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

26 April 2019

GLENCORE

1 Introduction

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

(a) the Queensland Competition Authority's (***QCA***) Draft Decision of 18 December 2018 (the ***QCA Draft Decision***) to recommend that Queensland Rail's (***QR***) Mount Isa Line service should be a declared service under Part 5 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***);

(b) the submission from QR opposing the QCA Draft Decision including in respect of the Mount Isa line service of 11 March 2019 (***QR March 2019 Submission***); and

(c) the QCA staff questions released on 5 April 2019.

This submission is consistent with Glencore's previous submissions to the QCA in the QR declaration review process dated 30 May 2018 (***Glencore's Initial Submission***) and 16 July 2018 (***Glencore's Second Submission***) and should be read together with them.

2 Executive Summary

Glencore strongly supports the QCA's Draft Decision with respect to the Mount Isa Line service, including that the Mount Isa Line service satisfies each of the access criteria and the QCA should recommend its continued declaration.

It is common ground between QR, Glencore and the QCA that the rail transport infrastructure used to provide the Mount Isa Rail Access service is significant, such that criterion (c) is satisfied.

Accordingly this submission only refers to criterion (a), (b) and (d).

Glencore does not consider that any of the arguments made in the QR March 2019 Submission should alter the QCA's draft decision to recommend that the Mount Isa Line service be declared as expressed in the QCA Draft Decision for the reasons set out below.

3 Service and Facility Definitions: the Mount Isa Rail Access Service

QR asserts that access to the Mount Isa system (described by QR as bounded to the east by (and including) Stuart and to the west by (and including) Mount Isa) should be analysed as a separate service to the rail access services provided by each of its other systems.

Glencore is largely agreed that it should be analysed separately as a part of a declared service that is a service itself and satisfies the access criteria (such that declaration should be recommended in accordance with section 87A(1)(b) QCA Act).

However, as submitted to the QCA previously, the service should be properly defined as the rail access service for the Mt Isa line including the rail links to the Port of Townsville, via the Jetty branch line (the ***Mount Isa Rail Access Service***).

The difference is displayed in the maps below showing the Mt Isa line (as described by QR) in Figure 1 and the 'missing link' of rail between Stuart and Townsville that Glencore submits access to should also form part of the service, highlighted in red in Figure 2:

Figure 1: Mt Isa line

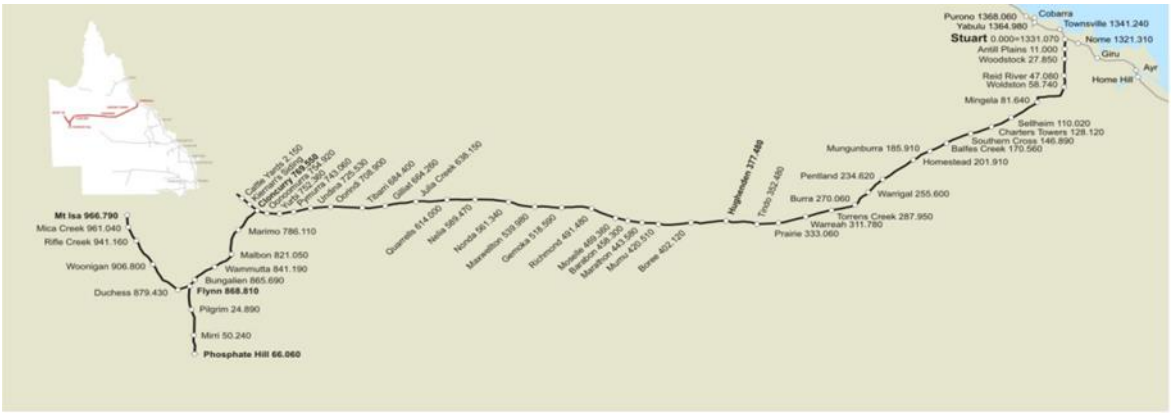
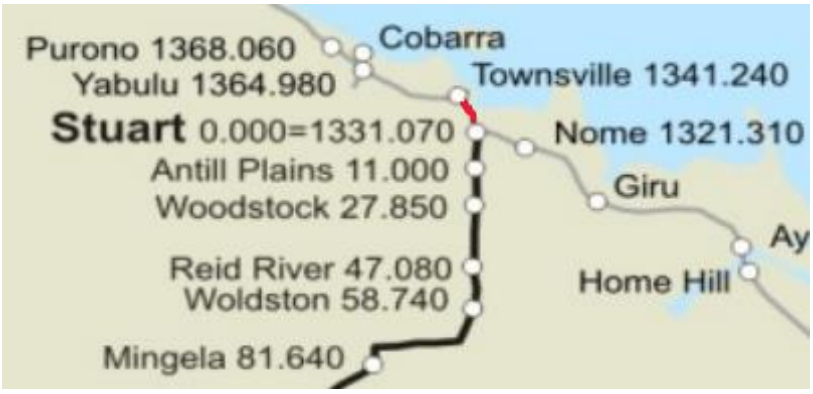


Figure 2: Stuart – Port of Townsville rail link (in red)



The service ought to be defined to include access to the rail links to the Port of Townsville line as:

(a) access to the Mount Isa system alone is of little to no utility when the vast bulk of rail freight is either for transport of goods imported at the Port of Townsville for operations on the line or produced by operations on the line for export at the Port of Townsville (such that for users like Glencore, access to the Mount Isa Line but not the rail from Stuart to the Port of Townsville is not useful – it is the full rail line to the Port of Townsville that provides the supply chain);

(b) Glencore, and presumably other users, currently contract rail on the basis of rail access (and rail haulage) from origins in the Mount Isa region to the Port of Townsville;

(c) while it would theoretically be possible to contract access to the sections of rail separately as QR suggests, it is commercially irrational to do so due to the potential that would create for disconnects in scheduling, force majeure, treatment of defaults and non-performance and other issues;

(d) the access criteria assume that they are being measured against a service for which one can reasonably measure foreseeable demand (for criterion (b)), and this can only really be done for a service that customers seek to acquire (i.e. the service all the way through to the Port of Townsville, not to Stuart); and

(e) the absurd result that might result from QR's proposed service definition is that any benefits arising from declaration of access to the Mount Isa system could be completely undone if the rail links between Stuart and the Port of Townsville are not also separately declared – such that the terms for that remaining rail would reflect an exercise of QR's market power, which is clearly inconsistent with the legislative intent of Part 5 of the QCA Act.

4 Road haulage is not a substitute or a sufficient constraint in at least some dependent markets

QR's arguments in respect of criterion (a) and (b) are heavily dependent on their assertion that road haulage is a close substitute for the Mount Isa Rail Access Service, and a competitive constraint on QR's pricing of that service, such that:

(i) demand for competing road haulage services should be included in foreseeable demand for the purposes of criterion (b); and

(ii) road haulage pricing provides an effective constraint on QR's ability to engage in monopoly pricing in the absence of declaration such that criterion (a) would not be satisfied.

(a) Criterion (b) – Is road haulage a substitute?

Whether road haulage is a substitute service is properly analysed as a matter of economic substitution, i.e. would a customer be likely to switch to a different service if rail access was to impose a small but significant non-transitory increase in price (a ***SSNIP***).

In the case of rail access, a switch would also involve switching away from rail haulage – such that the most appropriate way to analyse the extent of substitution potential is to ask whether if the access price rose by a SSNIP, would rail haulage providers (as the typical customer for rail access services) switch to providing transportation services by road.

As the QCA Draft Decision notes:[1]

> *In this context, the question is whether, if the cost of rail infrastructure increased relative to road (for example, if Queensland Rail imposed a SSNIP for the use of its rail infrastructure), would above-rail operators switch from using rail infrastructure to using road infrastructure instead?*
>
> *The QCA considers that this would be highly unlikely. While it may be physically possible for an above-rail operator to sell its rollingstock and buy trucks instead (in order to switch from using rail infrastructure to using road infrastructure), the costs of doing so are likely to be so high as to make switching between different infrastructure services unviable in response to a SSNIP. For this reason, the QCA considers that no other form of infrastructure service is substitutable for the rail infrastructure service provided by Queensland Rail.*
>
> *Therefore the QCA is satisfied that the primary market is confined only to rail infrastructure.*

Glencore agrees with that analysis.

That is also consistent with the fact that, as discussed further below, road haulage does not provide a competitive constraint for bulk minerals transportation. End customers (such as Glencore) would not switch away from rail transportation to road transportation in the event that access charges were increased by a SSNIP and the haulage provider simply passed those charges through – as rail would remain more economic.

(b) Houston Kemp's flawed analysis in relation to the reverse cellophane fallacy

For completeness, Glencore also notes QR's reliance on the Houston Kemp's flawed discussion of the 'reverse cellophane fallacy'. The reverse cellophane fallacy is concerned with the situation where a SSNIP test is applied to an uneconomically low imposed price which results in an inappropriately narrow market definition. But Houston Kemp's analysis simply assumes that because of declaration it must be the case that the reverse cellophane fallacy applies. Whereas, Glencore considers that argument cannot be made in relation to the Mount Isa line where there is no reference tariff, and the price that is reached is reached in the context of the right (for either

[1] QCA Draft Decision, Part B, page 16

party – so QR has the right as well) to have the QCA arbitrate access disputes (including as to price) such that there is no reason to suggest the current price is not a reasonable approximation of the price that would exist in a workably competitive market. It is simply not the case that the market price in a hypothetically workable competition market is the ceiling price (i.e. the standalone cost of QR providing the service for the relevant customer – which is a deeply uneconomic price) as Houston Kemp seems to assume.

(c) **Criterion (a) – Does road haulage impose a competitive constraint?**

QR argues that road haulage services provide a competitive constraint on rail access pricing (for the Mount Isa Rail Access Service) on the basis that the end rail haulage customers, will switch to road haulage if QR engages in monopoly pricing.

In making that argument, QR does not provide any cost information to substantiate its assertions, but merely points to some examples of rail customers utilising a degree of road haulage services.

Critically, as the courts have recognised, the mere fact that a customer may use two different services does not constitute substitution.[2]

For example, the Mount Isa line has recently been closed due to significant damage caused by flooding. During that time producers of bulk products including Glencore, South32, MMG and Incitec Pivot have been forced to utilise road haulage, and have incurred significant costs and expenses doing so. However, that usage of road haulage (when rail access is completely unavailable for a short period) is not evidence of long term substitution of the type relevant to assessment of the access criteria across the proposed 15 year declaration period.

In addition Mount Isa Mines is actually stockpiling large volumes of product on site in anticipation of the Mount Isa line becoming operational again due to the significant additional costs of rail haulage (and considering community and corporate responsibility).

An illustration of the size of the haulage task that QR is alleging can easily be converted to road might assist in understanding why QR's submissions on that issue are not credible. By way of example, to haul [redacted] this equates to 82 trucks travelling on the Flinders Highway across that period, or a truck being encountered every 10 kilometres / every 5 minutes on the road. Significantly, that is in respect of Mount Isa Mines' product only and does not take account for product of other North West Queensland users being transported on road, or that all mining input transportation would also need to be completely switched to road in this hypothetical in order to avoid QR recovering monopoly revenue against any residual usage.

Trucking of those volumes – particularly when considering the volumes that would be created by all North West Queensland users – is very clearly not in the best interests of the community when considering the significantly elevated road usage and congestion it would cause.

Secondly, as the QCA recognised in the QCA Draft Decision, and consistent with the issues described above, the extent to which road transportation provides competition to rail transport depends on a range of factors including (mostly relevant to the Mount Isa Rail Access Service) the type of product and the distance of transportation.

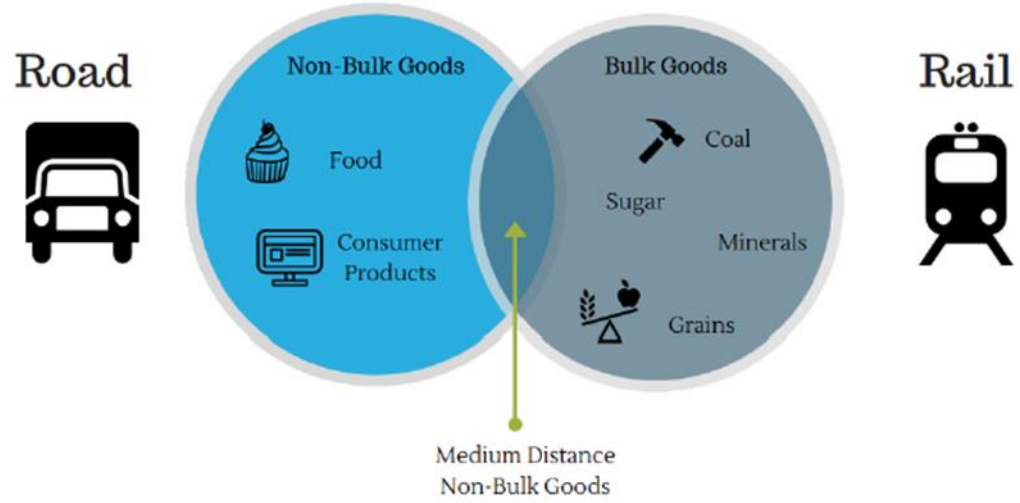
In relation to bulk freight, the QCA Draft Decision noted:[3]

[2] *Arnotts v Trade Practices Commission* [1990] FCA 473
[3] QCA Draft Decision, page 37-38

Road transport is generally preferable for bulk freight, which generally involves large volumes of homogenous product, typically liquid or crushed material (e.g. coal, minerals, sugar, grain), transport in mass quantities, without packaging, which tend to be relatively non-perishable and non-fragile.

and provided the following diagram showing the dominant mode of transportation for different types of goods:

Figure 3 Road and rail usage for the transportation of goods



In relation to the impact of distance, the QCA has recognised that there is a 'tipping point' in terms of distance travelled at which transport by rail becomes significantly cheaper than road.[4] Notably, the distances referred to by the QCA in respect of that 'tipping point' are shorter than the hauls Glencore utilises in the Mount Isa Rail Access Service.

One additional factor not specifically discussed in the QCA Draft Decision, is that most bulk minerals freight (including most minerals concentrates) are classified as a 'dangerous good', and handling products with that classification via rail instead of road is preferable from a cost, safety, regulatory burden and compliance perspective.

The Mount Isa Rail Access Service is utilised for transportation of a variety of goods including bulk goods (mineral concentrates, fertiliser, acid, fuel, refined metals) and cattle, general freight and passenger freight.

Given that variety of freight, the question under criterion (a) is not whether road haulage provides a constraint on QR's pricing or conduct on the Mount Isa line generally, but whether it provides a sufficient constraint in relation to the type of transportation relevant to each specific dependent market (with QR's ability to exercise market power only needing to be unconstrained without declaration in a way that impacts adversely on competition in one dependent market in order for criterion (a) to be satisfied). Accordingly, the QCA needs to analyse this issue separately for each dependent market identified.

(d) **North West Minerals Province minerals tenements market**

In its consideration of whether road transportation could provide a sufficient constraint on QR's potential future monopoly pricing for bulk minerals services without declaration, the QCA Draft Decision rightly stated:[5]

[4] QCA Draft Decision, page 38
[5] QCA Draft Decision, Part B, page 58

The QCA considers that these alleged constraints do not apply in the case of the Mount Isa Line service, as the service falls into the exception referred to by Queensland Rail – that is, the transportation of bulk commodities over long distances.

The North West Queensland minerals tenements market is located a substantial distance away from the nearest export port – over 1,000 km from Mount Isa to the Port of Townsville. The nature of the goods produced by the tenements, being high-volume bulk minerals, combined with the substantial distance to port, means that rail transport offers a substantial cost advantage to other modes of transport, such as road transport. This is because the average per kilometre cost of road freight is approximately constant with respect to distance, whereas rail transport enjoys significant economies of scale, with costs decreasing with increasing freight volumes and distances. For freight travelling greater than 600 – 1,000 km, rail transport is significantly cheaper than road. This is supported by submissions from Glencore, which stated:

For all of the bulk minerals services contracted by Glencore, rail transport is the only economic mode of transport … road haulage does not provide any competitive constraint on rail costs for bulk minerals.

The natural cost advantage of rail for transporting freight (both bulk and non-bulk) over the long distances on the Mount Isa Line means that users of the Mount Isa Line service will depend upon rail transport as the primary mode of transporting their freight, both for moving mining inputs into a tenement and for transporting minerals output out to port.

Given these underlying cost fundaments, the QCA considers that Queensland Rail does have the ability to exercise market power on the Mount Isa Line service.

As the QCA notes, that is in fact entirely consistent with QR's own acknowledgement that competition by road operators was a constraint in respect of some freight *'other than some bulk commodities over long distances'*.[6]

On that basis, it appears clear that road freight does not provide a relevant competitive constraint relative to the minerals tenements market.

Glencore also consider the QCA's analysis accurately reflects the market realities, and while there may be instances of bulk products being transported by road for short to medium distances or short term examples of usage of road for longer distance hauls while rail was not available, the vast bulk of haulage of bulk minerals occurs by rail.

Consistent with that, and as previously submitted by Glencore, for all of the bulk minerals services it contracts for transport to the Port of Townsville, rail transport is the only economic mode of transport.[7] That is unsurprising given that Glencore is transporting bulk minerals concentrates over distances that exceed the 'tipping point' at which road transportation becomes uncompetitive.

However, for completeness Glencore have set out below responses to each of the examples that QR has raised to date as potentially evidencing road providing a constraint:

Example	**This is not evidence of a constraint because…**
All bulk minerals freight is being trucked to the Port of Townsville until the Mount Isa rail re-opens following significant flood damage	Using road haulage when rail transportation is not available as a way of mitigating the financial losses caused by the outage of rail, is not an example of economic substitution.

[6] Latest QR Submission, page 33
[7] Glencore submission dated 16 July 2018, p 8.

	As discussed above, a long term switching decision to road haulage for bulk minerals is not economic and would not be caused by a SSNIP in the pricing for the Mount Isa Rail Access Service. An idea of how uneconomic road haulage is for bulk freight is provided by Incitec Pivot's announcement that the outage of the line would contribute to losses between $100-$120 million at Phosphate Hill and that it had *'attempted to partially offset the effects of the rail closure through limited road deliveries of its phosphate fertiliser product',*[8] which suggests it is also stockpiling products in the same way Mount Isa Mines is given how much more economic rail transport is relative to road transport for bulk freight on the Mount Isa line. The mere fact that extensive capital has been invested by QR in repairing the Mount Isa line (including a temporary bypass of a site where a derailment occurred) suggests that there is bulk traffic which cannot be provided by road.
Intermodal freight transported by road pending Pacific National having rolling stock available following Glencore's termination of Aurizon contract	Using road haulage, when rail transportation is not available (in this case because of a temporary lack of rolling stock) as a way of mitigating the financial losses caused by inaccessibility of rail, is not an example of economic substitution. This was an anticipated short term cost of switching between competing rail providers, which Glencore considered was justified by the longer term improvement in price and service achieved *for rail haulage* – not a long term decision to switch to road haulage.
Road haulage by CuDeco of copper concentrates	There are a number of issues with this example: • CuDeco's long term plans had been to develop a multi-user rail loading facility near Cloncurry, so that it would truck the product from the Rocklands mine to Cloncurry where it would then be railed using the Mount Isa Rail Access Service – road transport was not CuDeco's long term plan; • operations at CuDeco's Rocklands mine have been suspended since August 2018 and have been reported as recently as January 2019 as being intended to remain in suspension until the company is able to improve funding issues via a share placement and rights issue (neither of which has yet occurred).[9] There are obviously real questions about

[8] Australian Mining article: https://www.australianmining.com.au/news/phosphate-hill-to-take-potential-120m-hit-as-queensland-rail-repairs-advance/ (accessed 5 April 2019).
[9] M North, *Cudeco confirm operations will remain suspended*, The North West Star Newspaper (online) 10 January 2019 https://www.northweststar.com.au/story/5843456/cudeco-confirm-operations-will-remain-suspended/ (accessed 15 April 2019).

	the economics of these operations without using rail transportation.
Houston Kemp statement that *'several new, smaller scale mines along the Mount Isa system are opting for intermodal solutions', resulting in a higher total cost than bulk wagons making 'road a closer constraint'*[10]	Houston Kemp does not even assert that such smaller mines are utilising road. Rather that such mines are *utilising rail* – but that they are utilising higher cost rail options which would make road a 'closer constraint' (whatever that means). No evidence is provided of what the differences in costs are alleged to be. Footnote 41 which is apparently supposed to substantiate this information merely states '*this information has been provided by Queensland Rail*'. Glencore considers that this information is totally unsubstantiated and given the lack of any details cannot be relied upon by the QCA. Further, to Glencore's knowledge: • Capricorn Copper's copper concentrate production is railed to the Port of Townsville; • MMG's Dugald River's zinc concentrate production is railed to the Port of Townsville; • South 32's Cannington concentrate production is railed to the Port of Townsville; • Glencore's concentrate production is railed to the Port of Townsville; and • there are new bulk projects continuing to be developed on the assumption of utilising rail transportation, such as Centrex Metal's Ardmore Phosphate project (800,000 wet tonnes of product to be railed per annum).[11]
Some non-minerals freight such as fuel and cement utilising road	Glencore does not dispute that there are some mining inputs which it is economic to transport by road. However, that clearly involves the acquisition of a different product for a different purpose and does not change the fact that for bulk minerals, road haulage is not a competitive constraint (i.e. cost savings or synergies arising from backhaul deliveries has not made road competitive for bulk minerals).

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

Glencore strongly supports the QCA's approach to the interpretation of criterion (b) and the steps involved in determining whether criterion (b) is satisfied.[12]

[10] Houston Kemp, Does Queensland Rail's network satisfy criterion (a), page 18
[11] Centrex Metals, Ardmore Phosphate Rock Project Definitive Feasibility Study Results & Maiden Ore Reserve, 8 October 2018: http://www.centrexmetals.com.au/wp-content/uploads/2019/01/20181008-Ardmore-DFS-Results-Maiden-Ore-Reserve.pdf
[12] QCA Draft Decision, pages 8-18.

5.1 The service and facility

Consistent with the discussion in section 3 of the submission above, Glencore considers the appropriate definitions of the service is the Mount Isa Rail Access Service consisting of access to rail between Mount Isa to the Port of Townsville (and all relevant branch lines), with the facility consisting of all of the relevant rail transport infrastructure for the provision of that service.

5.2 The market

The market for the purposes of criterion (b) include the service and any other close substitute services.[13]

As discussed in section 4 above, the market is the market for the Mount Isa Rail Access Service (as road transportation is not a close substitute).

5.3 The period for assessing total foreseeable demand

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

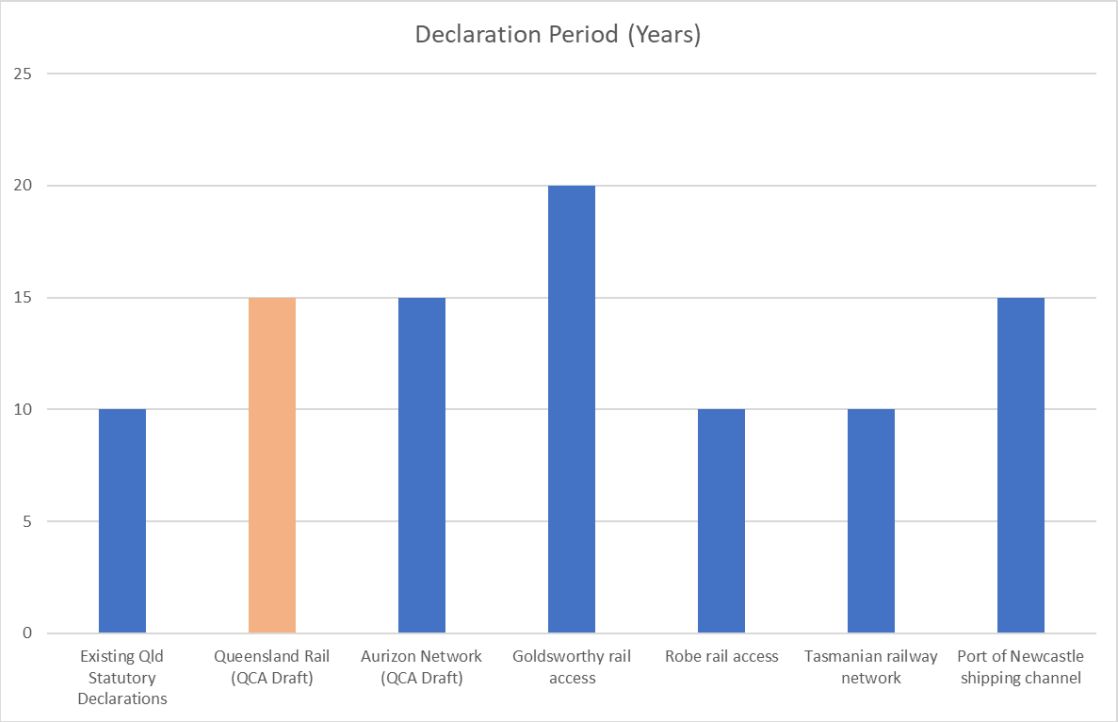
It is not clear what changing market developments and dynamics QR is actually talking about as it relates to the Mount Isa Rail Access Service – as the issues or other rail developments that QR mentions are not related to the Mount Isa line. If the QCA was to find a lesser declaration period should apply to other QR services, the longer period should still be applied to the Mount Isa Rail Access Service.

In any case, Glencore supports the QCA's 15 year declaration period, and agrees with the QCA's view that represents an appropriate balancing of the need to provide certainty to stakeholders making long term investments (in mines and above rail rolling stock) and QR's legitimate interests in having the service declared for the period in which there was certainty the access criteria were met.[14]

Despite the statements in Houston Kemp's statements (which advocate for 5 or at most 10 years), the weight of regulatory precedent in terms of Queensland and national access regime declarations suggest a declaration period like that proposed by the QCA is appropriate as show in Figure 3 below:

[13] Section 71 QCA Act
[14] QCA Draft Decision, Part B, page 20

Figure 3 – Declaration period precedents



5.4 Foreseeable demand at least cost

The foreseeable demand to be measured is foreseeable demand for the service and substitute service.

As discussed in section 4, there is no substitute service for the Mount Isa Rail Access Service, such that the comparison which criterion (b) requires is whether the foreseeable demand can be met at least cost by either:

(a) the Mount Isa rail line; or

(b) the Mount Isa rail line and an additional rail line.

The QR March 2019 Submission does not provide any revised estimate of foreseeable demand.

However, on any view it is clear to Glencore that foreseeable demand can be met at least cost by the relevant parts of QR's rail network, as the foreseeable demand is less than the existing capacity of the Mount Isa rail line.

In particular, Glencore notes that:

(a) QR has emphasised the extent to which the Mount Isa line is currently under-utilised; and

(b) the 2012 Master Isa Rail Infrastructure Master Plan suggested the 'Base Case' demand of 8 mtpa could be accommodated by the existing infrastructure with limited capital investment (in addition to detailing numerous expansions options if demand was expanded), and tonnages are below that level; and

(c) the costs of developing an entirely new rail line (particularly in light of the long distances involved) would be so excessive, that even without detailed cost modelling it is clear that any reasonable demand profile will be able to be met at least cost by the Mount Isa rail line.

5.5 Conclusion

Accordingly, Glencore considers it is clear that the Mount Isa system is able to meet total foreseeable demand throughout the proposed 15 year declaration period at the least cost compared to any two or more facilities, such that criterion (b) is satisfied.

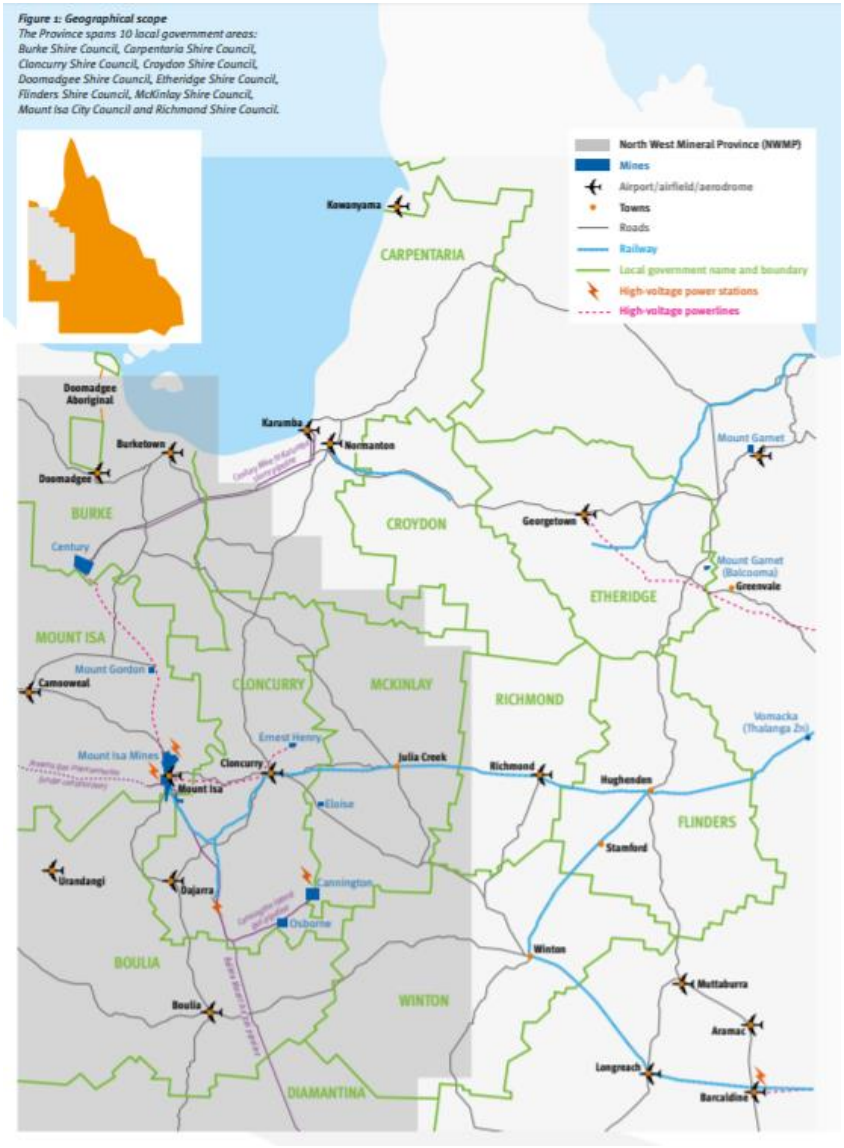
6 Criterion (a) – promote a material increase in competition

6.1 Dependent markets definition

QR has not contested the existence of the North West Queensland minerals tenements market in any of its submission.

However, for completeness Glencore reconfirms that it considers the QCA is correct there is clearly a separate market for North West Queensland minerals tenements, being tenements for non-coal minerals in what is commonly referred to as the North West Queensland minerals province (shown in the diagram from the State's Strategic Blueprint for Queensland North West Minerals Province below).[15]

Figure 4 – North West Queensland Minerals Province



[15]

Glencore considers that minerals tenements in that region are in a separate market to minerals tenements elsewhere given:

(a) the high quality of the mineral resources in the North West Minerals province (which are of larger scale);

(b) the Queensland government's competitive exploration tender releases in the region (which, for example, included a competitive tender for 4 tenements totalling 1,100 km^2 in the region in 2018),[16] produces competition and a market that is distinct from other minerals regions where such releases do not occur;

(c) the differences in infrastructure costs relative to any other minerals regions elsewhere (which will mean there is a difference in value and returns relative to other mineral provinces for tenements in this region); and

(d) the regulatory and social licence issues being highly favourable in relation to developments in the North West Queensland Minerals province relative to developments in other regions (as demonstrated by the Queensland government having particular strategies and policies in favour of mineral development in the region).

While Glencore considers there is a promotion of competition in other dependent markets as well, including the relevant rail haulage market, these submissions focus on the impact in the North West Queensland tenements market.

6.2 The 'promote a material increase in competition' threshold

(a) Appropriate interpretation of material

The QR March 2019 Submission places a heavily reliance on a flawed interpretation of what is required to show that declaration would promote a material increase in competition so as to satisfy criterion (a).

It is beyond any doubt that material in this context only means 'not trivial' or 'not marginal'.

The legislative intent as to the level of the materiality threshold was clearly set out in the explanatory notes to the bill which introduced the 'material increase' wording in the QCA Act:[17]

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

To similar effect was the explanatory memorandum to the Commonwealth bill which introduced the identical amendment to criterion (a) into the national access regime.[18]

Subsequent consideration by the Australian Competition Tribunal has, unsurprisingly, adopted that clear legislative intent in interpreting criterion (a), with the Tribunal stating *'there are little, if any, practical differences between the descriptions 'not trivial', 'real' and 'material' in this context.*[19]

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

[16] Minister for Natural Resources, Mines and Energy Hon Anthony Lynham MP, *Exploration feeds future of North West resource sector*, 28 March 2018: http://statements.qld.gov.au/Statement/2018/3/28/exploration-feeds-future-of-north-west--resource-sector
[17] Explanatory notes *Motor Accident Insurance and Other Legislation Amendment Bill 2010* (Qld)
[18] Explanatory memorandum *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth)
[19] Application Services Sydney Pty Limited [2005] ACompT 7 at [134]

(b) **Promotion of competition**

Glencore also considers that the promotion of a material increase in competition was correctly concluded by the QCA to involve 'an *improvement in the opportunities and environment for competition* such that competitive outcomes are materially more likely to occur'.[20]

The QCA is also correct in its analysis that:[21]

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

Again, that is consistent with numerous statements from the leading decisions of the Australian Competition Tribunal.[22]

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

That is demonstrated by the National Competition Council's (***NCC***), as the only other regulator that has been required to consider the new criteria since their amendment, adopting the same interpretation to the QCA, as expressed in the NCC's Guide to Declaration (which has been updated since the criterion (a) amendments),[23] and in its Preliminary Statement of Reasons regarding the Newcastle shipping channel service revocation application.[24]

6.3 Ability and incentive to exercise market power

Glencore agrees with the QCA's analysis that consideration of criterion (a) requires an analysis of whether QR has market power and whether it has the ability or incentive to exercise such market power.

It is absolutely clear from the QCA Draft Decision that QR does have market power in respect of the Mount Isa Rail Access Service. QR is a monopoly supplier of that service and is clearly not constrained given that there are no viable substitutable services (including for the transport of bulk commodities from Mount Isa to the Port of Townsville).

Consequently, the critical question is whether QR has the ability or incentive to exercise such market power with and without declaration. QR's assertions that it does not have such ability or incentive rest upon constraints that QR alleges will apply to QR's conduct in a future without declaration as a result of:

(a) a lack of vertical integration;

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

(c) QR's position as a statutory authority,

(d) competitiveness of road haulage;

[20] QCA Draft Decision, page 21.
[21] QCA Draft Decision, Part B, page 28
[22] *Services Sydney Pty Limited* [2005] A Comp T 7 at [131] and [135]; *Re Duke Eastern Gas Pipeline* ATPR at 43,061; *Re Sydney International Airport* ATPR at 40,775
[23] National Competition Council, Declaration of Services – A Guide to Declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth), April 2018, page 32
[24] National Competition Council, Statement of Preliminary Views – Revocation of the declaration of the shipping channel service at the Port of Newcastle, 19 December 2018

(e) the threat of declaration; and

(f) QR's proposed Deed Poll and Access Framework,

each of which are considered in turn below.

6.4 Non-vertically integrated monopolists can engage in monopoly pricing

To state the obvious, QR not being vertically integrated does not mean criterion (a) cannot be satisfied. As the NCC Guide to Declaration expressly states:

(a) criterion (a) may be satisfied where the service provider is not vertically integrated into a dependent market(s);[25] and

(b) where a service provider charges monopoly prices for the provision of the service, those monopoly prices may adversely affect competition in a dependent market by suppressing demand or restricting entry or participation in a dependent market.[26]

As the QCA recognises *'As a business, Queensland Rail has an incentive to maximise profits'*.[27]

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

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

Glencore accepts that QR currently has some surplus capacity on the Mount Isa Line.

However, it does not automatically follow from there being surplus capacity in April 2019 that QR has an incentive to set prices in a way that maximises volumes across the 15 year declaration period being considered.

Frankly, if QR actually had such incentives it would have sought to reduce prices to retain Glencore's magnetite on the railway, when it became uneconomic with falling iron ore prices – but Glencore's experience is that QR was not willing to make any concessions to retain that volume.

In considering the incentives existing levels of capacity utilisation provides, it is worth considering:

(a) existing levels of utilisation do not provide a complete picture of incentives that QR might have due to surplus capacity because:

  (i) QR has not provided any evidence about access applications it currently has or discussions it has recently had in regarding future access to the Mount Isa line;

  (ii) capacity on the Mount Isa line is, by the very nature of the large scale of bulk minerals projects that principally utilise it, relatively lumpy – such that it will only take one or two projects to take up much of the surplus capacity;

  (iii) the question is what QR's incentives will be during the declaration period when capacity is anticipated to be more heavily utilised, including through a ramp up of volumes from recently developed projects (such as Capricorn Copper) and development of new projects (such as the Ardmore phosphate project);

(b) that even at the existing levels of utilisation, QR is making material returns, making over $75 million in revenue and $16 million in earnings before interest tax from the Mount Isa line during 2017/18, and being the only system in which QR is not being subsidised by

[25] NCC, Guide to Declaration, page 30.
[26] NCC, Guide to Declaration, page 34.
[27] QCA Draft Decision. Part B, page 46

transport services contract payments from the State,[28] suggesting that monopoly pricing above those levels is likely to be profitable; and

(c) the existing pricing is not set for QR by reference tariffs under the existing undertaking, and users would be anticipated to only seek arbitration of access disputes against higher prices, such that if QR was truly incentivised to grow demand, it would be anticipated QR would already have been decreasing pricing in order to attract new development. However there is no evidence of that occurring.

In relation to the last point, Glencore's strong impression is that QR has the (misconceived) view that its pricing does not impact on the development of projects – such that it does not seek to set pricing in a way that incentivises or facilitates additional investment or demand.

Consequently, QR's submissions amount to mere speculation that it will not be incentivised to engage in monopoly pricing, and Glencore urges great caution in determining the likely outcomes with and without declaration in dependent markets on the basis of such speculation, when all past conduct of QR contradicts the very theoretical arguments QR and Houston Kemp raise.

In any case, QR's initial incentives, do not address the two-period economic hold-up problem which the QCA has identified (as discussed in detail below).

6.6 Two-period economic hold-up problem

(a) The nature of the two period economic hold-up problem

The critical passages from the QCA Draft Decision as this analysis is applied to the Mount Isa Rail Access Service are set out below:[29]

The two-period hold up problem

The QCA considers that there currently is spare capacity on the Mount Isa Line, and the availability of spare capacity on this line is likely to continue into the future. Given this, the QCA considers in a future without declaration, Queensland Rail is likely to have an incentive to offer access to a potential entrant miner (or a train operator hauling product under an agreement with that miner) in order to promote utilisation of its below-rail infrastructure and increase its revenues.

Therefore, in a future without declaration, the QCA is concerned that existing tenement holders may begin to delay undertaking efficient actions in their existing tenements in anticipation of the possibility of such investments being held-up. ***Thus, in a future without declaration the QCA is concerned that all market participants in the North West Queensland minerals tenements market will face uncertainties relating to material price and non-price terms for access to below-rail services on the Mount Isa Line, particularly at the time of contract renewal, and that these uncertainties will deter efficient entry and efficient participation across the North West Queensland minerals tenements market.***

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

However, the key point is that Houston Kemp's arguments might be more credible in relation to an infrastructure service acquired by a large number of users each of which typically has multiple projects, such that monopoly pricing in relation to one project will impact on such users future investment and contracting decisions in other projects as well (i.e. for a service like the rail access service provided by Aurizon Network on the central Queensland coal region network). However, that analysis is not suited to the characteristics of the Mount Isa Rail Access Service.

[28] QR Slides from QCA Stakeholder Forum, page
[29] QCA Draft Decision, page 58-60.

QR / Houston Kemp argument	This does not address the two-period economic hold-up problem because…
QR will have the incentives and ability to resolve the hold-up problem by contracting arrangements	• 'Contractual solutions' to the economic hold-up problem are not workable, and do not reflect Glencore's experience in negotiating access with QR; • Rail access under a life of mine contract with long term take or pay components is not a viable option for mineral producers in an attempt to prevent the hold-up problem. Long term contracts impose significant risk on the producer assuming a substantial 'take or pay tail' of liability trailing after any decision to cease production; • Glencore has never been offered a rail access arrangement by QR that is not 100% take or pay based (including when seeking to develop new more marginal business like its magnetite production), and is not aware of QR ever doing so on the Mount Isa line, despite Glencore requests in access negotiations. Whether it has done so elsewhere is not relevant when it refuses to do so on the Mount Isa line; • QR has no incentives to provide renewal rights (other than at significant cost to the user) as by doing so it quarantines future capacity. Glencore has previously requested renewal rights in access negotiations and QR has rejected those requests as inconsistent with the queueing framework (which remains part of its Access Framework); • QR has offered a *5 year* access framework in the face of 10-30 year investment decisions, such that it appears to be expressly intending to give itself the freedom to engage in unconstrained pricing beyond the initial 5 year term; and • While it is accepted that QR also has some sunk investments, the negotiating position remains asymmetric. Most users of QR's Mount Isa Rail Access Service are single-project users. As such, a failure to reach an agreement with QR in respect of a single user results in those users exiting the market and their projects being closed. By contrast, as a below-rail service provider across a vast part of the State, QR provides services to a number of other users (whether they are single-project users or not) such that QR has an ability to offset any losses by making agreements with any other number of those other users. In other words it does not have the incentives to resolve this problem.
The multiple rounds of negotiations QR has to undertake with Users	• This argument does not properly take into account the varying lives of mines and projects in the North West Queensland region; • Existing projects already have sunk costs and are exposed to this problem at the next contract round negotiation post the existing declaration ceasing (which for some of the existing projects will be the last given their remaining mine life such that QR has incentives to monopoly price in that negotiation); and

	• In addition, many of the new generation of mining projects – Rocklands (CuDeco), Capricorn Copper, Ardmore Phosphate (Centrex Metals) – have shorter mine lives such that they are only likely to have 2 rounds of negotiations. As those proponents don't have additional projects, QR has no incentives to not engage in monopoly pricing against them in the 2nd period due to the impact on future negotiations.
Existing arrangements provide limited protection against the hold-up problem (as QR is currently allowed to increase 2nd round pricing to the ceiling limit)	• This is completely misconceived and assumes the revenue ceiling limit is the only pricing protection declaration provides in the 2nd round of negotiations. • However, the main pricing protection that users of QR's services have is the right to refer access disputes (including as to pricing) to the QCA for an arbitrated access determination. QR knows that is the case and negotiations proceed on that basis. Glencore confirms that it takes the likely QCA arbitrated outcome into account when negotiating access prices with QR and has raised the likely QCA outcome with QR as part of commercial negotiations. The right to QCA arbitration is a clear and effective constraint that prevents the hold-up problem, but will be removed without declaration. Glencore notes that the NCC accepted in its Preliminary Statement of Reasons in the Newcastle shipping channel revocation consideration that a right to ACCC arbitration of this nature was a material constraint. • Glencore also notes that users of the Mount Isa Rail Access Service can raise the potential for a Mount Isa Rail Access Service reference tariff in QR access undertaking processes, which they would be anticipated to begin doing if QR was to consistently seek to engage in monopoly pricing while declaration exists.

6.7 Ability to pay or user's countervailing powers do not provide a constraint.

QR and the Houston Kemp report suggest it follows from the fact that access prices are below the revenue ceiling limit that there are non-regulatory binding constraints, such as competition from road, end consumer's ability to pay and countervailing power.

However that analysis is misconceived for numerous reasons including:

(a) seeking to infer constraints from previous access charges received does not demonstrate QR's argument at all given that it shows the figures over a period *in which declaration existed*. This obviously demonstrates QR's ability and incentive to exercise its market power under declaration (when the right to refer access disputes to the QCA for arbitration exists as a clear constraint on QR's pricing), and not without declaration;

(b) QR charging below the ceiling price does not reflect there being pricing constraints – the ceiling price reflects stand-alone costs of providing access (as the maximum possible price that might theoretically be efficient if there was a single customer), not the price that would apply in a multi-user system in a workably competitive market where the non-regulatory constraints QR alleges exist. If anything the strong financials for the Mount Isa Rail Access Services show the strength of QR's position;

(c) as discussed in detail in section 4, road transportation does not provide a constraint on the pricing of QR bulk minerals transportation. The fact that there might be some mining

inputs for which transportation by road provides a pricing constraint, does not change the position that for bulk mineral producers, a significant proportion of the transportation needs of minerals projects are met by rail;

(d) given the inability of users to switch to an alternative service, users have no countervailing power in negotiations with QR; and

(e) no evidence is given that a user's ability to pay provides a constraint as QR alleges.

6.8 QR's statutory obligations and position as statutory authority does not provide a material constraint

Glencore considers that QR's statutory obligations and position as a statutory authority do not provide a constraint on their incentive or ability to engage in monopoly pricing in the absence of declaration.

In fact, as one of only two systems where access revenues are greater than the costs incurred in providing access (and the most profitable of those two), if anything it appears that without declaration QR will have incentives to increase the profits it derives from the Mount Isa system to the maximum extent possible so as to reduce the overall government subsidy required for its other operations.

If anything, QR's repeated submissions about not being able to charge the ceiling price, suggest it is clear that QR's nature is not impacting on its intentions to maximise its profit from the Mount Isa Rail Access service.

Glencore understands that the only internal policies or principles QR has pointed to are not relevant where road transportation does not provide a market based price (as is the case for bulk minerals transport), and are not legally binding in any case, and QR has pointed to no actual statutory obligations that impact on its behaviour in respect of the Mount Isa Rail Access Service.

Accordingly, there is no evidence that QR's position, State ownership or statutory obligations provides it with incentives to maximise coal services.

6.9 Road haulage is not a competitive constraint

As discussed in section 4 of this submission, Glencore considers that QR's argument that it is constrained by road haulage in the North West Queensland region vastly overstates the use of road haulage in that region.

Accordingly, the QCA's reasoning in the QCA Draft Decision regarding the lack of substitutability of road transport for the Mount Isa Rail Access Service should not be affected and continues to support that QR is not constrained in its provision of below-rail services for the transport of bulk commodities from the North West Queensland region to the Port of Townsville.

6.10 Threat of declaration or regulation does not provide a constraint

Glencore strongly supports the QCA's conclusion that:[30]

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

The threat of re-declaration is not a real one once declaration has been initially removed. In the hypothetical scenario where declaration has been removed, the QCA would have already determined during the review that despite QR having no effective constraints, the service should

[30] QCA Draft Decision, Part B, page 53.

not be declared applying the very same declaration criteria which would apply in any future application for declaration.

The QR March 2019 Submission also notes the potential application of price monitoring under Part 3 of the QCA Act. However, that is merely a price monitoring regime under which the QCA only has powers to make recommendations. It does not provide a constraint on QR's pricing. This is very similar to the IPART price monitoring regime about which the NCC stated in the Newcastle shipping channel revocation draft decision that while 'these requirements may provide some very limited constraint of PNO's pricing practices by promoting transparency' they were *'not a substitute for the type of access regulation contemplated by the National Access Regime'* and were not a *'direct regulatory constraint that acts to set or limit the prices that PNO may charge'*.[31] The same reasoning applies here.

Consequently there is no basis on which to conclude that threat of declaration or regulation would provide a constraint without declaration.

6.11 The Access Framework

Ultimately QR's arguments in respect of criterion (a) therefore solely rest on the unilaterally proposed Access Framework (and related Deed Poll) being considered to impose an effective constraint on QR's ability to exercise market power in the absence of declaration.

For the reasons set out below, Glencore considers it is absolutely clear that is not correct:

Issue with Access Framework	**Detailed explanation**
Deed Poll is not legally effective	• It was held in the New South Wales Court of Appeal decision in *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*[32] that to be effective a Deed Poll must first be accepted or relied upon by the intended beneficiaries. • There has been no such acceptance or reliance in this case (and it is clearly not in access seekers' interests to accept the Deed Poll given its disadvantageous terms and QR's submissions on the potential consequences for the existing declaration). • Accordingly, the Deed Poll actually imposes no legal constraints on DBCTM.
Scope of beneficiaries / covenantees	• The covenantees in clause 2.1 only extend to 'Confirmed Access Seekers' (who have signed an access application or renewal access application). • Accordingly, potential future users who have not progressed their project to that point will have no rights under the Deed Poll (i.e. at the time of making an investment in tenements, potential purchasers of such tenements have no protections).
Extremely limited term	• The Deed Poll has a term of 5 years (see clause 5.1) with no obligation to renew or any certainty that any renewal would occur on the same terms.

[31] NCC Statement, pages 28-29.
[32] (1986) NSWLR 642 at 659E

	• It clearly does not provide a constraint during the vast majority of the proposed 15 year declaration period or the likely useful life of investments stakeholders are making in mining projects or above rail rolling stock. • Due to the timing for obtaining regulatory approvals and undertaking development, by the time that a mineral exploration or development project acquired during the term of the Deed Poll is in production it is likely the Deed Poll's terms will have expired.
Deed Poll does not apply to successors, assigns or subsidiaries	• The Deed Poll does not apply to QR's "successors, assigns or subsidiaries" (as the existing declaration under section 250 of the QCA Act does), leaving future users exposed to the potential for a restructure or privatisation of the Mount Isa line (which Glencore notes was proposed by a previous State government and which is clearly permitted by the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld)). • Legally the Deed Poll can only impose obligations on the entity providing it. It cannot prevent the government from suddenly removing protections by a transfer of the Mount Isa line to a different legal entity.
Ease of QR making Access Framework amendments	• While the Access Framework now requires consultation, QR's obligations are only to 'review and consider' any comments from stakeholders and QR *'is not bound to implement any comments'* received during that process (clause 6.4.3). • The Deed Poll provides QR with the right to amend the Access Framework from time to time, so long as the amendment(s) are not inconsistent with the Framework Objectives and appropriate having regard to each of the mandatory considerations set out in clause 6.3. • 'Not inconsistent' is an extremely low threshold and a myriad of amendments could be justified as being 'not inconsistent' with the Framework Objective that is particularly the case given the broad nature of the objective • In addition, given that low threshold that 'not inconsistent' with the Framework Objective provides and the tension between the various mandatory considerations, it will be nearly impossible except in the most extreme of examples to demonstrate to a court that QR's proposed amendments do not comply with the requirements of the Deed Poll. • As the QCA Draft Decision correctly notes: [33] *The QCA considers that it is not clear that the recourse to court proceedings will provide an effective means of reviewing Queensland Rail's amendments. Any access seeker or user who sought to challenge any amendments would have to undertake expensive and potentially protracted court proceedings, with an uncertain outcome … Therefore, the QCA considers that even if the proposed access framework were executed,*

[33] QCA Draft Decision, Part B, page 31.

	there would be considerable uncertainties as to its terms over the period of its operations. • Given that QR itself decides whether or not an amendment is appropriate in accordance with the Framework Objective and mandatory considerations, it is inherently biased such that users would have limited ability to obtain a fair or balanced outcome (whereas by contrast the QCA's judgment is subject to judicial review processes in the event of bias). • A user's only theoretical recourse if they raise issues with amendments that are not accepted by QR is to commence legal proceedings – which they have to do within 120 days of the amendments being finalised (clause 6.5). • The futility and unlikelihood of challenge by an adversely affected user becomes clear when it is considered that even if a user was to successfully challenge an amendment, its likely remedy is mere declaratory relief that the amendment would be invalid. There is nothing stopping QR continually seeking to make changes in its favour and then forcing the user to go through the same expensive and protracted process again if they want to prevent the amendment. In other words, if QR is minded to make amendments it will be excessively expensive for a user to try to prevent repeated attempts to make a series of substantially similar amendments. • When all of that is considered it becomes clear that no potential investor in tenements in the North West Queensland minerals region would rely on the terms of the access framework remaining the same.
Differences between private and QCA arbitration	• There will be real risks and uncertainties for future users in having private arbitration as the 'back stop' to failed negotiations. • That is particularly the case for the Mount Isa system, where based on previous negotiations it is apparent that there is no established asset base – such that setting a building blocks based reference tariff would be extremely complicated and require a thorough assessment of the relevant asset base in addition to the weighted average cost of capital parameters. • There is a very significant difference in the level of certainty that an access seeker will have about the outcomes that will occur through private arbitrations. • In particular, private arbitrations: o are likely to be significantly more protracted and costly than more informal QCA processes; o involve significantly more uncertainty as the decision is being made by a single person who, even assuming that the person did have experience in the field of economic regulation, could not propose to make such deeply informed and holistic decisions as what would be produced by the QCA, with more than 20 years of experience in regulating these assets and a machinery of highly experienced economists and analysts;

	○ are likely to involve an arbitrator only having a one-off role in the arbitration, such that they will not have the benefit of considering these issues in multiple contexts and over multiple periods in the way the QCA will. • The costs, time period, and uncertainty involved in such private arbitration will make access seekers far less likely to bring access disputes and therefore leaves future access seekers more exposed to exercise of monopoly power by QR in setting access terms.
Extreme difficulties in enforcement	• It is extremely difficult for users to enforce the Deed Poll or commence disputes. The only avenue for achieving compliance is costly litigation. • For many potential breaches, the time delay and cost involved in bringing such proceedings will mean that users may be better off just accepting breaches of the Deed Poll and Access Framework – making the protections it provides illusory. • The absence of an experienced, well-resourced and independent economic regulator to monitor compliance (with information gathering powers to do so), and with enforcement powers under the QCA Act, makes a substantial difference to the likelihood of compliance and effectiveness of enforcement with and without declaration. • The Deed Poll also contains substantial limitations on a user's ability to bring disputes including: ○ the 120 day time bars on most breaches (clause 9) which run from when the breach occurred – not when the user became aware of (which obviously means that breaches that are not transparent are unlikely to ever be actionable); ○ limits on remedies (clause 7); and ○ QR's ability to amend the Access Framework means that any victory in a dispute is unlikely to permanently resolve the issue in the user's favour in any case. • The challenges for users in enforcement results in QR having very little incentive to comply with the Access Framework in the absence of declaration.
Irrelevance of certification principles	• QR has asserted that the Access Framework must be acceptable (and criterion (a) not satisfied) given that QR asserts it meets the principles in the Competition Principles Agreement for an effective access regime. • Irrespective of whether that is true, it is clear that the QCA's role under the declaration review is to assess whether it is satisfied that the access criteria are met.

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

The clear legislative intent of Part 5 of the QCA Act is that such arrangements should not be taken into account by the QCA in assessing criterion (a) given:

(a) there was no suggestion in the Productivity Commission inquiry into the national access regime which recommended the current version of criterion (a) (or the Federal government's response) that such an approach (which effectively allows contracting out of the access regime) was legitimate or contemplated as a possibility;

(b) it is clear that the intention is not to consider the detailed terms and conditions which would apply with declaration, which makes it highly anomalous to rely on the detailed terms and conditions QR proposed would apply without declaration as a basis for determining criterion (a) is not satisfied;

(c) if the Deed Poll/Access Framework is required to be considered then it would create the absurd position that QR would be permitted to continue to make revocation applications slightly amending the terms of the Deed Poll Access Framework until they can convince the Minister that the criteria are no longer satisfied; and

(d) requiring the QCA's consideration of the Deed Poll/Access Framework places the QCA in the position of providing a de-facto approval to the terms of the Access Framework, when the QCA Act clearly intends that if non-declared service access terms are to be set, that is to occur under the voluntary access undertaking process.

Consequently it is clear that criterion (a) should not be given an interpretation that allows infrastructure service providers to contrive an artificial way out of access regulation as QR is currently attempting to do.

6.12 The future with declaration – the constraints declaration imposes

By contrast, Glencore strongly supports the QCA's view that a third party access regime under Part 5 of the QCA Act would, in a future with declaration, provide a credible constraint on QR's use of market power.[34]

While there is no tariff for Mount Isa Rail Access Service, that does not mean that declaration provides users of that service with no pricing protection (as QR and Houston Kemp appear to assert).

To the contrary:

(a) access seekers have a right to have the QCA arbitrate access disputes (including as to pricing); and

(b) at each access undertaking renewal, users of the Mount Isa Rail Access have the potential to seek a reference tariff. Although Glencore has never sought a reference tariff, it has considered doing so in the past and strongly considers that the mere presence of that option provides a constraint on QR's behaviour.

The right to have the QCA arbitrate access dispute means that users have certainty that they have a right to obtain a reasonable and appropriate price where negotiations fail.

For Glencore this is not a hypothetical protection. As discussed earlier in this submission, Glencore's experience is that that directly impacts on the pricing outcomes of access negotiations. It has also previously sought access to information from QR under section 101(2) of the QCA Act, with a view of seeking to understand the differences between the way in which QR has calculated a proposed access price and the manner in which a QCA arbitration would be likely to determine the access price.

[34] QCA Draft Decision, Part B, page 33.

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

6.13 Conclusion

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

Glencore firmly supports the QCA's conclusion that access on reasonable terms and conditions as a result of declaration would materially promote competition in the North West Queensland minerals tenements market (and most likely the Mount Isa region rail haulage market) such that criterion (a) is satisfied in respect of the Mount Isa Rail Access service.

7 Criterion (d) – promote the public interest

7.1 Support for QCA's findings

QR's arguments in respect of criterion (d) are nearly entirely reliant on their arguments in respect of criterion (a).

Glencore agrees with the QCA's reasoning in respect of criterion (d) that:[35]

the QCA considers that declaration would promote the long-term certainty of access (including assurance of access on reasonable terms and conditions). Such certainty would more likely promote users of the Mount Isa Line to make investments in the Line, given that users can have confidence that they will reap the benefits of their current investment in the future.

The long-term certainty of access (including assurance of access on reasonable terms and conditions) guaranteed under declaration is especially important for the promotion of investment in below-rail facilities, as such investments usually involve large sunk costs, long construction times (e.g. two or more years) and coordinated action between the railway manager and all users.

On balance, the QCA considers that declaring the Mount Isa Line service would have a net beneficial impact on investment in the Mount Isa Line.

…

the QCA is satisfied that the certainty of access terms in a future with declaration is likely to promote additional investment effects in dependent markets, compared to an environment where there is no declaration.

…

The QCA considers that declaring the Mount Isa Line service would have a net benefit effect on investment in facilities and dependent markets in the mining sector in North West Queensland, and that such investments would lead to beneficial effects in promoting employment and development of the regional economy … the QCA is satisfied that declaration is likely to provide long-term certainty of access, and access on reasonable terms and conditions, and that this environment is likely to promote additional employment and regional development spending effects compared to an environment where there is no declaration.

…

The QCA considers that declaration of the Mount Isa Line service:

[35] QCA Draft Decision, Part B, pages 104-107.

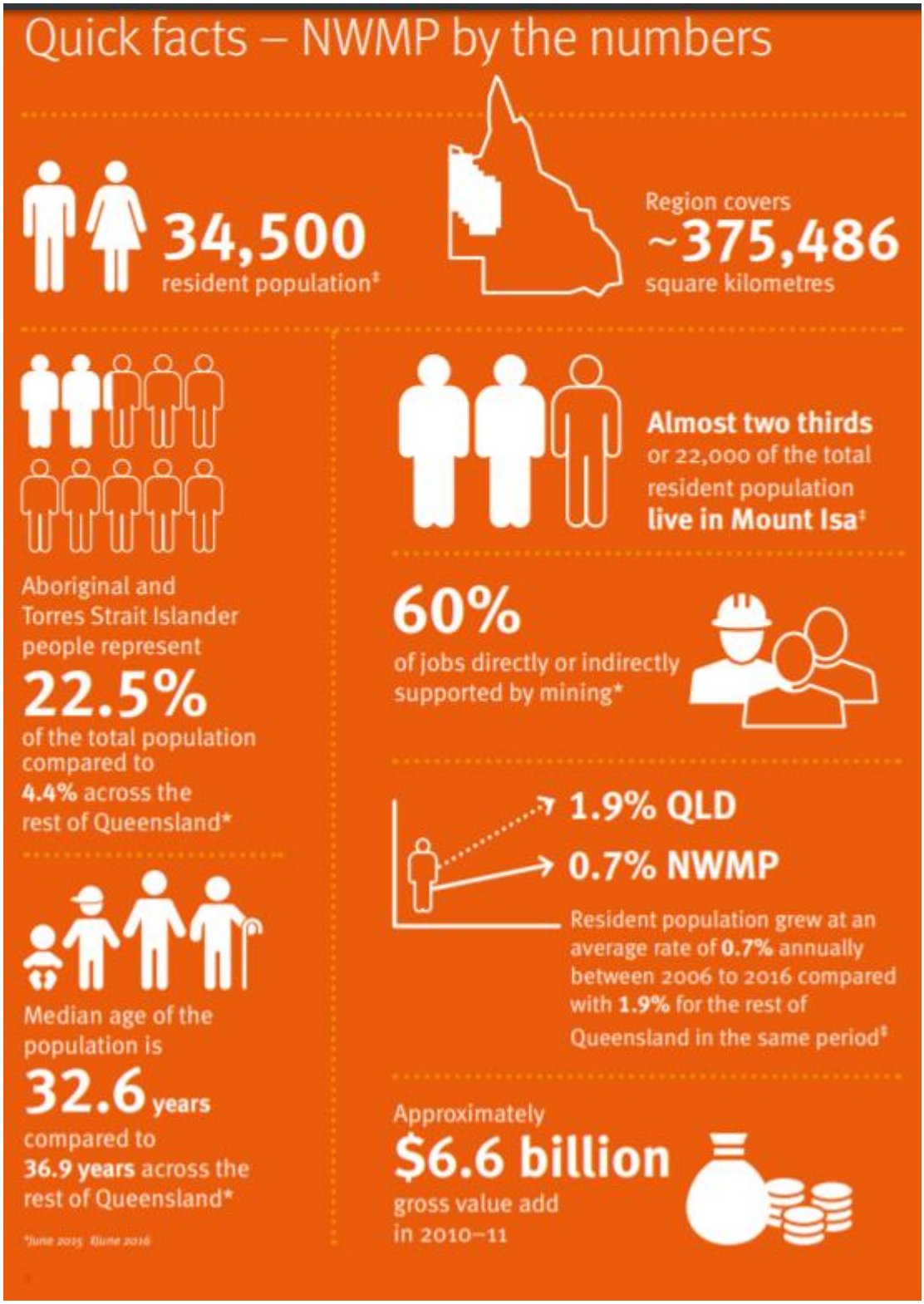
- *would have a net beneficial effect on investment in facilities and markets that depend on access to the service*
- *would mean that Queensland Rail incurred administrating and compliance and other costs, however, these costs are not considered excessive relative to those that may be incurred in the absence of declaration*
- *would have a net beneficial effect for employment and regional development in the North West Minerals Province region, as well as the various regional communities served by the Mount Isa Line service.*

Having weighed all of the costs and benefits, the QCA considers that there is a net public benefit.

Glencore refers to its previous submissions in this regard, which address the effect of declaration on mining investment in detail and provides some further commentary below.

In assessing criterion (d), it is also worth understanding the magnitude of the public benefits arising from the North West Minerals Province, including the over $6 billion in value added to the State's economy through minerals development in that region. The following comes from the State's own North West Minerals Province Strategic Blueprint:[36]

[36] Queensland Government, *A Strategic Blueprint for Queensland's North West Minerals Province*, page 10.



The balance of the below submissions focus on responding to the arguments raised by QR in the March 2019 Submission.

Despite QR's submissions, Glencore does not dispute that the 'overall gains' required by criterion (d) need to be shown to arise from declaration, not just access. However, Glencore considers the QCA's reasoning is very clear in that it considered the likely impact on public benefit factors with and without declaration.

However, the QR March 2019 Submission does not take into account that, even if QR will provide access without declaration, it will not do so on reasonable terms and conditions as its pricing (in particular – but also its non-pricing terms) will effectively be unconstrained – and it is that potential for monopoly pricing and other monopolistic behaviour which impacts on the incentives to make investments in the minerals tenements market and a variety of other public interest factors, including the flow-on impacts the QCA has identified.

7.2 Constraints and incentives

As discussed in detail in respect of criterion (a), QR has an incentive to maximise profits, but does not face material constraints of the nature asserted in the QR March 2019 Submission.

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

As addressed in detail in the submissions above (and Glencore's earlier submissions), QR will not have constraints that prevent them from engaging in monopoly pricing in the absence of declaration.

7.3 Factors impacting on investment decisions

Glencore notes the QCA's view that investment in mines (and the subsequent effects to regional development and employment) would still be likely to occur in the future with or without declaration such that the ongoing declaration of the Mount Isa Rail Access Service would only result in *additional investment*.[37] Whilst Glencore accepts that a public benefit relevant to the assessment of criterion (d) is produced in either case, Glencore considers that this view does not fully appreciate the significant levels of risk inherent in logistics cost and how this would impact any investment in mining with or without declaration.

As an entity that has actually considered and made investments in the North West Queensland minerals province, Glencore implores the QCA to appreciate that declaration is a material driver of investment in the mining industry. This is particularly the case when considering the:

(a) nature of the products produced in the North West Queensland minerals province, being bulk commodities;

(b) cost of logistics for a mining operation as a key investment decision and as a significant portion of costs once a mine is operational; and

(c) very significant distance between the North West Queensland minerals province and the point of export at the Port of Townsville.

In the absence of declaration, it would be an impossible expectation for a North West Queensland miner (existing or prospective) to take on the enormous levels of risk in:

(d) exploring and developing a new tenement (which may or may not be profitable depending on the outcome of those activities) at such a drastic distance from the point of export; and

(e) negotiating the terms of access to that point of export at a point in the future with no certainty as to whether the outcome of that negotiation will produce economically or commercially feasible terms.

The same logic clearly applies for producing mines when it comes to considering either new investments or expansions of existing projects.

[37] QCA Draft Decision, Part B, page 104-105 and 106.

Glencore also notes QR's comments that the existence of negotiated access agreements on the Mount Isa system under the existing declaration indicate that the same outcome would be possible in the absence of declaration. This could not be further from the truth.

As discussed above in respect of criterion (a), just having the availability of the protections under the QCA Act and the QCA as regulator are themselves substantial constraints to QR's behaviour in negotiating terms of access is the existing declared environment.

Although Glencore has not previously sought to rely on those protections (for example, through requesting a reference tariff or requiring arbitration under the QCA Act) that simply shows that those protections have had the constraining effect that they are designed to have.

Consequently, Glencore continues to consider that in a future with declaration, all investment in dependent markets would be promoted, not only additional investment.

7.4 The Access Framework does not provide reasonable terms and conditions

The QR March 2019 Submission appears to assert that the Access Framework means that some public benefits will be produced without declaration as QR will provide access, and it is 'fit for purpose' or 'cost-effective'.

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

(a) legal ineffectiveness;

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

(c) the very limited 5 year term;

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

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

(f) the difficulties of enforcement and disputes (and therefore achieving compliance); and

(g) the clear legislative intention

The flaws in the Deed Poll means that even if it is considered as part of the likely future without declaration, it does not constrain QR's conduct.

7.5 Administrative and compliance costs

Glencore continues to consider that it is QR's approach to the regulatory process that causes an increase to its costs of administration and compliance (despite those costs still not being explicitly described, even after the QCA's clear invitation to do so in the QCA Draft Decision).

That only serves to demonstrate the clear benefits declaration is delivering, particularly given QR's ambit pricing claims during the undertaking process. To the extent that QR wishes to decrease regulatory and compliance costs, it always has a right to provide draft amending access undertakings to the QCA seeking to remove or amend provisions that it considers imposes costs that are not justified by public benefit outcomes. The fact that QR has not done that clearly raises questions about their assertions of undue regulatory burdens that are imposed as a result of declaration.

The point also remains that if users, including Glencore, are willing to pay for the QCA levy and their costs of the regulatory system, they must see real benefits from the regime in advance of the costs incurred, and any remaining costs incurred by QR itself must be relatively minimal.

The analysis of administrative and compliance costs also needs to be considered on a with or without declaration basis – and Glencore consider it is clear that there will be very substantial administrative and compliance costs without declaration. QR's Deed Poll and Access Framework

is heavily dependent on private arbitration and litigation – and, as a result, the costs that all parties will incur in giving effect to it would be expected to be significantly more than would be the case under a QCA administered regulatory framework.

QR has never answered the QCA's questions about how an Access Framework that is (on QR's view) supposed to produce a 'QCA like result' will reduce costs in the way that QR alleges.

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

In any case, in addition to the issues with arbitration and litigation discussed in respect of criterion (a), there are any number of further factors that would prevent QR from putting itself in the QCA's shoes as decision maker. For example, the QCA has substantial information gathering powers under Part 6 of the QCA Act which can require a person to produce statements and documents to the QCA for an investigation.[38]

7.6 Regional employment and development

The QCA considered the regional employment and development impacts with and without declaration were finely balanced, ultimately concluding that declaration is likely to have a small beneficial effect in terms of promoting the public interest in the areas of employment and regional development through mining in the North West Queensland region.[39]

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

7.7 Assessment of private benefits based on nature of recipients

The QR March 2019 Submission argues that:

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

A discussed in Glencore's initial cross-submission:

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

[38] *Queensland Competition Authority Act 1997* (Qld) s 185(1).
[39] QCA Draft Decision, Part B, page 106.

… It is acknowledged that economic benefits derived from QR are 'public' in a sense. It is a fundamental tenet of economics that while monopoly pricing increases the suppliers profit/utility it causes a deadweight loss to society.

As discussed above, it is also clear that the promotion of investment in the North West Queensland mining industry would drive numerous local public benefits including donations such as those made to the North Queensland flood appeal, as well as additional State royalties, federal income tax, employment growth, and economic activity for businesses in related industries.

7.8 Conclusion

Glencore strongly supports the QCA's conclusion that access to the Mount Isa Rail Access Service on reasonable terms and conditions as a result of declaration would promote the public interest as a result of the beneficial impact on competition in dependent markets, investment in dependent markets, limited administration and compliance costs relative to the benefits derived and benefits to regional employment and development and State funding (and less of such costs than would be caused without declaration), such that criterion (d) is satisfied.