facilitate rapid completion of WIRP and to compensate Aurizon for additional risk. These factors were considered in our original decision in 2012 and reflect legitimate business interests of Aurizon Network. We also consider that Aurizon has a legitimate business interest arising from the long-term investment certainty intended to be provided by QCA's decision in 2012, hence it would not be in Aurizon's legitimate business interests for QCA to make a decision in relation to UT4 that undermined</p>	<p>As noted above, it is clear that the 2012 decision did not reflect a decision by the QCA that the WIRP Access Conditions were reasonable or appropriate.</p> <p>Aurizon Network does not have a <i>legitimate</i> interest in earning monopoly profits that are not commensurate with the regulatory and commercial risks involved. This is exactly what the WIRP Fee does where it applies <i>in addition to</i> reference tariffs which the QCA has determined fully and appropriately reflect the relevant costs and risks borne by Aurizon Network.</p> <p>That Aurizon chose to make the investment in WIRP without knowledge of the reference tariffs that would apply in the future is a natural consequence of the regulatory</p>

Statutory factor in section 138(2)	QCA Draft Decision analysis	Glencore Comments
	<p>the intent of decisions made by the QCA in the context of UT3 that were intended to provide longer-term certainty.</p>	<p>framework (which rewards them for that the risk through the return permitted on investment) – not a risk they should be immunised from in all future regulatory periods.</p> <p>It is not clear how the QCA has concluded that the decision on the WIRP Access Conditions were intended to provide longer-term certainty when there is no express statement of that in UT3 or the final decision on the WIRP Access Conditions.</p>
<p>(c) If the owner and operator of the service are different entities – the legitimate business interests of the operator are protected</p>	<p>Not applicable – Aurizon Network is both the owner and operator as those terms are used in the QCA Act.</p>	
<p>(d) The public interest, including the public interest in having competition in markets (whether or not in Australia)</p>	<p>We canvassed the public interest at length in our original decision to approve the access conditions. We do not disagree with our previous reasoning. We also consider that absent evidence that the previous process was deficient in a material regard, the public interest in ensuring regulatory continuing and certainty outweighs the need to take into account any changes in circumstances.</p>	<p>The assessment of the public interest in the context of the WIRP Deed access conditions was tightly constrained to a determination of whether approving the conditions 'would be <i>contrary to</i> the public interest'. That was far from a finding that the WIRP Deed access conditions were <i>in</i> the public interest.</p> <p>Glencore acknowledges that regulatory certainty can be a factor indicating that it is not in the public interest to change a provision of an undertaking. However, that only applies where the existing position is itself appropriate and there has been no change in circumstances since it was approved which make it appropriate. That is not the case here. Please see the discussion about regulatory certainty earlier in this submission.</p> <p>In relation to the public interest, Glencore notes the QCA's comments in the Final Decision in respect of UT4 (Volume 1 at 10) that:</p> <p><i>Where consumers of rail services sell their products in international markets or face intense competition in their domestic markets, the ability of such consumers to pass on rail transport costs is likely to be constrained. If the costs of providing the service are not efficient, this could undermine the</i></p>



Statutory factor in section 138(2)	QCA Draft Decision analysis	Glencore Comments
		<p><i>competitiveness of rail operators accessing Aurizon Network's declared service and consumers of above-rail services provided by those rail operators (particularly coal producers in global coal markets).</i></p> <p>It is clear that the imposition of the WIRP Fee reflects additional (and inefficient costs) which adversely impacts on rail operators and coal producers. Impact on coal producers have a number of flow on impacts on the public interest (in relation to employment, royalties paid to government, goods and services provided as mining inputs and other economic activity).</p>
<p>(e) The interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected</p>	<p>We recognise the various concerns expressed by Glencore regarding the adverse impact of the WIRP Deed. However, we note that one of the interests of WIR Users at the time these arrangements were negotiated was to facilitate the timely completion of WIRP. Absent the access conditions, it is unclear whether this would have occurred.</p> <p>We re particularly concerned by any suggestion that access seekers can enter into a binding commercial agreement at 'Time X' to enable construction of a facility and receive from the QCA a decision regarding the appropriate regulatory treatment of that commercial arrangement, then revisit the appropriate regulatory treatment of that arrangement with QCA at later 'Time Y' when the infrastructure has already been completed. QCA is concerning regarding the scope for future opportunistic use of regulatory processes by access seekers when adequate provision has already been made historically to balance the interests of access seekers with those of access providers.</p>	<p>Glencore is not seeking a revisiting of the WIRP Deed access conditions approval.</p> <p>Any concern the QCA holds in relation to the future use of the regulatory process is an irrelevant consideration as the QCA will have the clear power to refuse or approve draft access undertakings as appropriate. Speculation about possible future conduct by access seekers in respect of future undertaking processes is not relevant to the merits of the current consideration of UT4.</p> <p>The binding ruling process under the QCA Act is available for any infrastructure provider that wishes to provide itself with certainty of outcomes across multiple regulatory periods.</p> <p>It is inaccurate to say that adequate provision has been made historically to balance the interests of access seekers and providers when the QCA acknowledges that the 2012 decision on the WIRP access conditions did not involve a full merits review of appropriateness of those access conditions. As noted earlier in this submission, the outcome of that historical constrained process should be critically reconsidered afresh based on the criteria of appropriateness under section 138 of the QCA Act.</p>

Statutory factor in section 138(2)	QCA Draft Decision analysis	Glencore Comments
(f) The effect of excluding existing assets for pricing purposes	Not applicable – no assets are being excluded	
(g) The pricing principles mentioned in section 168A QCA Act	<p>QCA notes Glencore's concerns that the pricing contemplated by the WIRP arrangements could lead to over-recovery by Aurizon.</p> <p>We note that the WIRP Users did make submissions on the pricing at the time and these submissions were considered by the QCA.</p> <p>Moreover, the pricing was justified by Aurizon Network at the time on the basis of various matters such as the need for timely completion of the WIRP infrastructure and the additional risks to Aurizon. These matters were also canvassed in detail at the time.</p>	<p>As the QCA acknowledged in the Draft Decision, the review of the merits of the WIRP Deed access conditions that occurred in 2012 was a limited one. In particular (as acknowledged by the QCA in the 2012 Decision) the applicable approval criteria did not provide for the QCA to consider the reasonableness of the access conditions. In other words, contrary to the impression given by the Draft Decision, the merits of Aurizon Network earning a monopoly return (well in excess of the return suggested by the pricing principle in section 168A(a) QCA Act) by virtue of the WIRP Fee has never fallen to be considered by the QCA.</p> <p>The pricing principles in section 168A of the QCA Act include that the price for access should <i>'generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved'</i>. The WIRP Fee is a return that is (by definition) additional to the revenue that the QCA determined was appropriate in respect of the efficient costs and risks involved in providing access under UT3 (and therefore clearly is above the revenue described in section 168A(a) QCA Act)).</p> <p>As noted earlier in this submission, regulatory certainty suggests that the QCA's practice (and the pricing principles in the QCA Act itself) to include measures to prevent monopoly profits should be extended to the WIRP access arrangements.</p>
(h) Any other issues the QCA considers relevant	<p>Another issue we consider relevant is the need for long-term regulatory consistency and certainty in regulatory decisions made by the QCA in relation to successive undertakings made by Aurizon Network.</p> <p>One of the purposes of an access undertaking is to provide greater certainty for all</p>	<p>Please see the comments earlier in the submission about regulatory certainty, particularly in the context of the limited review previously conducted.</p> <p>An approach of seeking consistency across successive undertakings – has the high potential in this context to result in the QCA failing to satisfy the requirement to only approve a draft access undertaking if it is</p>

Statutory factor in section 138(2)	QCA Draft Decision analysis	Glencore Comments
	stakeholders regarding the terms and conditions on which access is provided.	appropriate.  Glencore notes the QCA's comments in the Final Decision in respect of UT4 (Volume 1 at 12) that the interests of access holders and end users are relevant under section 138(2)(h) of the QCA Act, and that one of the issues of particular relevance to such entities is <i>'the extent to which a regulated entity earns windfall gains and monopoly profits'</i> . That is clearly the position which applies in respect of the WIRP Fee.

### 3. When a partial adjustment would be appropriate

Glencore considers that the WIRP reference tariffs for UT4 should be reduced by the entirety of the over-recovery provided by the WIRP Deed. However, it accepts that the exercise of the QCA's discretion in setting reference tariffs is not confined to the binary outcomes of an approval or rejection of that proposal.

In accordance with the pricing principle in section 168A(a) QCA Act tariffs should be set at a level to *'generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved'*. That necessarily involves the QCA forming a view of the extent additional risks (if any) Aurizon Network has assumed under the WIRP Deed.

As noted in Glencore's earlier submission, Glencore considers that there is no such additional risks (as the only risks borne are to earning less monopoly profits under the WIRP Deed itself or risks which already existed in the provision of the regulated service more generally). However, if the QCA ultimately considers that the additional revenue under the WIRP Deed was partially justified by additional risks borne by Aurizon Network, the appropriate outcome is a partial reduction (either as a constant proportion or as a smoothed price path towards efficient tariff levels) rather than the refusal to adjust the WIRP reference tariffs in any way provided for in the Draft Decision.

### 4. Conclusion

For the reasons set out above, Glencore continues to consider that it is not appropriate to approve a draft amending access undertaking without varying the WIRP reference tariffs to account for the monopoly profits being derived from the WIRP Deeds.

The Draft Decision is fundamentally flawed in respect of this issue, principally due to the inappropriate emphasis placed on, and misplaced assertions of the relevance of, regulatory certainty. It is also not a conclusion that is reasonably open as being appropriate having regard to the mandatory factors in section 138(2) QCA Act as analysed above.

If you have any queries in relation to this submission please do not hesitate to contact Frank Coldwell, Glencore Coal Assets, Australia.

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