



# Queensland Government Gazette

**EXTRAORDINARY**

**PUBLISHED BY AUTHORITY**

ISSN 0155-9370

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**VOL. 384]**

**MONDAY 1 JUNE 2020**

**[No. 31**

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*Queensland Competition Authority Act 1997*

**NOTICE OF A DECISION TO DECLARE A SERVICE UNDER SECTIONS 84 - 87**

**1. Declaration**

I, the Honourable Cameron Dick MP, Treasurer and Minister for Infrastructure and Planning, as Minister administering the *Queensland Competition Authority Act 1997 (QCA Act)*, have decided to declare "the use of a coal system for providing transportation by rail" as a service under section 84(1)(a) of the QCA Act.

The phrase "the use of a coal system for providing transportation by rail" has the same meaning as the same expression which appears in section 250(1)(a) of the QCA Act as at the date this notice is gazetted.

**2. Period of the Declaration**

This declaration starts to operate at the beginning of 9 September 2020 and expires at the end of 8 September 2040.

Cameron Dick MP  
Treasurer  
Minister for Infrastructure and Planning  
31 May 2020

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## STATEMENT OF REASONS CONCERNING THE DECLARATION OF THE USE OF A COAL SYSTEM FOR PROVIDING TRANSPORTATION BY RAIL AS A SERVICE

Queensland Competition Authority Act 1997, sections 84 - 87

### 1 Background

#### 1.1 Current declaration

1.1.1 The use of certain rail transport infrastructure for providing transportation by rail is currently declared as a service under section 250(1)(a) of the *Queensland Competition Authority Act 1997 (QCA Act)*. That declaration will expire on 8 September 2020 (**Current Expiry Date**).

1.1.2 In this statement of reasons:

- (a) that rail transport infrastructure will be referred to as the “Central Queensland Coal Network” (or **CQCN**); and
- (b) the service currently declared under section 250(1)(a) of the QCA Act will be referred to as the “Central Queensland Coal Network service” (**CQCN service**).

#### 1.2 QCA recommendation

1.2.1 Section 87A of the QCA Act requires the Queensland Competition Authority (**QCA**), at least six months, but not more than 12 months, before the Current Expiry Date, to recommend to the Minister administering the QCA Act, that, with effect from the Current Expiry Date:

- (a) the service be declared;
- (b) part of the service, that is itself a service, be declared; or
- (c) the service not be declared.

1.2.2 On 4 April 2018, the QCA commenced the declaration review process with respect to the CQCN service by issuing notices of review and investigation to the owner of the service, Aurizon Network Pty Ltd (**Aurizon**) (in accordance with sections 87B and 87E of the QCA Act). The investigation notice indicated that the subject matter of the investigation was whether the CQCN service should be declared in whole or in part following the expiry of the existing declaration on 8 September 2020.

1.2.3 As part of the declaration review process, the QCA has done the following.

- (a) On 4 April 2018, the QCA published a staff issues paper to assist stakeholders in making submissions in the declaration review process and provided stakeholders with the opportunity to provide initial submissions by 30 May 2018.
  - (b) On 6 June 2018, the QCA published a staff questions paper to assist stakeholders in preparing submissions on the initial submissions (cross submissions) and inviting stakeholders to make these cross submissions by 16 July 2018.
  - (c) On 18 December 2018, the QCA published its draft recommendations in relation to the CQCN service.
  - (d) The QCA then gave stakeholders the opportunity to provide:
    - (i) submissions on the draft recommendations by 11 March 2019 (the draft recommendation submissions); and
    - (ii) cross submissions on the draft recommendation submissions by 26 April 2019.
  - (e) The QCA conducted a stakeholder forum for the CQCN service on 20 March 2019.
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- (f) The QCA also accepted late and supplementary submissions in relation to the CQCN service in June 2019.
- 1.2.4 The QCA published on its website the submissions which it accepted from stakeholders on the CQCN service in relation to this review. I have been provided with un-redacted versions of the submissions accepted by the QCA (**Stakeholder Submissions**).
- 1.2.5 On 2 March 2020 and pursuant to section 87A of the QCA Act, the QCA provided to the Minister administering the QCA Act its recommendation in relation to the CQCN service within a document entitled *Final recommendations Declaration Reviews: Aurizon Network, Queensland Rail and DBCT* (**QCA's Recommendation**). The QCA Recommendation comprises four parts as follows:
- (a) Declaration review: Aurizon Network, Queensland Rail and DBCT, which includes an executive summary and overview and the QCA's approach to the statutory criteria (**QCA Approach**);
  - (b) Part A: Aurizon Network declaration review (**Part A**);
  - (c) Part B: Queensland Rail declaration review (**Part B**); and
  - (d) Part C: DBCT declaration review (**Part C**).<sup>1</sup>
- 1.2.6 The QCA's Recommendation included a summary and analysis of the Stakeholder Submissions.
- 1.2.7 The QCA's Recommendation included a determination that it was satisfied about all of the criteria in section 76(2) of the QCA Act (**Access Criteria**), that is:
- (a) Criterion A - that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
  - (b) Criterion B - that the facility for the service could meet the total foreseeable demand in the market—
    - (i) over the period for which the service would be declared; and
    - (ii) at the least cost compared to any two or more facilities (which could include the facility for the service);
  - (c) Criterion C - that the facility for the service is significant, having regard to its size or its importance to the Queensland economy;
  - (d) Criterion D - that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.
- 1.2.8 The QCA's Recommendation included a recommendation that the CQCN service be declared for a period of 20 years.
- 1.3 Role of the Minister**
- 1.3.1 Under section 84(1) of the QCA Act I am required, after receiving the QCA's Recommendation, to do one of the following:
- (a) declare the service;
  - (b) declare part of the service, that is itself a service; or

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<sup>1</sup>References in this Statement of Reasons are to the relevant part, section and page.

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- (c) decide not to declare the service.
- 1.3.2 I must:
- (a) declare the CQC service if I am satisfied about all of the Access Criteria for the service; or
- (b) decide not to declare the CQC service if I am not satisfied about all of the Access Criteria for the service.
- 1.3.3 I may declare part of the CQC service, that is itself a service, if I am satisfied about all of the Access Criteria for the part of the service.
- 1.3.4 If I declare the CQC service, or part of the service (that is itself a service), I must decide the expiry date of the declaration.

## 2 Decision

- 2.1.1 I am satisfied about all of the Access Criteria for the CQC service. Accordingly, I have decided to declare the CQC service for a period of 20 years, with the declaration to start to operate at the beginning of 9 September 2020 and expiring at the end of 8 September 2040.
- 2.1.2 For the purposes of making this decision, I have been provided with:
- (a) the QCA's Recommendation;
- (b) briefing papers from Treasury which summarise issues, contentions and submissions made by stakeholders during the QCA declaration review process; and
- (c) access to all the Stakeholder Submissions to enable me, if necessary, to consider them further.
- 2.1.3 In making my decision, I have paid appropriate regard to the QCA's Recommendation as the QCA is the independent regulator which has considered these matters in detail. I have, however, as I am required to, considered all matters afresh when reaching my decision. As a result, in some respects I have not adopted the conclusions and reasons of the QCA.
- 2.1.4 When making this decision, I did not find it necessary to resolve any of the issues raised in the Stakeholder Submissions concerning different possible constructions of the QCA Act, save for those specifically mentioned below.

## Reasons

### 3 Criterion B – Meet total foreseeable demand at least cost

#### 3.1 Overview

- 3.1.1 Criterion B (section 76(2)(b) of the QCA Act) requires that I consider whether the facility for the service could meet the total foreseeable demand in the market—
- (a) over the period for which the service would be declared; and
- (b) at the least cost compared to any two or more facilities (which could include the facility for the service).
- 3.1.2 Under section 76(3) of the QCA Act, if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, I may have regard to the facility as if it had that expanded capacity. Section 76(4) of the QCA Act provides that the cost referred to in paragraph 3.1.1(b) above includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

**3.2 Identify the relevant service**

3.2.1 I accept the QCA's recommendation that the CQCN service should be considered as a single service, being the use of the CQCN for providing transportation by rail, for the reasons set out in the QCA analysis.<sup>2</sup>

**3.3 Identify the relevant facility**

3.3.1 I accept the QCA's recommendation that the facility used to provide the CQCN service is the rail transport infrastructure as currently defined in section 250 of the QCA Act. That is, the facility:

- (a) is rail transport infrastructure that is:
  - (i) part of any of the following—
    - (A) the Blackwater system, being the railway connecting Gregory, Rolleston and Minerva to Gladstone, including the part of the North Coast Line between Parana and Rocklands, as shown on the diagram in schedule 1;
    - (B) the Goonyella system, being the railway connecting Gregory, North Goonyella and Blair Athol mine to the Port of Hay Point, as shown on the diagram in schedule 1;
    - (C) the Moura system, being the railway connecting Moura mine to Gladstone, as shown on the diagram in schedule 1;
    - (D) the Newlands system, being the railway connecting Newlands to the Port of Abbot Point, including the part of the North Coast Line between Durroburra and Kaili, as shown on the diagram in schedule 1; or
  - (ii) directly or indirectly connected to a system mentioned in paragraph (i) and owned or leased by the owner or lessee, or a related body corporate of the owner or lessee, of the system; and
- (b) includes an extension of the rail transport infrastructure mentioned in paragraph (a) (the **coal system**) that:
  - (i) is built on or after 30 July 2010; and
  - (ii) does not directly connect the coal system to a coal basin to which the coal system was not directly connected on 30 July 2010; and
  - (iii) is owned or leased by—
    - (A) the owner or lessee of the coal system; or
    - (B) a related body corporate of the owner or lessee of the coal system.

3.3.2 I accept the evidence set out in the submission made by the Queensland Resources Council (**QRC**) that the relevant capacity of this facility is currently 275 mtpa.<sup>3</sup>

**3.4 Identify the market in which the service is provided**

3.4.1 I accept the QCA's recommendations that:

- (a) the relevant market is the market in which access is provided to the whole of the CQCN; and

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<sup>2</sup> Part A, section 2.2 at pages 11-12.

<sup>3</sup> QRC 30 May 2018 section 4.1.1 at page 7 and schedule 1 line 6 at page 29.

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- (b) the market for the service is the market for access to rail infrastructure in the coal basins served by the CQCN.

3.4.2 I do so for the reasons set out in the QCA analysis.<sup>4</sup> In particular, I note and accept that:

- (a) the service involves the use of below-rail infrastructure for transportation by rail; and
- (b) there are no substitutes for rail transport as it is the only mode of transport capable of meeting the requirements of coal miners that involves transporting large quantities of coal, over considerable distances.

### **3.5 Identify total foreseeable demand in the market (including the period for assessing total foreseeable demand)**

3.5.1 I accept the QCA's recommendation that 20 years is a reasonable period for a possible declaration of the CQCN service. I do so for the reasons set out in the QCA analysis.<sup>5</sup> In particular, I note and accept that:

- (a) regulatory and investment certainty is provided to all parties over that period;
- (b) there is provision for the declaration to be periodically reviewed to account for new and relevant information;
- (c) the assets which rely on the CQCN (e.g. rollingstock and mining operations) are long lived in nature;
- (d) the CQCN has the ability to satisfy total foreseeable demand in existing or expanded form (at least cost) over this period (see further below); and
- (e) all submissions from stakeholders support a longer period of declaration than the 15 year period initially proposed by the QCA in its draft recommendations.

3.5.2 I accept the QCA's recommendation that the total foreseeable demand for the facility is likely to be in the range of 260 mtpa to 300 mtpa over this period of 20 years, for the reasons set out in the QCA analysis.<sup>6</sup>

### **3.6 Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand, over the relevant period at least cost compared to any two or more facilities**

3.6.1 I accept the QCA's recommendation that the facility could meet the foreseeable demand at least cost (compared to any two or more facilities) over that period of 20 years, for the reasons set out in the QCA analysis.<sup>7</sup> I particularly note and accept the submission of Aurizon (the owner of the service) that if demand were to exceed the CQCN's current capacity, then it is likely that CQCN could meet that demand at least cost through an economically and technically feasible expansion to the facility.<sup>8</sup>

### **3.7 Overall finding - Criterion B**

3.7.1 In light of the above, I accept the QCA's recommendation that Criterion B is satisfied.

3.7.2 My conclusions set out above with respect to identifying the "service", the "facility" and the market in which the service is provided, also apply to my consideration of the other Access Criteria.

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<sup>4</sup> Part A, section 2.3.3 at pages 13-14.

<sup>5</sup> Part A, section 2.4.1 at pages 17-18.

<sup>6</sup> Part A, section 2.5.2 at page 19; see also Part A, section 2.1, Table 2 at page 9.

<sup>7</sup> Part A, section 2.6.2 at pages 20-21.

<sup>8</sup> Aurizon 24 June 2019 section 4 at page 3.

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## 4 Criterion A – Promote a material increase in competition

### 4.1 Overview

4.1.1 Criterion A (see section 76(2)(a) of the QCA Act) requires that I consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

### 4.2 The relevant service

4.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above.

### 4.3 The relevant market for the service

4.3.1 I have stated my findings identifying the relevant market for the service at paragraph 3.4.1 above.

### 4.4 The relevant dependent market (upstream or downstream)

4.4.1 I accept the QCA's recommendations that:

- (a) the above-rail haulage market is the key relevant dependent market for the purposes of assessing Criterion A; and
- (b) the above-rail haulage market is separate from the market for the service as defined in paragraph 3.4.1 above.

4.4.2 I do so for the reasons set out in the QCA analysis.<sup>9</sup>

### 4.5 Access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration, would promote a material increase in competition in a relevant dependent market

4.5.1 I accept the QCA's recommendations that Aurizon would, in the absence of declaration, have commercial incentives to exert market power by favouring its related entity above-rail service provider and would not be constrained by:

- (a) the countervailing power of mining companies and above-rail haulage users; or
- (b) the counterfactual environment outlined by Aurizon, including a regulatory environment under Part IIIA of the *Competition and Consumer Act 2010*, general competition law and prices oversight under Part 3 of the QCA Act.

4.5.2 I accept these recommendations for the reasons set out in the QCA analysis.<sup>10</sup>

4.5.3 I further accept the QCA's recommendation that declaration would constrain Aurizon's market power such that the opportunities or conditions for competition in the above-rail haulage market would be materially better than it would be without declaration. I do so for the reasons set out by in the QCA analysis<sup>11</sup>, and the QCA conclusion.<sup>12</sup>

4.5.4 In particular, I note and accept that in the absence of declaration:

- (a) Aurizon as a vertically integrated entity would have the ability and incentive to exercise market power in providing access to its service, such that third party haulage operators (existing or new entrants) would be deterred from or be unable to effectively participate in the above-rail haulage market; and

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<sup>9</sup> Part A, section 3.2.1 at page 24.

<sup>10</sup> Part A, section 3.3.2 at pages 27-28.

<sup>11</sup> Part A, section 3.4.2 at pages 30-32.

<sup>12</sup> Part A, section 3.5 at page 32.

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- (b) the environment for competition in the above-rail haulage market would be adversely affected in a material way.

#### 4.6 Overall finding - Criterion A

- 4.6.1 In light of the above, I accept the QCA's recommendation that Criterion A is satisfied.

### 5 Criterion C – State significance

#### 5.1 Overview

- 5.1.1 Criterion C (see section 76(2)(c) of the QCA Act) requires that I consider whether the facility for the service is significant, having regard to its size or its importance to the Queensland economy.

#### 5.2 The relevant facility for the service

- 5.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above and identifying the facility for the service at paragraph 3.3.1 above.

#### 5.3 Size or importance

- 5.3.1 I accept the QCA's recommendation that the facility for the service is significant, having regard to both its size and its importance to the Queensland economy. I do so for the reasons set out in the QCA analysis.<sup>13</sup> In particular, I note and accept that:

- (a) the CQCN is significant in size as it is Australia's largest export coal rail network that comprises around 2,725 km of rail infrastructure connecting over 40 mines to export terminals at Abbot Point, Dalrymple Bay, Hay Point and the Port of Gladstone; and
- (b) the CQCN is significant in importance to the Queensland economy, as it facilitates the operation of a significant proportion of Queensland's coal industry, which in turn makes a sizeable economic contribution to Queensland.

#### 5.4 Overall finding - Criterion C

- 5.4.1 Accordingly, I accept the QCA's recommendation that Criterion C is satisfied.

### 6 Criterion D – Promote the public interest

#### 6.1 Overview

- 6.1.1 Section 76(2)(d) of the QCA Act (Criterion D) requires that I consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

- 6.1.2 Section 76(5) of the QCA Act provides that, in considering Criterion D, I must have regard to the following matters—

- (a) if the facility for the service extends outside Queensland—
- (i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and
- (ii) the desirability of consistency in regulating access to the service;
- (b) the effect that declaring the service would have on investment in—
- (i) facilities; and

<sup>13</sup> Part A, section 4.2.2 at pages 34-35.



- (ii) markets that depend on access to the service;
- (c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and
- (d) any other matter I consider relevant.

## **6.2 The relevant service**

6.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above.

## **6.3 Whether the facility for the service extends outside Queensland**

6.3.1 I accept that the facility (which I find at paragraph 3.3.1 above) does not extend beyond Queensland. Accordingly, I accept the QCA's recommendation that no further consideration of section 76(5)(a) of the QCA Act is required.<sup>14</sup>

## **6.4 Whether there would be access (or increased access) to the service, on reasonable terms and conditions, as result of declaration**

6.4.1 I have stated my findings in relation to whether there would be access (on increased access) to the service, on reasonable terms and conditions, as result of declaration when addressing Criterion A, at section 4 above.

## **6.5 Investment in facilities**

6.5.1 I accept the QCA's recommendation that declaration of the service is not likely to adversely impact Aurizon's incentive to invest in the facility, for the reasons set out in the QCA analysis.<sup>15</sup>

## **6.6 Investment in markets that depend on access to the service**

6.6.1 I accept the QCA's recommendation that declaration of the service would promote investment in markets that depend on access to the service. I do so for the reasons set out in the QCA analysis.<sup>16</sup> In particular, I note and accept that:

- (a) declaration of the service would promote a material increase in competition in the above-rail haulage market (see the decision I have reached on Criterion A above); and
- (b) the QCA Recommendation records a broad stakeholder consensus that declaration would have a positive impact on investment in other markets, notably the above-rail haulage market.<sup>17</sup>

## **6.7 Administration and compliance costs**

6.7.1 I accept the QCA's recommendation that declaration of the service is not likely to result in compliance and administrative costs that are excessive such as to adversely impact the public interest, for the reasons set out in the QCA analysis.<sup>18</sup>

6.7.2 In particular I note and accept that stakeholders have expressed a willingness to pay the costs associated with the regulatory regime incurred by industry via the QCA levy and through access charges.<sup>19</sup>

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<sup>14</sup> Part A, section 1.4 at page 7.

<sup>15</sup> Part A, section 5.3.2 at pages 39-40.

<sup>16</sup> Part A, section 5.4.2 at pages 41-42.

<sup>17</sup> Part A, section 5.4.2 at page 42.

<sup>18</sup> QCA's Recommendation Part A, section 5.5.2 at page 44.

<sup>19</sup> Queensland Resources Council, section 3 at page 2.

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**6.8 Other matters**

6.8.1 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

6.8.2 Given my conclusions set out above, I regard declaration of the service as consistent with that object.

6.8.3 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the *Human Rights Act 2019 (HR Act)*. For the reasons set out in section 7, I consider that declaration of the service would be consistent with the obligations imposed on public entities under that Act.

6.8.4 Apart from the matters set out in detail above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.

**6.9 Overall finding - Criterion D**

6.9.1 In light of the above, I accept the QCA's recommendation that Criterion D is satisfied

**7 Human rights considerations****7.1 Overview**

7.1.1 Section 58(1) of the HR Act makes it unlawful for a public entity:

- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

7.1.2 Section 58(5) of the HR Act provides that, for section 58(1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to:

- (a) identifying the human rights that may be affected by the decision; and
- (b) considering whether the decision would be compatible with human rights.

7.1.3 I accept that the threshold for engaging a human right is low, and that for this purpose human rights must be construed in the broadest possible way.

7.1.4 In accordance with section 58(1) of the HR Act, I have considered whether declaration of the CQC service would be compatible with human rights.

7.1.5 The only human rights which I consider may be affected by the declaration of the CQC service are:

- (a) the right of individuals not to be arbitrarily deprived of property (HR Act section 24(2));
- (b) the right to life (HR Act section 16);
- (c) the right to equality and non-discrimination (HR Act section 15) (on the basis of intergenerational equity); and
- (d) the right of children to protection in their best interests (HR Act section 26(2)).

7.1.6 I refer to the human right in paragraph 7.1.5(a) above as "arbitrary deprivation of property". The human rights in paragraphs 7.1.5(b), 7.1.5(c) and 7.1.5(d) above can be described as "rights potentially related to climate change".

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**7.2 Arbitrary deprivation of property**

- 7.2.1 The declaration of the CQCN service may limit the human right not to be arbitrarily deprived of property (section 24 of the HR Act).
- 7.2.2 The concept of “arbitrary deprivation of property” is a wide one and a deprivation may be arbitrary notwithstanding that it is authorised by law.
- 7.2.3 Although the entities whose property may be directly affected by the declaration are corporations, and although the stakeholders in the review of the declarations are corporations, it is conceivable that declarations may affect individuals’ right not to be arbitrarily deprived of their property (e.g. shares in relevant companies).
- 7.2.4 However, if the declaration of the CQCN service limits the right not to be “arbitrarily deprived of property”, I consider that any limitation would be justified under section 13 of the HR Act (and therefore compatible with that right under section 8(b) of the HR Act), for these reasons:
- (a) the purpose of the limitation, as indicated in section 69E of the QCA Act, is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, and thereby promote competition in upstream and downstream markets;
  - (b) that purpose is important;
  - (c) the nature of the limitation on the human right is consistent with a free and democratic society based on human dignity, equality and freedom. A declaration of a service that promotes third party access, a material increase in competition in markets that depend on access to that service and that promotes the public interest, is not contrary to those democratic values;
  - (d) the limitation helps to achieve its purpose. That is apparent from the Access Criteria which I must be satisfied of in section 76 of the QCA Act before making the declaration of the service (or part of the service that is itself a service);
  - (e) I am not satisfied that there is a less restrictive and reasonable available alternative that would achieve the purpose of the limitation;
  - (f) any effect of the limitation on individuals is likely to be minor: the declaration has been in force for several years and there is no suggestion that it has sterilised the use of anyone’s property or prevented them earning a living; and
  - (g) while any deprivation of property must be taken seriously, given that the limitation would be likely to have only a minor impact on individuals, that the purpose that it serves is important, and that there are no less restrictive, reasonable alternatives to achieve the same purpose, the limitation would not result in arbitrary deprivation. It would not be capricious, unjust or unreasonable (in the sense of being disproportionate to a legitimate purpose).

**7.3 Human rights potentially relating to climate change**

- 7.3.1 Decisions which facilitate emissions contributing to climate change may conceivably limit a range of human rights, including the right to life, the right to equality and non-discrimination (on the basis of intergenerational equity) and the right of children to protection in their best interests.
- 7.3.2 Against that background, I have considered whether a decision under section 84 of the QCA Act to declare the CQCN service would have the consequence of materially increasing the level of coal production in Queensland over the period of the declaration. Such an increase may lead to an increase in emissions, potentially affecting climate change.
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- 7.3.3 While the declaration of the CQC service is likely to promote investment in the above-rail haulage market and in related coal supply chain facilities and may promote investment in the coal tenements market (although I do not need to consider this market for the purposes of the declaration decision) for the reasons given by the QCA<sup>20</sup>, there is no evidence before me that the declaration would have a material effect on the volume of coal exported and consumed overseas. This will primarily depend on market factors such as demand and price.
- 7.3.4 I therefore consider that the declaration of the CQC would not limit any of the human rights potentially relating to climate change, and would therefore be compatible with those rights under section 8(a) of the HR Act.

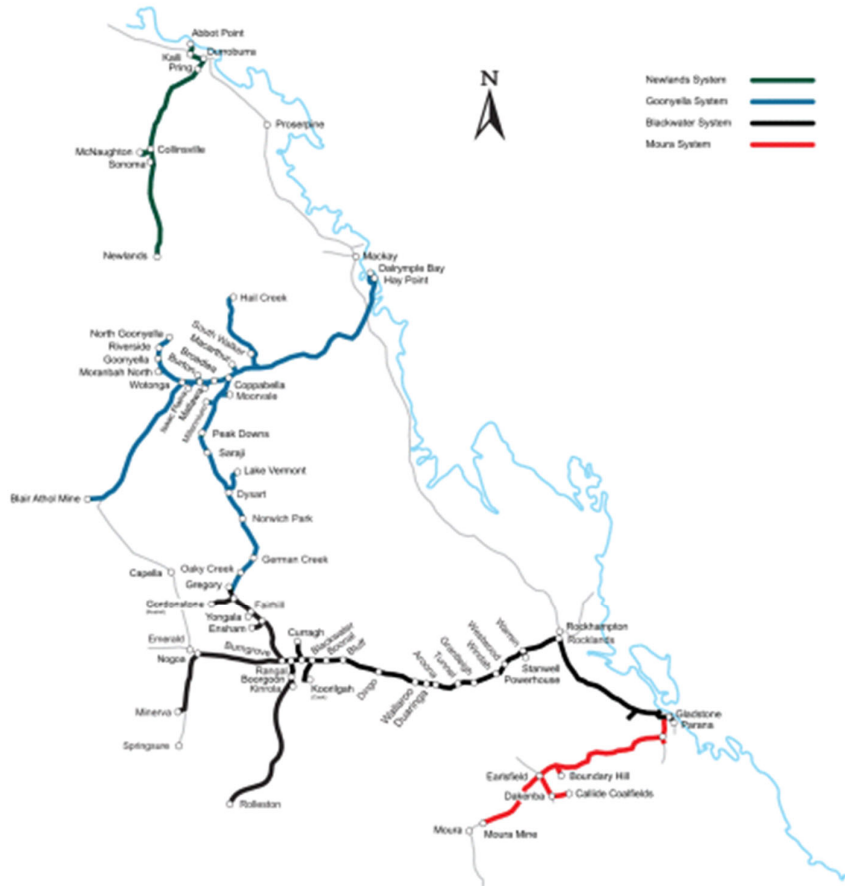
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<sup>20</sup> Part A, section 3.2.2 at page 25 and section 5.3.2 at page 40.

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Schedule 1

Central Queensland coal network rail infrastructure



*Queensland Competition Authority Act 1997***NOTICE OF A DECISION TO DECLARE PARTS OF A SERVICE THAT ARE THEMSELVES A SERVICE  
UNDER SECTIONS 84 - 87****1. Declaration**

I, the Honourable Cameron Dick MP, Treasurer and Minister for Infrastructure and Planning, as Minister administering the *Queensland Competition Authority Act 1997 (QCA Act)*, have decided to declare the following parts of the Queensland Rail service, which parts are each a service, under section 84(1)(b) of the QCA Act:

- a) the North Coast Route service;
- b) the Mount Isa Route service;
- c) the West Moreton Route service;
- d) the Central Western Route service;
- e) the Western Route service; and
- f) the South Western Route service.

**2. Period of the Declaration**

This declaration starts to operate at the beginning of 9 September 2020 and expires at the end of 8 September 2035.

**3. Definitions**

- a) "Central Western Route service", means the use of the Central Western system, the Metropolitan system, and those parts of the North Coast Line that interconnect the Central Western system and Metropolitan system and the Port of Mackay;
- b) "Central Western system" means those parts of the Queensland Rail service that extend from Nogoa to Winton and includes the branch line from Emerald to Clermont (illustrated in orange on the map in Schedule 1);
- c) "Metropolitan system" means those parts of the Queensland Rail service radiating from the Brisbane central business district, bounded by Rosewood to the west and Nambour to the north, and that extend south to Varsity Lakes station in the Gold Coast region, as well as south-west to the Acacia Ridge Terminal (illustrated in light green on the map in Schedule 1). Where use of the Metropolitan system is referred to as part of the relevant service, it is a reference to the use of the whole of the Metropolitan system;
- d) "Mount Isa Route service" means the use of the Mount Isa Line and those parts of the North Coast Line that interconnect the Mount Isa Line and the Port of Townsville;
- e) "Mount Isa Line" means those parts of the Queensland Rail service that extend from Mount Isa to Stuart and includes the branch line from Flynn to Phosphate Hill (illustrated in dark green on the map in Schedule 1);
- f) "North Coast Route service" means the use of the North Coast Line and the Metropolitan system;
- g) "North Coast Line" means those parts of the Queensland Rail service bounded to the south by (and including) Nambour station, to the north by (and including) Cairns and to the west by (but excluding) Stuart and including all branch lines, comprised in that part of the network, including those in the Maryborough area and Taragoola to Graham (illustrated in purple on the map in Schedule 1);
- h) "Queensland Rail service" has the same meaning as "the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager" as it appears in section 250(1)(b) of the QCA Act as at the date this notice is gazetted;
- i) "South Western Route service" means the use of the South Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the South Western system and the Metropolitan system;
- j) "South Western system" means those parts of the Queensland Rail service that extend from Toowoomba to Thallon via Warwick, and includes the branch lines from Wyreema to Millmerran and Warwick to Wallangarra. The South Western system adjoins the West Moreton system at Toowoomba (illustrated in yellow on the map in Schedule 1);

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- k) “Western Route service” means the use of the Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the Western system and the Metropolitan system;
  - l) “Western system” means those parts of the Queensland Rail service that extend from Miles to Quilpie and includes the branch lines from Westgate to Cunnamulla, Dalby to Meandarra (Glenmorgan), Miles to Wandoan and Tycanba to Jandowae. The Western system adjoins the West Moreton system at Miles (illustrated in light blue on the map in Schedule 1);
  - m) “West Moreton Route service” means the use of the West Moreton system and the Metropolitan system; and
  - n) “West Moreton system” means those parts of the Queensland Rail service that extend between Rosewood and Miles. It adjoins the Metropolitan system at Rosewood, and adjoins the Western system at Miles (illustrated in pink on the map in Schedule 1).

Cameron Dick MP  
Treasurer  
Minister for Infrastructure and Planning  
31 May 2020

Schedule 1





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**STATEMENT OF REASONS CONCERNING THE DECLARATION OF THE USE OF RAIL  
TRANSPORT INFRASTRUCTURE OPERATED BY QUEENSLAND RAIL LIMITED**

*Queensland Competition Authority Act 1997, sections 84 - 87*

**1 Background**

**1.1 Current declaration**

1.1.1 The use of rail transport infrastructure for providing transport by rail operated by Queensland Rail Limited is currently declared as a service under section 250(1)(b) of the *Queensland Competition Authority Act 1997 (QCA Act)*. That declaration will expire on 8 September 2020 (**Current Expiry Date**).

1.1.2 In this statement of reasons, the service currently declared under section 250(1)(b) of the QCA Act will be referred to as the "Queensland Rail service" (**Queensland Rail service**).

**1.2 QCA recommendation**

1.2.1 Section 87A of the QCA Act requires the Queensland Competition Authority (**QCA**), at least six months, but not more than 12 months, before the expiry date of the existing declaration of the Queensland Rail service, to recommend to the Minister administering the QCA Act, that, with effect from the Current Expiry Date:

- (a) the service be declared;
- (b) part of the service, that is itself a service, be declared; or
- (c) the service not be declared.

1.2.2 On 4 April 2018, the QCA commenced the declaration review process with respect to the Queensland Rail service by issuing notices of review and investigation to Queensland Rail Limited (**Queensland Rail**) (in accordance with section 87B and 87E of the QCA Act). The investigation notice indicated that the subject matter of the investigation was whether the service should be declared in whole or in part following the expiry of the existing declaration on 8 September 2020.

1.2.3 As part of the declaration review process, the QCA has done the following:

- (a) On 4 April 2018, the QCA published a staff issues paper to assist stakeholders in making submissions in the declaration review process and provided stakeholders with the opportunity to provide initial submissions by 30 May 2018.
  - (b) On 6 June 2018, the QCA published a staff questions paper to assist stakeholders in preparing submissions on the initial submissions (cross submissions) and inviting stakeholders to make these cross submissions by 16 July 2018.
  - (c) On 18 December 2018, the QCA published its draft recommendations in relation to each of the services.
  - (d) The QCA then gave stakeholders the opportunity to provide:
    - (i) submissions on the draft recommendations by 11 March 2019 (the draft recommendation submissions); and
    - (ii) cross submissions on the draft recommendation submissions by 26 April 2019.
  - (e) The QCA conducted a stakeholder forum for Queensland Rail service on 9 April 2019.
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- (f) The QCA also accepted certain late information and submissions in relation to the Queensland Rail service from Watco, GrainCorp, Linfox and Queensland Rail in May and June 2019.
- 1.2.4 The QCA published on its website the submissions which it accepted from stakeholders of the Queensland Rail services in relation to this review. I have been provided with un-redacted versions of the submissions accepted by the QCA (**Stakeholder Submissions**).
- 1.2.5 On 7 August 2019, Queensland Rail provided further information to the QCA. In respect of this late information, the QCA determined that it was reasonable in all of the circumstances to make their final recommendation on the Queensland Rail service without taking into account Queensland Rail's late information. Accordingly, this information has not been published on the QCA's website and has not been provided to me.
- 1.2.6 On 2 March 2020, and pursuant to section 87A of the QCA Act, the QCA provided to the Minister administering the QCA Act, its recommendation in relation to the Queensland Rail service in a document entitled *Declaration Review: Aurizon Network, Queensland Rail and DBCT* (**QCA's Recommendation**). The QCA's Recommendation comprises four parts:
- (a) Declaration review: Aurizon Network, Queensland Rail and DBCT which includes an executive summary and overview and the QCA's approach to the statutory criteria (**QCA Approach**);
  - (b) Part A: Aurizon Network declaration review (**Part A**);
  - (c) Part B: Queensland Rail declaration review (**Part B**); and
  - (d) Part C: DBCT declaration review (**Part C**).<sup>1</sup>
- 1.2.7 The QCA's Recommendations included a summary and analysis of the Stakeholder Submissions.
- 1.2.8 The QCA's Recommendations included a determination that it was not, in respect of the Queensland Rail service as a whole, satisfied about all the criteria in section 76(2) of the QCA Act (**Access Criteria**), that is:
- (a) Criterion A - that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
  - (b) Criterion B - that the facility for the service could meet the total foreseeable demand in the market—
    - (i) over the period for which the service would be declared; and
    - (ii) at the least cost compared to any two or more facilities (which could include the facility for the service);
  - (c) Criterion C - that the facility for the service is significant, having regard to its size or its importance to the Queensland economy; and
  - (d) Criterion D - that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

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<sup>1</sup> References in this statement of reasons is to the relevant part, section and page.

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- 1.2.9 As such, in accordance with section 80(5) of the QCA Act, the QCA considered whether the QCA could recommend to the Minister that part of the Queensland Rail service satisfied all of the Access Criteria.
- 1.2.10 The QCA's Recommendations included a determination that it was satisfied about all of the Access Criteria in respect of the following parts of the Queensland Rail service, each of which is itself a service within the meaning of section 72 of the QCA Act:
- (a) the North Coast Route service — which is the use of the North Coast Line and the Metropolitan system;
  - (b) the Mount Isa Route service — which is the use of the Mount Isa Line and those parts of the North Coast Line that interconnect the Mount Isa Line and the Port of Townsville;
  - (c) the West Moreton Route service — which is the use of the West Moreton system and the Metropolitan system;
  - (d) the Central Western Route service — which is the use of the Central Western system, the Metropolitan system, and those parts of the North Coast Line that interconnect the Central Western system and Metropolitan system and the Port of Mackay;
  - (e) the Western Route service — which is the use of the Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the Western system and the Metropolitan system; and
  - (f) the South Western Route service — which is the use of South Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the South Western system and the Metropolitan system.
- 1.2.11 The QCA's Recommendation included a determination that it was not satisfied about all of the Access Criteria in respect of that part of the Queensland Rail service defined as the Tablelands system service (i.e. the use of the Tablelands system).
- 1.2.12 The QCA's Recommendation included a recommendation that those parts of the Queensland Rail service that satisfied all of the Access Criteria (as listed in paragraph 1.2.10 above) be declared for a period of 15 years.
- 1.3 Role of the Minister**
- 1.3.1 Under section 84(1) of the QCA Act I am required, after receiving the QCA's Recommendation, to do one of the following:
- (a) declare the service;
  - (b) declare part of the service, that is itself a service; or
  - (c) decide not to declare the service.
- 1.3.2 I must:
- (a) declare the Queensland Rail service if I am satisfied about all of the Access Criteria for the service; or
  - (b) decide not to declare the Queensland Rail service if I am not satisfied about all of the Access Criteria for the service.
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1.3.3 I may declare part of the Queensland Rail service if I am satisfied about all of the Access Criteria for part of the service.

1.3.4 If I declare the Queensland Rail service, or part of the service, I must decide the expiry date of the declaration.

## 2 Decision

2.1.1 I am not satisfied about all of the Access Criteria for the Queensland Rail service as a whole. Accordingly, I have decided not to declare the Queensland Rail service as a whole.

2.1.2 I am satisfied about all of the Access Criteria for the following parts of the Queensland Rail service, that are each a service. Accordingly, I have decided to declare those parts of the Queensland Rail service for a period of 15 years with the declaration to start to operate at the beginning of 9 September 2020 and expiring at the end of 8 September 2035. Those parts of the Queensland Rail service are:

- (a) the North Coast Route service — which is the use of the North Coast Line and the Metropolitan system;
- (b) the Mount Isa Route service — which is the use of the Mount Isa Line and those parts of the North Coast Line that interconnect the Mount Isa Line and the Port of Townsville;
- (c) the West Moreton Route service — which is the use of the West Moreton system and the Metropolitan system;
- (d) the Central Western Route service — which is the use of the Central Western system, the Metropolitan system, and those parts of the North Coast Line that interconnect the Central Western system and Metropolitan system and the Port of Mackay;
- (e) the Western Route service — which is the use of the Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the Western system and the Metropolitan system; and
- (f) the South Western Route service — which is the use of South Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the South Western system and the Metropolitan system.

2.1.3 I am not satisfied about all of the Access Criteria for the part of the Queensland Rail service described as the Tablelands system service (i.e. the use of the Tablelands system) and therefore I have decided not to declare the Tablelands system service.

2.1.4 For the purposes of making this decision, I have been provided with:

- (a) the QCA's Recommendation;
- (b) briefing papers from Treasury which summarise issues, contentions and submissions made by stakeholders during the QCA declaration review process; and
- (c) access to all the Stakeholder Submissions to enable me, if necessary, to consider them further.

2.1.5 In making my decision I have paid appropriate regard to the QCA's Recommendation as the QCA is the independent regulator which has considered these matters in detail. I have, however, as I am required to, considered all matters afresh when reaching my decision. As a result, in some respects I have not adopted the conclusions and reasons of the QCA.

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- 2.1.6 When making this decision, I did not find it necessary to resolve any of the issues raised in the Stakeholder Submissions concerning different possible constructions of the QCA Act, save for those specifically mentioned below.
- 2.1.7 In my reasons below, I use the term “Agricultural lines” to refer to the Central Western Route service, the Western Route service and the South Western Route service (as each of those services is defined in paragraph 1.2.10 above).

## Reasons

### 3 Criterion B – Meet total foreseeable demand at least cost

#### 3.1 Overview

- 3.1.1 Criterion B (section 76(2)(b) of the QCA Act) requires that I consider whether the facility for the service could meet the total foreseeable demand in the market—
- (a) over the period for which the service would be declared; and
  - (b) at the least cost compared to any two or more facilities (which could include the facility for the service).
- 3.1.2 Under section 76(3) of the QCA Act if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, I may have regard to the facility as if it had that expanded capacity. Under section 76(4) of the QCA Act the cost referred to in paragraph 3.1.1(b) above includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

#### QCA recommendation on Criterion B

- 3.1.3 The QCA recommended<sup>2</sup> that:
- (a) the facility as a whole satisfies Criterion B; and
  - (b) the facility for each identified part of the service satisfies Criterion B because:
    - (i) as a result of the existing spare capacity, the identified part of the service could meet total foreseeable demand in each market over the proposed declaration period; and
    - (ii) the identified part of the service could meet total foreseeable demand in the market at least cost compared to any two or more facilities.

#### 3.2 Identify the relevant service

- 3.2.1 I accept the QCA's recommendation for the reasons given by the QCA<sup>3</sup> that the correct starting point for identifying the relevant service is section 250(1)(b) of the QCA Act. I have therefore considered in these reasons:
- (a) whether the Queensland Rail service as a whole, as described in section 250(1)(b) of the QCA, satisfies each of the Access Criteria; and
  - (b) if not, whether one or more parts of the Queensland Rail service (which are each a service) satisfy each of the Access Criteria.
- 3.2.2 I note that Queensland Rail in its submissions sought to describe parts of its services by reference to rail lines or systems. While this is a convenient way to analyse the various components of the

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<sup>2</sup> Part B, section 11.8 at page 153.

<sup>3</sup> Part B, section 2.2.2 at pages 9-10.

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Queensland Rail network, I note and accept the approach taken by the QCA to define the parts of the service as 'routes' (which includes the use of those parts of the relevant rail lines and systems that are used for a particular route) as this recognises the operation of rail access services and may necessitate the use of rail infrastructure in one or more rail lines or systems.<sup>4</sup>

- 3.2.3 I accept the QCA's recommendation<sup>5</sup> for the reasons given by the QCA<sup>6</sup> that each of the parts of the service identified in paragraph 1.2.10 is itself a service.
- 3.2.4 I also accept the QCA's recommendations<sup>7</sup> for the reasons given by the QCA<sup>8</sup> as to the definition of service and facility in relation to each part of the service identified in paragraph 1.2.10.
- 3.2.5 On the basis of the above approach, I accept the QCA's recommendation for the reasons given by the QCA<sup>9</sup>, that:
- (a) the Queensland Rail service as a whole is a service and must be assessed against the Access Criteria; and
  - (b) if the Queensland Rail service as a whole does not satisfy all of the Access Criteria, the parts of the service as defined in paragraph 1.2.10 above must be assessed against the Access Criteria:
    - (i) the North Coast Route service;
    - (ii) the Mount Isa Route service;
    - (iii) the West Moreton Route service;
    - (iv) the Central Western Route service;
    - (v) the Western Route service;
    - (vi) the South Western Route service; and
    - (vii) the Tablelands system service – which is the use of the Tablelands system.

### 3.3 Identify the relevant facility

- 3.3.1 In accordance with my finding regarding the relevant service at paragraph 3.2.5 above, I have accepted the QCA's recommendation that the relevant facilities to be analysed are: first, the facility for the Queensland Rail service as a whole and then secondly, the facility for each part of the Queensland Rail service, being the following services:
- (a) the North Coast Route service;
  - (b) the Mount Isa Route service;
  - (c) the West Moreton Route service;
  - (d) the Central Western Route service;
  - (e) the Western Route service;
  - (f) the South Western Route service; and

<sup>4</sup> Part B, section 2.2.2 and 2.2.3 at pages 9-11 and Appendix B.

<sup>5</sup> Part B, section 2.2.3 at page 11.

<sup>6</sup> Part B, sections 2.2.2 and 2.2.3 at pages 9-11.

<sup>7</sup> Part B, section 2.2.3 at pages 10 -11.

<sup>8</sup> Part B, sections 2.2.2 and 2.2.3 at pages 9-11.

<sup>9</sup> Part B, section 2.2.2 and 2.2.3 at pages 9-11.

(g) the Tablelands system service,  
as each is defined in paragraph 1.2.10 above.<sup>10</sup>

3.3.2 I note and accept the QCA's recommendation that

- (a) the facility for the Queensland Rail service is the facility described in section 250(1)(b) of the QCA Act; and
- (b) the facility for each part of the Queensland Rail service is all relevant rail transport infrastructure used to provide rail access services to customers in the relevant dependent markets and not just the railway track.<sup>11</sup>

3.3.3 I further accept the evidence of Queensland Rail that it is currently operating below capacity and has historically operated below capacity on each of the services identified in paragraph 3.2.5 above.<sup>12</sup>

### **3.4 Identify the market in which the service is provided**

3.4.1 I accept the QCA's recommendation, for the reasons given by the QCA<sup>13</sup>, that the market for the service is a market for access to (and use of) rail infrastructure. In particular, I note and accept that:

- (a) the supplier of the service is Queensland Rail and customers acquiring the service are generally above-rail entities operating rollingstock on the rail infrastructure;
- (b) there is no competing rail access service being provided and this is unlikely to change in the near future; and
- (c) there is no substitute for the service Queensland Rail provides to above-rail operators.

3.4.2 I further accept the QCA's recommendation, for the reasons given by the QCA<sup>14</sup>, that there is either a single geographic market for the service as a whole or a series of smaller geographic markets corresponding to the parts of the service for the facility that I have found in paragraphs 3.2.5-3.3.1 above.

### **3.5 Identify total foreseeable demand in the market (including the period for assessing total foreseeable demand)**

3.5.1 I accept the QCA's recommendation, for the reasons given by the QCA<sup>15</sup>, that the period for assessing total foreseeable demand should be 15 years. In particular, I note and accept that:

- (a) the period can be considered an appropriate balance between access holder's (and access seeker's) need for long term certainty (due to the long-lived nature of assets such as rollingstock or mining operations) and Queensland Rail's legitimate business interests to have its service declared for only as long as the service is considered to meet the Access Criteria;
- (b) it is likely that the facility for the service will continue to meet demand in the relevant market without the need for expansion over the next 15 years and, as such, a shorter period is not necessary; and

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<sup>10</sup> Part B, section 2.3.3 at page 12.

<sup>11</sup> Part B, section 2.3.3 at page 12.

<sup>12</sup> QR Submission, 11 March 2019, paragraphs 109, 118, 119; Attachment A, pages 6-14. See also Part B, section 11.6.2 at page 151.

<sup>13</sup> Part B, section 11.4.2 at pages 146-147.

<sup>14</sup> Part B, section 11.4.2 at pages 147-148.

<sup>15</sup> Part B, section 11.5.2 at pages 149-151.

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- (c) where market conditions change during the declaration period, such as completion of the Inland Rail project, it would be open for Queensland Rail to seek to have the declaration of the relevant service (or part of the service) revoked at that time.

3.5.2 I note that I have no evidence before me (and nor did the QCA have evidence before it<sup>16</sup>) as to what the current total foreseeable demand is for the service as a whole. Given my acceptance of the evidence of Queensland Rail at paragraph 3.3.3 above that Queensland Rail is currently operating below capacity and has historically operated below capacity, I accept the QCA's recommendation that there is no information to suggest that total foreseeable demand over the proposed 15 year declaration period could at any time exceed the existing available capacity on any of the services.<sup>17</sup>

### **3.6 Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand, over the relevant period at least cost compared to any two or more facilities.**

3.6.1 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>18</sup> that the facility for the service (and the facility for each identified part of the service) could meet the total foreseeable demand in the market at least cost compared to any two facilities. In particular, I note and accept that:

- (a) there is no other railway network (substitute service) in Queensland that duplicates Queensland Rail's rail systems or extends across similar routes;
- (b) foreseeable demand can be met by the relevant parts of the Queensland Rail network as the foreseeable demand is less than the existing capacity on the network, or on the relevant lines/routes; and
- (c) the development of a potential alternative facility, whether for the whole Queensland Rail service, or an identified part of the service, would require extensive costs that are very likely to be greater than the cost required to expand the existing service to meet foreseeable demand.

### **3.7 Overall finding - Criterion B**

3.7.1 In light of the above, I accept the QCA's recommendation<sup>19</sup> that Criterion B is satisfied for:

- (a) the facility for the Queensland Rail service as a whole; and
- (b) the facility for those parts of the Queensland Rail service identified in paragraph 3.2.5 above.

## **4 Criterion A - Promote a material increase in competition**

### **4.1 Overview**

4.1.1 Criterion A (see section 76(2)(a) of the QCA Act) requires that I consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

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<sup>16</sup> Part B, section 11.6.2 at page 151.

<sup>17</sup> Part B, section 11.6.2 at page 151.

<sup>18</sup> Part B, section 11.7.2 at pages 152-153.

<sup>19</sup> Part B, section 11.8 at page 153.

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QCA recommendation on Criterion A

4.1.2 The QCA recommended that:<sup>20</sup>

- (a) the Queensland Rail service as a whole does not satisfy Criterion A;
- (b) in relation to each part of the Queensland Rail service identified in the table below, Criterion A is satisfied in that access, or increased access, on reasonable terms and conditions as a result of declaration of that part of the Queensland Rail service, would promote a material increase in competition in the corresponding dependent market identified in the table below:

Description of relevant part of the Queensland Rail service	Dependent market
North Coast Route service	The above-rail freight haulage market
Mount Isa Route service	The North West Queensland minerals tenements market
West Moreton Route service	The market for coal tenements in the West Moreton region
Central Western Route service	The above-rail freight haulage market
Western Route service	The above-rail freight haulage market
South Western Route service	The above-rail freight haulage market

- (c) the Tablelands system service does not satisfy Criterion A.

#### 4.2 Criterion A - Queensland Rail service as a whole

The relevant service

4.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.5 above.

The relevant market for the service

4.2.2 I have stated my findings identifying the relevant market for the service at paragraphs 3.4.1 and 3.4.2 above.

The relevant dependent (upstream or downstream) markets

4.2.3 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>21</sup>

- (a) there is no identifiable single above-rail market (or any other market warranting further analysis of Criterion A) that is dependent on the use of the Queensland Rail service as a whole; and
- (b) that Criterion A is not satisfied for the Queensland Rail service as a whole.

#### 4.3 Criterion A - North Coast Route service

The relevant service

4.3.1 I have stated my findings identifying the relevant service at paragraph 3.2.5 above.

<sup>20</sup> Part B, section 10 at page 143.

<sup>21</sup> Part B, section 3.3 at pages 14-15.

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The relevant market for the service

4.3.2 I have stated my findings identifying the relevant market for the service at paragraphs 3.4.1 and 3.4.2 above.

The relevant dependent (upstream or downstream) markets

4.3.3 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>22</sup> that a relevant dependent market, for the purposes of assessing Criterion A, is the above-rail freight haulage market. This is the market where freight forwarders contract with operators of rollingstock to haul freight via rail from an origin to destination along the North Coast Route service.

4.3.4 I consider that the above-rail haulage market is separate from the market for the North Coast Route service.

4.3.5 In light of Stakeholder Submissions<sup>23</sup> and the QCA's conclusion<sup>24</sup> that rail transport competes with road transport for containerised intermodal freight on the North Coast Route, I have considered whether another possible definition of a relevant dependent market on the North Coast Route is the North Coast Route corridor freight haulage market (which includes both rail and road freight) which is also separate from the market for the service.

4.3.6 I do not consider it necessary to reach a concluded view on whether the relevant dependent market is the above-rail haulage market or a broader freight haulage market as, applying either market, I consider (for the reasons detailed below) that Criterion A is satisfied for the North Coast Route service.

4.3.7 My consideration of this issue has included reference to Queensland Rail's submissions that:<sup>25</sup>

- (a) the QCA must assess the extent to which road haulage services compete with rail haulage services in servicing the derived demand for the transport of intermodal and sugar freight in the North Coast corridor;
- (b) the derived demand for the supply of rail intermodal freight services on the North Coast Line by beneficial freight owners and freight forwarders (or end users) includes demand for the supply of road intermodal freight services on the North Coast freight corridor;
- (c) due to short haul journeys, road is substitutable, and the market includes sugar transported by road; and
- (d) there is no demand for access to the below-rail services to operate long distance passenger services as no third-party operator can provide these without substantial subsidies from government.

4.3.8 I have considered these submissions, however, for the reasons outlined in paragraph 4.3.6 above, I do not consider it necessary to reach a concluded view on whether the dependent market is the above-rail haulage market or a broader freight haulage market (which includes road freight).

Access arrangements with and without declaration

4.3.9 I accept that the correct approach to assessing the service under Criterion A is that taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of

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<sup>22</sup> Part B, section 5.3 at pages 29-30.

<sup>23</sup> QR, 30 May 2018 at paragraph 35 at page 5; QR, 11 March 2019 table 4 at page 53-54 and paragraph 256; Pacific National, 30 May 2018 at page 6; GrainCorp, 11 June 2019 at page 5

<sup>24</sup> Part B, section 5.5.2 at page 46.

<sup>25</sup> QR, 11 March 2019 Table 4 at pages 53-54.

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declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach)<sup>26</sup>.

- 4.3.10 In relation to access arrangements **with** declaration, I accept the approach taken by the QCA,<sup>27</sup> that as the required assessment is of whether a currently declared service should remain declared, the terms and conditions of access that exist now (and the state of competition in related markets) reflect the current outcome of declaration, including the application of the QCA Act, the operation of access undertakings and user agreements entered into under these arrangements. While a future scenario in which there is declaration does not necessarily involve a continuation of the status quo, the existing conditions help illustrate this future scenario.
- 4.3.11 In relation to access arrangements **without** declaration, Queensland Rail has developed the Access Framework, which it has said will apply in the future without declaration on the North Coast Route service, the Mount Isa Route service, the West Moreton Route service and the Metropolitan line, in the form of an annexure to the executed Deed Poll. The Access Framework would remain in effect throughout its term, which is five years (that is, until 9 September 2025), unless the relevant service is declared under the QCA Act with effect on or after 9 September 2020 (in which case the term ends).
- 4.3.12 Accordingly, I have assessed whether the Deed Poll and Access Framework should form part of the counterfactual (that is, the “future without” approach) for the purpose of applying Criterion A.
- 4.3.13 I accept the QCA’s recommendation<sup>28</sup> that the Deed Poll and Access Framework are a part of the appropriate counterfactual in circumstances where prospective access seekers seek access, or increased access to the service in a future without declaration. In particular, I note and accept that:
- (a) as a matter of fact, the Deed Poll was executed by Queensland Rail in March 2019, to come into effect in September 2020, should certain lines of Queensland Rail’s network not be declared, and can be assessed on its own terms;<sup>29</sup> and
  - (b) Queensland Rail intends to be legally bound by the Deed Poll and considers that it will come into force if Queensland Rail is not declared.<sup>30</sup>
- 4.3.14 I note that the conclusion I (and the QCA) have reached differs from the views of some stakeholders, who submitted that the Deed Poll and Access Framework should not be part of the counterfactual because they are an artificial contrivance, with uncertain application. As noted above, I accept the QCA’s recommendation that the Deed Poll and Access Framework should be considered on their own terms.

Constraints on exercising market power in the absence of declaration

- 4.3.15 I accept the QCA’s recommendation, for the reasons given by the QCA,<sup>31</sup> that whether access, or increased access, to the North Coast Route service, on reasonable terms and conditions, as a result of declaration would promote competition in a dependent market depends on whether:
- (a) Queensland Rail has market power that it could use to adversely affect competition in the dependent market; and

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<sup>26</sup> QCA’s Approach, section 2.4.5 at page 18.

<sup>27</sup> QCA’s Approach, section 2.4.5 at page 18.

<sup>28</sup> Part B, section 4.5 at pages 27-28.

<sup>29</sup> Part B, section 4.3.2 at pages 19-20; QCA’s Approach, section 2.4.5 at page 19.

<sup>30</sup> Part B, section 4.3.2 at pages 19-20.

<sup>31</sup> Part B, section 5.5 at page 36.

- (b) if so, Queensland Rail has an ability and incentive to exercise that market power, in a future without declaration.

4.3.16 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>32</sup> that Queensland Rail does have market power that it could use to adversely affect competition in dependent markets. In particular, I note and accept that Queensland Rail:<sup>33</sup>

- (a) has an incentive to maximise profits; and
- (b) is the natural monopoly provider of the service that is fundamental to the operation of the above-rail freight haulage market (among other dependent markets).

4.3.17 In accepting this recommendation, my consideration of this issue has included reference to the following submissions:

- (a) Queensland Rail's submission<sup>34</sup> that it lacks market power for the following reasons:
  - (i) its revenue is far below its total cost for all of its systems, other than the West Moreton System;
  - (ii) it requires significant government funding to remain financially viable; and
  - (iii) it has been losing market share to competition from road transport.
- (b) Queensland Rail's further submission<sup>35</sup> that it does not gain market power by virtue of becoming undeclared because:
  - (i) it is market factors – such as competition from road, countervailing power and customers' ability to pay – that constrain Queensland Rail's ability to charge for services and these factors do not change, with or without declaration;
  - (ii) the same market factors restrict its ability to impose unreasonable terms and conditions; and
  - (iii) put another way, it has an incentive to provide reasonable terms and conditions to its customers because to do so would help retain existing customers and attract new customers, thereby reducing the economic loss it would make, regardless of Queensland Rail's declaration status.<sup>36</sup>

4.3.18 I do not accept these submissions for the reasons given by the QCA<sup>37</sup> and for the reasons outlined in paragraphs 4.3.19 to 4.3.39 below.

4.3.19 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>38</sup> that Queensland Rail has the ability and incentive to exercise market power in a depway that may adversely affect competition in a dependent market (whether the above-rail freight market or the possible broader freight haulage market) for the reasons given below. I note and accept that the following factors discussed below do not sufficiently constrain Queensland Rail's ability and incentive to exercise that market power in a manner that would adversely affect competition in a dependent market:

- (a) Queensland Rail is not vertically integrated;

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<sup>32</sup> Part B, section 5.5 at page 36.

<sup>33</sup> Part B, section 5.5 at page 36.

<sup>34</sup> QR, 11 March 2019 Attachment B at pages 1-2.

<sup>35</sup> QR, 11 March 2019 Attachment B at pages 1-2.

<sup>36</sup> QR, 11 March 2019 Attachment B at pages 1-2.

<sup>37</sup> Part B, section 5.5 at page 36.

<sup>38</sup> Part B, section 5.5.4 at page 55.

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- (b) Queensland Rail's network has excess capacity;
- (c) competition with road as a constraint;
- (d) Queensland Rail's position as a statutory authority and statutory obligations;
- (e) the Deed Poll/ Access Framework;
- (f) the threat of declaration; and
- (g) the dependent market is workably competitive.

*Queensland Rail is not vertically integrated*

4.3.20 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>39</sup> that whether Queensland Rail is vertically integrated or not is not determinative of the question of whether Queensland Rail has an ability and incentive to exercise market power. As a non-vertically-integrated firm, Queensland Rail may nevertheless have an ability and incentive to exercise market power to increase its profits, which may adversely affect competition in a dependent market.

*Excess capacity*

4.3.21 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>40</sup> that there are limited circumstances where a firm with market power would seek to maximise utilisation of the service (for example, where the firm faces previously unanticipated competition from another provider that has recently entered the market). These circumstances do not arise in relation to Queensland Rail.

4.3.22 I further accept the QCA's recommendation, for the reasons given by the QCA,<sup>41</sup> that the potential for hold-up can also explain why regulation may still be necessary for firms that do not even earn a normal rate of return (for example, due to excess network capacity).

*Road as a constraint*

4.3.23 I accept the QCA's recommendation<sup>42</sup> that rail transport does compete with road transport for "containerised"<sup>43</sup> intermodal<sup>44</sup> freight and this competition is primarily on price on the North Coast Route service.

4.3.24 Having accepted this, I have considered whether competition from road transport operators provides an effective long-term constraint on Queensland Rail's ability and incentive to exercise market power in a dependent market. I do not consider that competition from road transport provides an effective long-term constraint on Queensland Rail for the reasons in paragraphs 4.3.25 to 4.3.27 below.

4.3.25 I accept that Queensland Rail's ability to exercise market power on end users<sup>45</sup> is constrained because:

- (a) the above-rail price and the below-rail price taken together are constrained by the road freight price (as end use customers can choose to switch transport of their freight between road and rail); and

<sup>39</sup> Part B, section 5.5.1 at pages 37-38.

<sup>40</sup> Part B, section 5.5.1 at pages 38-40.

<sup>41</sup> Part B, section 5.5.1 at pages 38-40.

<sup>42</sup> Part B, section 5.5.2 at pages 44-45.

<sup>43</sup> Containerised freight is freight that is easily transported via shipping containers, see Part B, section 5.5.2 at pages 40-45.

<sup>44</sup> Non-bulk also referred to as "intermodal" freight is general freight in containerised, palletised and/or parcel configurations (e.g. retail products, manufactured goods, and industrial supplies) and is distinguished from "bulk" freight which consists of loose homogenous commodities typically transported in large volumes, such as sugar, grain, coal and minerals, see Part B, section 5.4.3 at page 32.

<sup>45</sup> Part B, section 5.5.2 at pages 46-48.

(b) it is open to the above-rail provider and the below-rail provider to seek to increase their share of the total rail freight price as long as the total rail freight price does not increase above the road freight price. If Queensland Rail (as the below-rail provider) sought to raise the below-rail price, and above-rail operators passed the cost through to the end use customers, the combined cost of rail would be greater than the price of road, and these end use customers could switch from rail to road to transport their goods.<sup>46</sup>

4.3.26 I further accept that in a future without declaration, Queensland Rail has the ability and incentive to exercise market power against the above-rail freight haulage operators by seeking to maximise its profits by increasing the below-rail access charge for above-rail freight operators, seeking a larger share of the total rail price.<sup>47</sup> The above-rail haulage operator cannot switch to a substitute (such as road) as rollingstock cannot be converted to being used on road (and there are no other rail lines to switch to). The above-rail haulage operator faces the combined rail price constraint, and it is unlikely to be able to pass through the higher combined price of rail without losing customers.<sup>48</sup>

4.3.27 Based on this analysis, I accept that competition with road does not constrain Queensland Rail in its ability and incentive to exercise market power against the above-rail haulage operators in the dependent above-rail freight haulage market or the broader freight haulage market. The above-rail operator (who operates in both dependent markets) will foresee this risk in subsequent contractual periods and this risk is sufficiently material that a potentially more efficient entrant will likely be deterred from entering the market in the first place. This second period risk faced by above-rail haulage operators is described as “hold-up”.<sup>49</sup>

4.3.28 In accepting this recommendation, my consideration of this issue has included reference to Queensland Rail’s submission that the QCA must assess the extent to which road haulage services compete with rail haulage services in servicing the derived demand for the transport of intermodal and sugar freight in the North Coast corridor, and in particular that:

- (a) the derived demand for the supply of rail intermodal freight services on the North Coast Line by beneficial freight owners and freight forwarders includes demand for the supply of road intermodal freight services on the North Coast freight corridor; and
- (b) due to short haul journeys, road is substitutable and the market includes sugar transported by road.<sup>50</sup>

4.3.29 I consider that rail transport competes with road transport for containerised (intermodal) freight on the North Coast corridor, but generally not for bulk products, for the reasons given by the QCA.<sup>51</sup>

*Queensland Rail’s statutory obligations and position as a statutory authority*

4.3.30 I accept the QCA’s recommendation, for the reasons given by the QCA,<sup>52</sup> that Queensland Rail’s position as a statutory authority and its statutory obligations are not an effective long-term constraint on its ability and incentive to exercise market power in a future without declaration. I note and accept that:

- (a) while recognising Queensland Rail’s position as a statutory authority, and its obligations under the *Queensland Rail Transport Authority Act 2013* (Qld), Queensland Rail is required

<sup>46</sup> Part B, section 5.5.5 at pages 48-49.

<sup>47</sup> Part B, figure 7 at page 47 and Part B, section 5.5.2 at pages 49-50.

<sup>48</sup> Part B, section 5.5.2 at pages 49-50.

<sup>49</sup> Part B, section 5.5.2 at pages 49-50.

<sup>50</sup> QR, 11 March 2019 Table 4 at pages 53-54.

<sup>51</sup> Part B, section 5.5.2 at pages 44-45.

<sup>52</sup> Part B, section 5.5.3 at page 51.

to carry out its functions as a commercial enterprise (except its community service obligations); and

- (b) government policies are subject to change and Ministerial powers may be discretionary.

4.3.31 In accepting the QCA's recommendation, my consideration of this issue has included reference to:

- (a) Queensland Rail's submissions that Queensland Rail's systems (with the exception only of the Mount Isa Line) are supported by, and are commercially viable only because Queensland Rail receives, transport services payments under the transport services contracts (**TSCs**). The absence of TSC payments would result in large parts of the rail network becoming commercially unviable, as providing customers with access to the rail network on a commercial basis would not generally be affordable to customers and such subsidies would not be required if Queensland Rail had the ability to exercise market power;<sup>53</sup> and
- (b) Linfox's submissions<sup>54</sup> that the TSC subsidies do not provide an effective long-term constraint on Queensland Rail's ability to exercise market power and adversely affect competition in dependent markets and government policies routinely change and the TSC funding and its conditionality could be removed, reduced or adjusted at any time.

4.3.32 I note the QCA's comments<sup>55</sup> that in relation to the Agricultural lines, given the lack of publicly available information on the terms and the operation of the various TSCs (including both the below-rail and above-rail subsidies), and the interactions (if any) between them, it is unclear whether the subsidies provide any constraint on Queensland Rail's ability and incentive to exercise market power against the above-rail operators. I consider that the same circumstances apply in relation to the North Coast Route service.

4.3.33 I consider that this lack of publicly available information about how the various TSCs operate, may adversely impact upon investment decisions and disadvantage above-rail operators in negotiations with Queensland Rail as it is unclear to above-rail operators what constraint, if any, the TSCs impose on Queensland Rail's ability and incentive to exercise market power.

*Deed Poll/Access Framework*

4.3.34 I accept the QCA recommendation, for the reasons given by the QCA,<sup>56</sup> that the Deed Poll and Access Framework are not an effective constraint on Queensland Rail's ability and incentive to exercise market power in a future without declaration. I note and accept the following:

- (a) the Deed Poll and Access Framework do not constrain Queensland Rail's ability to expropriate rents from access seekers at the time of renegotiating access contracts;<sup>57</sup>
- (b) the standard access agreements that would apply under the Access Framework are not evergreen and, as such, users are required to renegotiate the terms of access (including price) when the contracts expire.<sup>58</sup> This means that, Queensland Rail is able to vary a user's

<sup>53</sup> QR, 30 May 2018 at paragraphs 4, 13, 25, QR, March 2019 at paragraphs 82, 128, 129; QR, 9 April 2019 Slide 3 (QR's slide presentation at the QCA's Declaration Review Public Forum: Queensland Rail).

<sup>54</sup> Linfox, 11 June 2019 at paragraph 3.4.

<sup>55</sup> Part B, section 8.5.2 at pages 128-129.

<sup>56</sup> Part B, section 4.5 at page 27-28; Part B, section 5.5.3 at pages 51-52.

<sup>57</sup> Part B, section 4.5 at page 27-28; Part B, section 5.5.3 at pages 51-52.

<sup>58</sup> Part B, section 5.5.3 at pages 51-52.

- access charges from one contract to the next at the time of contract renewal as there are no constraints on this ability in the Deed Poll/Access Framework;<sup>59</sup>
- (c) negotiations between the parties are bilateral and Queensland Rail's behaviour during negotiations is not transparent to other access seekers;<sup>60</sup>
  - (d) the pricing arrangements in the Access Framework provide a broad discretion to Queensland Rail to set prices between a floor and a ceiling;<sup>61</sup>
  - (e) the revenue ceiling limit will not constrain Queensland Rail's ability to maximise profits extracted from access seekers given it is calculated by determining a regulated asset base based on a depreciated optimised replacement costs (DORC) evaluation determined by Queensland Rail. Access seekers will have difficulty disputing this calculation without sufficient information to understand the valuations undertaken by Queensland Rail and it is unclear whether this information will be provided by Queensland Rail;<sup>62</sup>
  - (f) compliance and enforcement mechanisms under the Deed Poll and Access Framework create greater uncertainty for access seekers and access holders than would be the case with declaration as these parties must bring legal proceedings (the QCA viewed legal proceedings as a more costly and protracted mechanism for the resolution of disputes than those available in a future with declaration);<sup>63</sup>
  - (g) Queensland Rail's ability to amend the Access Framework creates a higher degree of uncertainty for access seekers and access holders, as the basis for negotiating terms and conditions of access may change over time, which is of particular concern given that access holders must renegotiate access at the end of access agreements,<sup>64</sup> and exacerbates the risk of hold-up for users at the time of contract renewal; and
  - (h) the access arrangements (including the standard access agreements, the Deed Poll and the Access Framework) do not constrain Queensland Rail's ability to exercise market power against access seekers who have made sunk investments (above-rail freight operators who have purchased locomotives and other infrastructure that enable above-rail freight). These parties face the risk of "hold-up" by Queensland Rail, in that they will be in a less favourable negotiating position at the end of access agreements with the access arrangements providing no protection against the risk of profit maximisation by Queensland Rail. For example, there is no provision requiring the same pricing apply under a new access agreement as applied in the previous access agreement.<sup>65</sup>

*Threat of regulation and declaration*

4.3.35 I agree with the QCA's recommendation, for the reasons given by the QCA,<sup>66</sup> that, on its own, the threat of declaration would not constrain Queensland Rail from exercising market power against access seekers at the time of contract renewal. I note and accept:

- (a) if the threat of declaration could be relied upon, Queensland Rail would have prepared its Deed Poll and Access Framework in a way that constrained its ability to unilaterally change

<sup>59</sup> Part B, section 4.4.1 at page 22.

<sup>60</sup> Part B, section 5.5.3 at page 52.

<sup>61</sup> Part B, section 4.4.1 at page 22.

<sup>62</sup> Part B, section 4.4.1 at pages 22-23.

<sup>63</sup> Part B, section 4.4.3 at page 25.

<sup>64</sup> Part B, section 4.4.4 at page 25-27.

<sup>65</sup> Part B, section 4.4.4 at pages 27-28.

<sup>66</sup> Part B, section 5.5.3 at page 53-54.



prices against access seekers at time of contract renewal, when the threat of declaration is clear; and

- (b) the Queensland Rail Deed Poll/Access Framework does not deliver certainty around access charges at the time of contract renewal and therefore the threat of declaration cannot be relied upon as a constraint for Queensland Rail's market power.<sup>67</sup>

*Dependent markets are already effectively competitive*

4.3.36 I note the comments made by the QCA regarding this potential constraint.<sup>68</sup>

4.3.37 I consider that there is insufficient evidence before me to conclude that the relevant dependent market is already effectively competitive

4.3.38 I consider, therefore, that it is not possible to conclude that this factor is a constraint on Queensland Rail's ability and incentive to exercise market power.

*Conclusion on Queensland Rail's ability and incentive to exercise market power*

4.3.39 Based on the above reasons, I consider that Queensland Rail is not sufficiently constrained in its ability and incentive to exercise market power in a way that may adversely affect competition in the above-rail haulage market or the possible broader freight haulage market.

*Material increase in competition in the dependent market*

4.3.40 In light of the above conclusion, it is necessary to consider whether Queensland Rail's ability and incentive to exercise market power in a future without declaration would materially affect competitive conditions in a dependent market compared to a future with declaration, such that I can be satisfied that declaration would promote a material increase in competition in at least one dependent market.

4.3.41 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>69</sup> that the protections offered in a future with declaration will lead to a material improvement in the environment for competition in the above-rail freight haulage market, compared to a future without declaration. I note and accept that:

- (a) In a future without declaration:
- (i) there will be an imbalance of negotiating power between Queensland Rail and access seekers/users in the presence of sunk investments. This imbalance in bargaining power could inhibit the ability of access seekers/users to effectively manage risks, including the risk of hold-up, which have a significant effect on the expected profitability of entry into (and operations within) the market;
  - (ii) long term contracts could not adequately protect against the risk of hold-up given the difficulty in preparing a contract that anticipates circumstances that may arise;<sup>70</sup>
  - (iii) the risk of reputational damage to Queensland Rail as an outcome of "holding-up" access holders would not necessarily constrain Queensland Rail where the benefits of hold-up exceed the perceived cost of reputational damage;<sup>71</sup>
  - (iv) access seekers are unlikely to have transparency of certain access terms provided to other access seekers, including price terms;<sup>72</sup>

<sup>67</sup> Part B, section 5.5.3 at pages 52-54.

<sup>68</sup> Part B, section 5.5.3 at pages 54-55.

<sup>69</sup> Part B, section 5.6.4 at pages 67-69.

<sup>70</sup> Part B, section 5.6.3 at pages 59-62.

<sup>71</sup> Part B, section 5.6.3 at pages 63-64.

<sup>72</sup> Part B, section 5.6.3 at page 64.

- (v) existing regulation (that is regulation applying to Queensland Rail other than declaration) does not provides sufficient protection against hold-up;<sup>73</sup> and
- (vi) the presence of these risks, and the imbalance in the ability of access seekers/users to address these risks in a future without declaration, are likely to deter efficient entry or efficient investments by market participants.<sup>74</sup>
- (b) In contrast, a future with declaration provides a transparent statutory process under the QCA Act within which terms and conditions of access can be negotiated. This process provides greater certainty that access will be provided on reasonable terms and conditions and mitigates the risk of hold-up.<sup>75</sup>
- 4.3.42 In respect of the possible broader freight haulage market without declaration, I consider that the risk identified in paragraph 4.3.41(a)(i) above would have an impact on the broader freight haulage market because above-rail haulage is an important component of that broader market (which is consistent with my conclusion at section 5.4 below that the North Coast Route is significant to the Queensland economy).
- Overall finding – Criterion A – North Coast Route service*
- 4.3.43 I accept the QCA's recommendation that Criterion A is satisfied in respect of the North Coast Route service, in relation to the dependent above-rail haulage market.<sup>76</sup> On the basis of the reasons above, I also consider that Criterion A is satisfied in respect of the North Coast Route service if consideration is given to a possible broader freight haulage market.
- 4.4 Criterion A - Mount Isa Route service**
- The relevant service*
- 4.4.1 I have stated my findings identifying the relevant service at paragraph 3.2.5 above.
- The relevant market for the service*
- 4.4.2 I have stated my findings identifying the relevant market for the service at paragraphs 3.4.1 and 3.4.2 above.
- The relevant dependent (upstream or downstream) markets*
- 4.4.3 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>77</sup> that:
- (a) a key dependent market, for the purposes of assessing Criterion A, is the North West Queensland minerals tenements market; and
- (b) the North West Queensland minerals tenements market is separate from the market for the Mount Isa Route service.
- 4.4.4 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>78</sup> that road transport does not effectively compete with rail transport for bulk freight on the Mount Isa Route and it is likely that the majority of this transport task is performed by rail.
- 4.4.5 I have, in accepting the QCA's recommendation, considered Queensland Rail's submission that:<sup>79</sup>

<sup>73</sup> Part B, section 5.6.3 at page 65.

<sup>74</sup> Part B, section 5.6.2 at pages 56-58.

<sup>75</sup> Part B, section 5.6.1 at page 55; section 5.6.4 at page 69.

<sup>76</sup> Part B, section 5.7 at page 69.

<sup>77</sup> Part B, section 6.3 at pages 70-71.

<sup>78</sup> Part B, section 6.5.1, at page 81.

<sup>79</sup> QR, 11 March 2019 Table 4 at pages 53-54 (Mount Isa Line at page 54).

- (a) the QCA must assess the extent to which road haulage services compete with rail haulage services in servicing the derived demand for the transport of freight in the Mount Isa Freight corridor; and
- (b) rail has economic advantages compared to road for certain bulk haulage tasks. Road freight haulage imposes a significant constraint on the Mount Isa freight corridor as market developments and investment in road infrastructure are contributing to increasing competition from road for the haulage of freight historically transported by rail.

Access arrangements with and without declaration

- 4.4.6 I accept that the correct approach to assessing the service under Criterion A is that taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach<sup>80</sup>)
- 4.4.7 The reasons given in paragraphs 4.3.9 to 4.3.14 above, in relation to the relevant access arrangements with and without declaration, equally apply to the Mount Isa Route service.

Constraints on exercising market power in the absence of declaration

- 4.4.8 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>81</sup> that whether access, or increased access, to the Mount Isa Route service, on reasonable terms and conditions, as a result of declaration would promote competition in a dependent market depends on whether:
- (a) Queensland Rail has market power that it could use to adversely affect competition in the dependent market; and
  - (b) if so, Queensland Rail has an ability and incentive to exercise that market power, in a future without declaration.
- 4.4.9 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>82</sup> that Queensland Rail does have market power that could be used to adversely affect competition in markets dependent on the Mount Isa Route service, including the North West Queensland minerals tenements market. In particular, I note and accept that Queensland Rail:
- (a) has an incentive to maximise profits; and
  - (b) is the natural monopoly provider of the service that the market participants in the North West Queensland minerals tenements market rely upon to realise the value of their tenements.<sup>83</sup>
- 4.4.10 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>84</sup> that Queensland Rail has the ability and incentive to exercise market power a way that may adversely affect competition in the North West Queensland minerals tenements market. I note and accept that the factors discussed below do not sufficiently constrain Queensland Rail's ability to exercise that market power in a manner that would adversely affect competition in the dependent market:
- (a) road as a constraint;
  - (b) customer's ability to pay and countervailing power;

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<sup>80</sup> QCA's Approach, section 2.4.5 at page 18.

<sup>81</sup> Part B, section 6.5 at page 76.

<sup>82</sup> Part B, section 6.5 at page 76.

<sup>83</sup> Part B, section 6.5 at page 76.

<sup>84</sup> Part B, section 6.5.4 at page 85.

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- (c) excess capacity; and
- (d) other constraints.

*Road as a constraint*

- 4.4.11 I accept the QCA's recommendation for the reasons given by the QCA<sup>85</sup> that road transport does not effectively compete with rail transport for bulk freight on the Mount Isa Route and it is likely that the majority of this transport task is performed by rail.
- 4.4.12 I therefore accept that Queensland Rail is not constrained in its ability and incentive to exercise market power a way that may adversely affect competition in the North West Queensland minerals tenements market by competition from road transport.<sup>86</sup>
- 4.4.13 In accepting the QCA's recommendation, my consideration of this issue has included reference to Queensland Rail's submission that the QCA must assess the extent to which road haulage services compete with rail haulage services in servicing the derived demand for the transport of freight in the Mount Isa freight corridor. Queensland Rail submitted that rail has economic advantages over road for certain bulk haulage tasks. However, road imposes a significant constraint on the Mount Isa freight corridor as market developments and investment in road infrastructure are contributing to increasing competition from road for the haulage of freight historically transported by rail.<sup>87</sup>
- 4.4.14 For the reasons stated in paragraphs 4.4.11 and 4.4.12 above, I do not consider that road transport effectively competes with rail transport for bulk freight on the Mount Isa Route.

*Customers' ability to pay and countervailing power*

- 4.4.15 I agree with the QCA's recommendation, for the reasons given by the QCA,<sup>88</sup> that Queensland Rail is not constrained in its ability or incentive to exercise market power by customers' ability to pay or countervailing power.
- 4.4.16 In accepting the QCA's recommendation, my consideration included reference to Queensland Rail's submission that while access revenue on the Mount Isa line covers incremental operating costs, Queensland Rail does not generate sufficient access revenue to cover the total economic cost of providing the service with regard to the substantial fixed cost base of the system. I also considered Queensland Rail's submissions that the existing regulatory arrangements are not a binding constraint on Queensland Rail's provision of services on the Mount Isa line, demonstrated by the fact that Queensland Rail's access revenue on this line is significantly below the ceiling limit established by these arrangements (\$74 million versus \$181 million).<sup>89</sup>
- 4.4.17 However, for the reasons given by the QCA,<sup>90</sup> I:
- (a) do not consider that whether a ceiling revenue limit is, or is not achieved, is not necessarily an indication of the absence of market power, nor an indication of the presence of countervailing power; and
  - (b) do consider that the existing regulatory regime imposes a range of constraints that prevent Queensland Rail from exercising market power.

<sup>85</sup> Part B, section 6.5.1, at page 81.

<sup>86</sup> Part B, section 6.5.1 at page 77-84.

<sup>87</sup> QR, 11 March 2019 Table 4 at pages 53-54 (Mount Isa Line at page 54).

<sup>88</sup> Part B, section 6.5.2 at pages 84-85.

<sup>89</sup> QR, 11 March 2019 at paragraphs 156-157.

<sup>90</sup> Part B, section 6.5.2 at page 84-85.

*Excess capacity*

- 4.4.18 I accept the evidence from Queensland Rail that utilisation of the Mount Isa Line varies between 24 per cent and 40 per cent.<sup>91</sup>
- 4.4.19 The QCA made recommendations about excess capacity in relation to the North Coast Route service which also apply to the Mount Isa Route service and are summarised at paragraphs 4.3.21 and 4.3.22 above. As with the North Coast Route service, I agree with the QCA's recommendation, for the reasons given by the QCA, that excess capacity is not a constraint on Queensland Rail's ability or incentive to exercise market power, specifically to maximise profits.

*Other constraints*

- 4.4.20 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>92</sup> that Queensland Rail's statutory obligations, its position as a statutory authority and the threat of regulation or declaration are not effective constraints for the reasons considered in paragraphs 4.3.30 to 4.3.31 and 4.3.35 above.<sup>93</sup> These reasons equally apply to the Mount Isa Route service.
- 4.4.21 In addition, I considered Stakeholder Submissions in respect of vertical integration, the Deed Poll/Access Framework and that dependent markets were already competitive. For the reasons outlined above in paragraphs 4.3.20, 4.3.34, and 4.3.36 to 4.3.38 for the North Coast Route service, I do not consider that those factors are effective constraints on the ability and incentive of Queensland Rail to exercise market power in respect of the North West Queensland minerals tenements market.

*Findings on the ability and incentive to exercise market power*

- 4.4.22 Based on the above reasons, I consider that Queensland Rail is not sufficiently constrained in its ability and incentive to exercise market power a way that may adversely affect competition in the North West Queensland minerals tenements market.

*Material increase in competition in the dependent market*

- 4.4.23 In light of the above conclusion it is necessary to consider whether Queensland Rail's ability and incentive to exercise market power in a future without declaration would materially affect competitive conditions in a dependent market compared to a future with declaration, such that I can be satisfied that declaration would promote a material increase in competition in at least one dependent market.
- 4.4.24 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>94</sup> that the protections offered in a future with declaration will lead to a material improvement in the environment for competition in the North West Queensland minerals tenements market compared to a future without declaration. In particular I note and accept that:<sup>95</sup>
- (a) in a future without declaration, Queensland Rail will not face any effective constraints on its ability and incentive to exercise market power, specifically "hold-up", against participants in the North West Queensland minerals tenements market. The risk of hold-up and the presence of substantial sunk investments is sufficiently material that it is likely to discourage efficient entry or efficient investments by market participants;<sup>96</sup> and
  - (b) in contrast, declaration and the associated access regime are able to credibly constrain Queensland Rail's ability and incentive to exercise market power and credibly address the

<sup>91</sup> QR 11 March 2019, Attachment A at page 12; Part B, section 6.4.3 at page 75.

<sup>92</sup> Part B, section 6.5.3 at page 85.

<sup>93</sup> Part B, section 6.5.3 at page 85.

<sup>94</sup> Part B, section 6.6.3 at pages 90-91.

<sup>95</sup> Part B, section 6.6.3 at pages 90-91.

<sup>96</sup> Part B, section 6.6.3 at pages 90-91.

hold-up risk. If efficient entry is likely to be promoted in a future with declaration (compared to a future without declaration), this would indicate that access, as a result of declaration, would promote an increase in competition that is material.<sup>97</sup>

*Overall finding – Criterion A – Mount Isa Route service*

4.4.25 I accept the QCA's recommendation that Criterion A is satisfied in respect of the Mount Isa Route service, in relation to the dependent North West Queensland minerals tenements market.<sup>98</sup>

**4.5 Criterion A - West Moreton Route service**

*The relevant service*

4.5.1 I have stated my findings identifying the relevant service at paragraph 3.2.5 above.

*The relevant market for the service*

4.5.2 I have stated my findings identifying the relevant market for the service at paragraphs 3.4.1 and 3.4.2 above.

*The relevant dependent (upstream or downstream) markets*

4.5.3 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>99</sup> that:

- (a) the major dependent market, for the purposes of assessing Criterion A, is the West Moreton region coal tenements market; and
- (b) the West Moreton region coal tenements market is separate from the market for the West Moreton Route service.

4.5.4 In accepting the QCA's recommendation, my consideration of this issue included reference to the submissions of:

- (a) South West Producers that it is possible that there are other dependent markets in which declaration promotes a material increase in competition, particularly in the South West Queensland region in which the West Moreton coal mines are a major supplier of energy (in the case of New Hope), purchaser of goods and services and employer;<sup>100</sup> and
- (b) Queensland Rail<sup>101</sup> that the relevant market must address:
  - (i) the extent to which rail haulage services provided, using alternative rail infrastructure, will be a substitute for the service over the period under consideration (i.e. Inland Rail likely to compete with West Moreton System); and
  - (ii) the extent to which road haulage services are a substitute for rail haulage services having regard to the derived demand for the particular service under consideration. The degree of substitutability between road and rail must be correctly assessed so that it is not underestimated. Queensland Rail submitted that road is a practical and commercial alternative to rail transport for all but the transportation of some bulk commodities over long distances.<sup>102</sup>

<sup>97</sup> Part B, section 6.6.3 at pages 90-91.

<sup>98</sup> Part B, section 6.7 at page 91.

<sup>99</sup> Part B, section 7.3 at pages 92-93.

<sup>100</sup> South West Producers, 30 May 2018 at pages 4-5, 20-25; South West Producers, 26 April 2019 at page 16.

<sup>101</sup> Paragraph 255, Paragraph 19, 15-16 QR 11 March 2019.

<sup>102</sup> QR, 30 May 2018 at paragraph 35.

- 4.5.5 I do not consider it necessary to consider whether there are other dependent markets given that I accept the QCA's recommendation that the major dependent market, for the purposes of assessing Criterion A, is the West Moreton region coal tenements market.<sup>103</sup>
- 4.5.6 Further, I accept the QCA's recommendation, for the reasons given by the QCA, that:
- (a) there is uncertainty in relation to the Inland Rail project, including uncertainties as to the final alignment, its operational characteristics, the charging regime and the expected completion date of the project;<sup>104</sup> and
  - (b) road transport cannot (and does not) compete with rail transport for the haulage of coal along the West Moreton Route (which represents about 98 percent of total freight carried).<sup>105</sup>
- Access arrangements with and without declaration
- 4.5.7 I accept that the correct approach to assessing the service under Criterion A is that taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach<sup>106</sup>).
- 4.5.8 The reasons given in paragraphs 4.3.9 to 4.3.14 above in relation to the relevant access arrangements with and without declaration equally apply to the West Moreton Route service.
- Constraints on exercising market power in the absence of declaration
- 4.5.9 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>107</sup> that whether access, or increased access, to the West Moreton Route service, on reasonable terms and conditions, as a result of declaration would promote competition in a dependent market depends on whether:
- (a) Queensland Rail has market power that it could use to adversely affect competition in the dependent market; and
  - (b) if so, Queensland Rail has an ability and incentive to exercise that market power, in a future without declaration.
- 4.5.10 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>108</sup> that Queensland Rail does have market power that could be used to adversely affect competition in markets dependent on the West Moreton Route service, including the West Moreton region coal tenements market. In particular, I note and accept that Queensland Rail:<sup>109</sup>
- (a) has an incentive to maximise profits; and
  - (b) is the natural monopoly provider of the service that the market participants in the West Moreton region tenements market rely upon to realise the value of their tenements.
- 4.5.11 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>110</sup> that Queensland Rail has the ability and incentive to exercise market power a way that may adversely affect competition in the West Moreton region coal tenements. I note and accept that the factors discussed below do not

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<sup>103</sup> Part B, section 7.3 at pages 92-93.

<sup>104</sup> Part B, section 11.5.2 at page 150.

<sup>105</sup> Part B, section 7.5.1 at page 99-100.

<sup>106</sup> QCA's Approach, section 2.4.5 at page 18.

<sup>107</sup> Part B, section 7.5 at page 97.

<sup>108</sup> Part B, section 7.5 at page 97-98.

<sup>109</sup> Part B, section 7.5 at page 97-98.

<sup>110</sup> Part B, section 7.5.3 at page 102.

sufficiently constrain Queensland Rail's ability to exercise that market power in a manner that would adversely affect competition in the dependent market:

- (a) road as a constraint; and
- (b) market factors and other constraints.

*Road as a constraint*

4.5.12 I agree with the QCA's recommendation,<sup>111</sup> for the reasons given by the QCA,<sup>112</sup> that competition from road does not provide a constraint on Queensland Rail's ability and incentive to exercise market power a way that may adversely affect competition in the West Moreton region coal tenements market. I note and accept that:

- (a) coal miners in the West Moreton region are entirely dependent on the use of above-rail haulage on the West Moreton Route to transport coal to the Port of Brisbane;
- (b) there is a prohibition on the use of road haulage to transport coal (particularly large volumes of coal) through the Brisbane metropolitan region; and
- (c) evidence from Queensland Rail that it is not constrained (by road competition) in its provision of some bulk commodities over long distances, such as coal on the West Moreton system.<sup>113</sup>

*Market factors and other constraints*

4.5.13 I agree with the QCA's recommendation, for the reasons given by the QCA,<sup>114</sup> that Queensland Rail would not be constrained in its ability or incentive to exercise market power by a customer's ability to pay or market factors, such as the presence of excess capacity under a low usage scenario, as I consider the hold-up problem continues to arise even in the presence of excess capacity. I note and accept:

- (a) excess capacity is not a constraint on Queensland Rail's ability or incentive to exercise market power, specifically to maximise profits; and
- (b) even with spare capacity, Queensland Rail has an incentive to maximise profits, not utilisation.<sup>115</sup>

4.5.14 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>116</sup> that Queensland Rail's statutory obligations, its position as a statutory authority and the threat of regulation or declaration are not effective constraints for the reasons considered in paragraphs 4.3.30 to 4.3.31 and 4.3.35 above<sup>117</sup> and equally apply to the West Moreton Route service.

4.5.15 In addition, I have considered Stakeholder Submissions in respect of vertical integration, the Deed Poll/Access Framework and that dependent markets were already competitive. For the reasons outlined above in paragraphs 4.3.20, 4.3.34, and 4.3.36 to 4.3.38 above for the North Coast Route service, I do not consider that those factors are effective constraints on the ability and incentive of Queensland Rail to exercise market power a way that may adversely affect competition in respect of the West Moreton region coal tenements market.

<sup>111</sup> Part B, section 7.5.1 at page 99-100.

<sup>112</sup> Part B, section 7.5.1 at pages 99-100.

<sup>113</sup> QR, 11 March 2019 paragraphs 79.3 and 122.

<sup>114</sup> Part B, section 7.5.2 at pages 100-102.

<sup>115</sup> Part B, section 7.5.2 at page 102.

<sup>116</sup> Part B, section 7.5.2 at pages 101-102.

<sup>117</sup> Part B, section 7.5.2 at pages 101-102.



Findings on the ability and incentive to exercise market power

- 4.5.16 Based on the above reasons, I consider that Queensland Rail would not be sufficiently constrained in its ability and incentive to exercise market power a way that may adversely affect competition in the West Moreton region coal tenements market.

Material increase in competition in the dependent market

- 4.5.17 In light of the above conclusion it is necessary to consider whether Queensland Rail's ability and incentive to exercise market power in a future without declaration would materially affect competitive conditions in a dependent market compared to a future with declaration, such that I can be satisfied that declaration would promote a material increase in competition in at least one dependent market.
- 4.5.18 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>118</sup> that the protections offered in a future with declaration will lead to a material improvement in the environment for competition in the West Moreton region coal tenements market compared to a future without declaration. In particular, I note and accept that:
- (a) in a future without declaration, Queensland Rail will not face any effective long-term constraints on its ability and incentive to exercise market power in relation to access terms. There will be an imbalance of negotiating power between Queensland Rail and access seekers/users in the presence of sunk investments which could inhibit the ability of access seekers/users to effectively manage risks, including the risk of hold-up, which will have a significant effect on the expected profitability of entry into (and operations within) the market. This is likely to deter efficient entry or efficient investments by market participants,<sup>119</sup> and
  - (b) in contrast, in a future with declaration, there will be a transparent statutory process under the QCA Act within which terms and conditions of access can be negotiated. This will provide greater certainty that access will be provided on reasonable terms and conditions, including to address sunk investments and mitigate the risk of hold-up for access seekers.<sup>120</sup>

Overall findings – Criterion A – West Moreton Route service

- 4.5.19 I accept the QCA's recommendation that Criterion A is satisfied in respect of the West Moreton Route service, in relation to the dependent West Moreton region coal minerals tenements market.<sup>121</sup>

**4.6 Criterion A - Agricultural lines**

The relevant service

- 4.6.1 I have stated my findings identifying the relevant services at paragraph 3.2.5 above.

The relevant market for the service

- 4.6.2 I have stated my findings identifying the relevant markets for the services at paragraphs 3.4.1 and 3.4.2 above.

The relevant dependent (upstream or downstream) markets

- 4.6.3 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>122</sup> that a relevant dependent market, for the purposes of assessing Criterion A, on each of the Central Western Route, the Western Route and the South Western Route is the above-rail freight market on each respective route.

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<sup>118</sup> Part B, section 7.6 at pages 102-107.

<sup>119</sup> Part B, section 7.6.2 at pages 103-106.

<sup>120</sup> Part B, section 7.6.1 at pages 102-103.

<sup>121</sup> Part B, section 7.7 at page 107.

<sup>122</sup> Part B, section 8.3 at pages 109-110.

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- 4.6.4 I consider that each above-rail freight market is separate from the market for each of the Central Western Route service, the Western Route service and the South Western Route service.
- 4.6.5 In light of Stakeholder Submissions<sup>123</sup> and the QCA's conclusion<sup>124</sup> that rail competes with road transport on all of the three main freight tasks<sup>125</sup> on the Agricultural lines, I have considered whether another possible definition of a relevant dependent market on the Agricultural lines is the freight haulage market (which includes both rail and road freight) which is separate from the market for the services.
- 4.6.6 I have not considered it necessary to reach a concluded view on whether the relevant dependent market is the above-rail haulage market or a broader freight haulage market as, applying either market, I consider, for the reasons detailed below, that Criterion A is satisfied for the Agricultural lines.
- 4.6.7 In accepting this recommendation, my consideration of this issue has included reference to Queensland Rail's<sup>126</sup> submission that the relevant market must address the extent to which road haulage services are a substitute for rail haulage services having regard to the derived demand for the particular service under consideration. The degree of substitutability between road and rail must be correctly assessed so that it is not underestimated. Queensland Rail submitted that road is a practical and commercial alternative to rail transport for all but the transportation of some bulk commodities over long distances.<sup>127</sup>
- 4.6.8 I have considered these submissions, however, for the reasons outlined in paragraph 4.6.6 above, I do not consider it necessary to reach a concluded view on whether the dependent market is the above-rail haulage market or a broader freight haulage market (which includes road freight).
- Access arrangements with and without declaration*
- 4.6.9 I accept that the correct approach to assessing the service under Criterion A is that taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach<sup>128</sup>).
- 4.6.10 The reasons given in paragraph 4.3.10 above in respect of the relevant access arrangements with declaration equally apply to the Agricultural lines.
- 4.6.11 I note that the Queensland Rail Deed Poll and Access Framework does not apply to the Agricultural lines and therefore are not relevant to the assessment of the future without declaration.<sup>129</sup>
- 4.6.12 Therefore, I consider that the future without declaration is one in which no access regime exists (either under the QCA Act or the Deed Poll and Access Framework).
- Constraints on exercising market power in the absence of declaration*
- 4.6.13 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>130</sup> that whether access, or increased access, to the Agricultural lines, on reasonable terms and conditions, as a result of declaration would promote competition in a dependent market depends on whether:

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<sup>123</sup> QR, 11 March 2019 at paragraph 256, table 4 at page 54; QR, 30 May 2018 at paragraph 35; See also generally: Pacific National, 30 May 2018 at ages 12-13; GrainCorp, 11 June 2019 at page 5.

<sup>124</sup> Part B, section 8.5.1 at page 126.

<sup>125</sup> The primary freight tasks include the transport of grain, livestock and intermodal freight.

<sup>126</sup> QR, 11 March 2019 at paragraph 255; and 15-16

<sup>127</sup> QR, 30 May 2018 at paragraph 35.

<sup>128</sup> QCA's Approach, section 2.4.5 at page 18.

<sup>129</sup> QR 11 March 2019 at paragraph 73.

<sup>130</sup> Part B, section 8.5 at page 121.

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- (a) Queensland Rail has market power that it could use to adversely affect competition in the dependent market; and
  - (b) if so, Queensland Rail has an ability and incentive to exercise that market power, in a future without declaration.

4.6.14 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>131</sup> that Queensland Rail has the ability and incentive to exercise market power in a way that may affect competition in a dependent market.

4.6.15 I consider that Queensland Rail does have market power that could be used to adversely affect competition in markets dependent on the Agricultural lines, including the above-rail freight haulage markets as Queensland Rail:

- (a) has an incentive to maximise profits; and
- (b) is the natural monopoly provider of the service that is fundamental to the operation of each above-rail freight haulage market.

4.6.16 I note and accept that the factors discussed below do not sufficiently constrain Queensland Rail's ability to exercise that market power in a manner that would adversely affect competition in the dependent market (whether the above-rail freight haulage market or the possible broader freight haulage market):

- (a) road as a constraint;
- (b) subsidies under the TSCs;
- (c) excess capacity; and
- (d) other possible constraints.

*Road as a constraint*

4.6.17 I accept the QCA's recommendation<sup>132</sup> that rail transport does compete with road transport on the Agricultural lines' corridors. Having accepted this, I have considered whether competition from road transport operators provides an effective long-term constraint on Queensland Rail's ability and incentive to exercise market power in a dependent market.

4.6.18 I accept the QCA's recommendation<sup>133</sup> that Queensland Rail's ability to exercise market power on the end users is constrained because:

- (a) the above-rail price and the below-rail price taken together are constrained by the road freight price (as end use customers can choose to switch transport of their freight between road and rail); and
- (b) it is open to the above-rail provider and the below-rail provider to seek to increase their share of the total rail freight price as long as the total rail freight price does not increase above the road freight price. If Queensland Rail (as the below-rail provider) sought to raise the below-rail price, and above-rail operators passed the cost through to the end use customers, the combined cost of rail would be greater than the price of road transport, and the end users could switch from rail to road to transport their goods.<sup>134</sup>

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<sup>131</sup> Part B, section 8.5.4 at page 130.

<sup>132</sup> Part B, section 8.5.1 at page 125.

<sup>133</sup> Part B, section 8.5.1 at pages 126-127.

<sup>134</sup> Part B, section 8.5.1 at pages 126-127.

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- 4.6.19 I further accept that in a future without declaration, Queensland Rail has the ability and incentive to exercise market power against the above-rail freight haulage operators by seeking to maximise its profits by increasing the below-rail access charge for above-rail freight operators, and thereby seek a larger share of the total rail price.<sup>135</sup> The above-rail haulage operator cannot switch to a substitute (such as road) as rollingstock cannot be converted to being used on road (and there are no other rail lines to switch to). The above-rail haulage operator faces the combined rail price constraint, and it is unlikely to be able to pass through the higher combined price of rail without losing customers.<sup>136</sup>
- 4.6.20 Based on this analysis, I accept that competition with road does not constrain Queensland Rail in its ability and incentive to exercise market power against the above-rail haulage operators in the dependent above-rail freight haulage market or the broader freight haulage market. The above-rail operator will foresee this risk in subsequent contractual periods and this risk is sufficiently material that a potentially more efficient entrant will likely be deterred from entering the market in the first place. This second period risk faced by above-rail haulage operators is described as “hold-up”.<sup>137</sup>
- Position as a statutory authority, statutory obligations and subsidies under TSCs*
- 4.6.21 I accept the QCA’s recommendation<sup>138</sup> for the reasons given by the QCA<sup>139</sup> that Queensland Rail’s position as a statutory authority and its statutory obligations are not an effective long-term constraint on its ability and incentive to exercise market power in a future without declaration.
- 4.6.22 I note that the QCA applied the same reasons on these matters in relation to the Agricultural lines as it applied to the North Coast Route service.<sup>140</sup> I accept the QCA’s recommendation<sup>141</sup> to apply the same reasons to the Agricultural lines.
- 4.6.23 I accept the QCA’s recommendation<sup>142</sup> that the existence of TSCs are not an effective long-term constraint on its ability and incentive to exercise market power in a future without declaration. I note and accept that:
- (a) while recognising Queensland Rail’s position as a statutory authority, and its obligations under the *Queensland Rail Transport Authority Act 2013* (Qld), Queensland Rail is required to carry out its functions as a commercial enterprise (except its community service obligations); and
  - (b) government policies are subject to change and Ministerial powers may be discretionary.
- 4.6.24 I note the QCA’s comments that, given the lack of publicly available information on the terms and the operation of the various TSCs (including both the below-rail and above-rail subsidies), and the interactions (if any) between them, it is unclear whether the subsidies provide any constraint on Queensland Rail’s ability and incentive to exercise market power against the above-rail operators who receive these subsidies in the above-rail freight haulage markets.
- 4.6.25 I consider that this lack of publicly available information about how the various TSCs operate, may adversely impact upon investment decisions and disadvantage above-rail operators in negotiations

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<sup>135</sup> Part B, section 8.5.1 at pages 127-128.

<sup>136</sup> Part B, section 8.5.1 at pages 127-128.

<sup>137</sup> Part B, section 8.5.1 at pages 125-128.

<sup>138</sup> Part B, section 8.5.3 at pages 129-130.

<sup>139</sup> Part B, section 8.5.3 at pages 129-130.

<sup>140</sup> Part B, section 5.5.3 at pages 51-52.

<sup>141</sup> Part B, section 8.5.3 at page 130.

<sup>142</sup> Part B, section 8.5.2 at pages 128-129.

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with Queensland Rail as it is unclear to above-rail operators what constraint, if any, the TSCs impose on Queensland Rail's ability and incentive to exercise market power.

- 4.6.26 I further accept the QCA's recommendation, for the reasons given by the QCA,<sup>143</sup> that the presence of TSC subsidies does not affect Queensland Rail's ability and incentive to exercise market power against non-subsidised above-rail operators (or above-rail operators operating non-subsidised services) on the Agricultural lines. That is, Queensland Rail does have the ability and incentive to exercise market power with respect to non-subsidised above-rail operators on the Agricultural lines.

*Excess capacity*

- 4.6.27 For the reasons given in respect of the North Coast Route service (see paragraphs 4.3.21 to 4.3.22 above), excess capacity on the Agricultural lines does not constrain Queensland Rail's ability and incentive to exercise market power in respect of the above-rail freight haulage markets.

*Other possible constraints*

- 4.6.28 I accept the QCA's recommendation, for the reasons given by the QCA,<sup>144</sup> that the threat of regulation or declaration are not effective constraints for the reasons considered in paragraph 4.3.35 above.<sup>145</sup>
- 4.6.29 In addition, I considered Stakeholder Submissions in respect of vertical integration, and that dependent markets were already competitive. For the reasons outlined above in paragraphs 4.3.20 and 4.3.36 to 4.3.38 above, I do not consider that those factors are effective constraints on the ability and incentive of Queensland Rail to exercise market power in respect of the above-rail freight haulage markets.

*Conclusion on Queensland Rail's ability and incentive to exercise market power*

- 4.6.30 Based on the above reasons, I consider that Queensland Rail is not sufficiently constrained in its ability and incentive to exercise market power a way that may adversely affect competition in the above-rail haulage markets or the possible broader freight haulage market for each Agricultural line.

*Material increase in competition in the dependent market*

- 4.6.31 In light of the above conclusion, it is necessary to consider whether Queensland Rail's ability and incentive to exercise market power in a future without declaration would materially affect competitive conditions in a dependent market compared to a future with declaration, such that I can be satisfied that declaration would promote a material increase in competition in at least one dependent market.
- 4.6.32 I accept the QCA's recommendations for the reasons given by the QCA<sup>146</sup> that access (or increased access) to the South Western Route service, the Western Route service and the Central Western Route service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the above-rail freight haulage markets on the Agricultural lines.
- 4.6.33 I note and accept that:<sup>147</sup>
- (a) in a future without declaration Queensland Rail will not face any effective long-term constraints on its ability and incentive to exercise market power in relation to access terms. There will be an imbalance of negotiating power between Queensland Rail and access seekers/users in the presence of sunk investments which could inhibit the ability of access seekers/users to effectively manage risks, including the risk of hold-up, which have a

<sup>143</sup> Part B, section 8.5.2 at pages 128-129.

<sup>144</sup> Part B, section 8.5.3 at pages 129-130.

<sup>145</sup> Part B, section 8.5.3 at pages 129-130.

<sup>146</sup> Part B, sections 8.6.3 and 8.7 at pages 134-5.

<sup>147</sup> Part B, sections 8.6.3 and 8.7 at pages 134-5.

significant effect on the expected profitability of entry into (and operations within) the market. This is likely to deter efficient entry or efficient investments by market participants; and

- (b) in contrast, a future with declaration provides market participants a transparent statutory process under the QCA Act within which terms and conditions of access can be negotiated and greater certainty that access will be provided on reasonable terms and conditions, including to address sunk investments and mitigate the risk of hold-up for access seekers.

4.6.34 In respect of the possible broader freight haulage market without declaration, I consider that the risk identified in paragraph 4.6.33(a) above would have an impact on the broader freight haulage market because above-rail haulage is an important component of that broader market which is supported by the QCA's finding that grain intended for export is more suited to the rail task, as it is typically transported in bulk form to one destination for export (e.g. the port).<sup>148</sup>

4.6.35 In reaching this recommendation, my consideration of this issue has included the following submissions:

- (a) Queensland Rail submitted that the services provided on these systems will be provided in the same manner, pursuant to TSC subsidies and for public policy reasons with or without declaration. For the reasons stated in paragraph 4.6.26 above, I do not consider that the presence of TSC subsidies affects my consideration of competition in the dependent market with or without declaration;<sup>149</sup>
- (b) Watco submitted that declaration promotes competition by providing transparency and certainty of terms of access, also noting that:
  - (i) Watco and GrainCorp's rail haulage contract (that was due to commence in late 2019) is evidence that competition in above-rail operations has been achieved within the current declared framework for these three systems. The ability to achieve competition in above-rail services, including the significant investment and innovation that will result, is at risk if the three systems are not re-declared;
  - (ii) the proposed introduction of supply chain efficiencies to attract more grain freight from road to rail will be seriously impacted with the uncertainty of access arrangements; and
  - (iii) the ability for a new above-rail entrant like Watco to enter the Queensland market is critically dependant on the stable operation of Queensland's regulatory framework under Part 5 of the QCA Act;<sup>150</sup>
- (c) GrainCorp<sup>151</sup> also made submissions stating that declaration:
  - (i) supported strong investment and the growth of competition across grain supply chains in Queensland (pointing to the entry of Watco into the market);
  - (ii) provided potential entrants with a degree of certainty around the future terms of access to below-rail infrastructure, thus supporting long-term investments;
  - (iii) promoted entry by, and competition between, above-rail operators for GrainCorp's above-rail grain haulage contracts;

<sup>148</sup> Part B, section 8.5.1 at page 122.

<sup>149</sup> QR, 11 March 2019 at paragraphs 455.

<sup>150</sup> Watco, 8 May 2019 at pages 4-5.

<sup>151</sup> GrainCorp, 11 June 2019 at pages 3 and 6-7.

- (iv) protected the grain supply chain from the inefficient implications of market power, including hold-up risk; and
- (v) the removal of declaration would be damaging to competition in dependent markets, due to increased uncertainty for potential entrants around the future access terms.

4.6.36 I accept these submissions of Watco and GrainCorp in support of my conclusions in paragraph 4.6.33 above as to the future with and without declaration.

Overall finding – Criterion A – Agricultural lines

4.6.37 I accept the QCA's recommendation that Criterion A is satisfied in respect of the South Western Route service, the Western Route service and the Central Western Route service in relation to the dependent above-rail freight haulage markets.<sup>152</sup>

4.6.38 On the basis of the reasons above I also consider that Criterion A is satisfied in respect of the South Western Route service, the Western Route service and the Central Western Route service if consideration is given to a possible broader dependent freight haulage market.

**4.7 Criterion A - Tablelands system service**

The relevant service

4.7.1 I have stated my findings identifying the relevant service at paragraph 3.2.5 above.

The relevant market for the service

4.7.2 I have stated my findings identifying the relevant market for the service at paragraph 3.4.1 above.

The relevant dependent (upstream or downstream) markets

4.7.3 I accept the QCA's recommendation for the reasons given by the QCA<sup>153</sup> that:

- (a) the relevant dependent market, for the purposes of assessing Criterion A, is the above-rail passenger market on the Tablelands system; and
- (b) the above-rail passenger market is separate from the market for the Tablelands system service.

Access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration, would promote a material increase in competition in a relevant dependent market

4.7.4 I consider that Queensland Rail does have market power that could be used to adversely affect the above-rail passenger market because Queensland Rail:

- (a) is vertically integrated in the above-rail passenger market on the Tablelands system;
- (b) has an incentive to maximise profits; and
- (c) is the natural monopoly provider of the service that the market participants in the above-rail passenger market rely.

4.7.5 I note and accept QCA's recommendations that:

- (a) there has rarely (if ever) been two above-rail passenger services that have operated in direct competition with each other (i.e. for the same route) in Queensland;<sup>154</sup>

<sup>152</sup> Part B, section 8.7 at page 135.

<sup>153</sup> Part B, section 9.3 at page 136-137.

<sup>154</sup> Part B, section 9.5.4 at page 141.

- (b) that the tourist services on the Tablelands system, are likely to be provided for public policy reasons (e.g. to promote the local tourism industry) rather than purely commercial reasons;<sup>155</sup> and
- (c) Queensland Rail may compete with a private operator to secure the above-rail passenger TSC (e.g. at the time of tendering for the TSC), rather than to deny access to a private above-rail passenger operator at a later stage in the hope that it (Queensland Rail) will secure the TSC.<sup>156</sup>

4.7.6 I therefore consider:

- (a) it is unlikely that the dependent above-rail passenger market supports competition; and
- (b) that insufficient evidence has been provided to demonstrate that there is competition for securing the TSC.

Overall finding – Criterion A – Tablelands system service

4.7.7 I accept the QCA's recommendation that Criterion A is not satisfied in respect of the Tablelands system service.<sup>157</sup>

4.7.8 I consider that access (or increased access), on reasonable terms and conditions, as a result of declaration, will not promote a material increase in competition in the above-rail passenger market on the Tablelands System service.

## 5 Criterion C - State significance

### 5.1 Overview

5.1.1 Criterion C (see section 76(2)(c) of the QCA Act) requires that I consider whether the facility for the service is significant, having regard to its size or its importance to the Queensland economy.

Overall QCA recommendations on Criterion C

5.1.2 The QCA recommended that:

- (a) the facility for the service as a whole satisfies Criterion C; and
- (b) the facility for each identified part of the service satisfies Criterion C.<sup>158</sup>

### 5.2 The relevant facility for the service

5.2.1 I have stated my findings identifying the relevant service(s) at paragraph 3.2.5 above and identifying the facilities for the service(s) at paragraph 3.3.1 and 3.3.2 above.

### 5.3 Criterion C - Services as a whole

5.3.1 I accept the QCA's recommendation that the facility for the service as a whole is significant, having regard to its size. I note and accept following:

- (a) the Queensland Rail network is of substantial physical size (at least 6,600 km of rail track based on estimates provided by stakeholders);
- (b) the network covers a large geographic area across the State and is interconnected; and

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<sup>155</sup> Part B, section 9.5.5 at pages 141-142.

<sup>156</sup> Part B, section 9.5.5 at page 141.

<sup>157</sup> Part B, section 9.6 at page 142.

<sup>158</sup> Part B, section 12.1, Table 10 at page 154.

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(c) substantial volumes of freight and numbers of passengers are transported on the network.<sup>159</sup>

5.3.2 I accept the QCA's recommendation that the facility for the service as a whole is significant, having regard to its importance to the economy. I note and accept that the Queensland Rail network as a whole facilitates the development of various industries in Queensland, which contribute significantly to the Queensland economy through Gross State Product (**GSP**).<sup>160</sup>

#### 5.4 Criterion C - North Coast Route service

5.4.1 I accept the QCA's Recommendation that the North Coast Route is significant, having regard to its size. I note and accept that the North Coast line (which forms the Route along with the Metropolitan system):

- (a) extends across a significant area of Queensland (i.e. Nambour (near Brisbane) north along Queensland's eastern coastline to Cairns);<sup>161</sup> and
- (b) carries substantial annual volumes of freight as well as a number of regional passengers (for example in 2017-18 the North Coast Line transported approximately 6,700 million gtk of freight and passengers)<sup>162</sup>.

5.4.2 I accept the QCA's recommendation that the North Coast Route is significant, having regard to its importance to the economy. I note and accept that the North Coast Route service is:

- (a) a crucial freight corridor;<sup>163</sup> and
- (b) connects freight traffic from other rail systems to various export ports on Queensland's eastern coastline,<sup>164</sup> including freight from the Mount Isa Line, Central Western, Western, South Western and West Moreton systems.<sup>165</sup>

#### 5.5 Criterion C - Mount Isa Route service

5.5.1 I accept the QCA's recommendation that the Mount Isa Route is significant, having regard to its size. I note and accept that the Mount Isa line:

- (a) is extensive in both its length (1,039 kms) and geographical spread, extending from Queensland's eastern coastline to almost its western border; and
- (b) carries substantial annual volumes of freight and passengers (for example, in 2017-18 it transported 4,377 million gtk of freight and passengers).<sup>166</sup>

5.5.2 I accept the QCA's recommendation that the Mount Isa Route is significant, having regard to its importance to the economy. I note and accept that the Mount Isa Route supports the development of the North West Minerals Province and enables key regional industries that contribute substantially to the Queensland economy through employment, local spending and royalties paid to the State.<sup>167</sup>

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<sup>159</sup> Part B, section 12.6.1 at pages 170-171.

<sup>160</sup> Part B, section 12.6.2 at pages 171-172.

<sup>161</sup> Part B, section 12.5.1 at page 159.

<sup>162</sup> Part B, section 12.5.1 at page 159.

<sup>163</sup> Part B, section 12.5.1 at page 172.

<sup>164</sup> Part B, section 12.5.1 at page 172.

<sup>165</sup> Part B, section 12.7.1 at page 172.

<sup>166</sup> Part B, section 12.5.2 at pages 160-161.

<sup>167</sup> Part B, section 12.7.2 at pages 172-173.

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**5.6 Criterion C - West Moreton Route service**

5.6.1 I accept the QCA's recommendation that the West Moreton Route is significant, having regard to its size. I note and accept that the West Moreton system and the Metropolitan systems:

- (a) are of substantial length (i.e. the West Moreton system is 380 kms),<sup>168</sup> and cover a wide geographic scope extending across a large area of southern Queensland and the greater Brisbane region;<sup>169</sup> and
- (b) carry substantial volumes of freight annually (i.e. the West Moreton system carried approximately 6.6 million net tonnes of freight, including coal and agricultural products, in 2017–18, and approximately 6.4 million net tonnes of freight in 2018–19).<sup>170</sup>

5.6.2 While I note that there is some uncertainty about future tonnages on the West Moreton Route, I consider it appropriate to take the available data from 2017–18 and 2018–19 into account in determining that the West Moreton Route is significant having regard to its size as:

- (a) this is the most current data; and
- (b) it is unclear whether alternative higher or lower tonnage predictions may eventuate.

5.6.3 I accept the QCA's recommendation that the West Moreton Route is significant, having regard to its importance to the Queensland economy. I note and accept:

- (a) its substantial direct contributions to the economy in the form of access revenue (approximately \$42.8 million in coal access charges, and \$2.5 million in non-coal access charges in 2017–18);<sup>171</sup> and
- (b) the facilitation of the operation of specific industries (coal mining, rail haulage and agriculture) that contribute via GSP, employment and regional development.<sup>172</sup>

**5.7 Criterion C - Agricultural lines**

5.7.1 I accept the QCA's recommendation that each of the Agricultural lines is significant, having regard to its size. I note and accept that:

- (a) the South Western system:
  - (i) is approximately 617.5 kms in length; and
  - (ii) the primary corridor of which extends from Toowoomba to Thallon via Warwick, with branch lines from Warwick to Wallangarra and Wyreema to Millmerran. The South Western system connects to the West Moreton system at Toowoomba;<sup>173</sup>
- (b) the Western system:
  - (i) is over 1,082 kms in length, although currently 312.8 kms of this is non-operational; and
  - (ii) consists of the corridor from Miles to Cunnamulla with branch lines—Westgate to Quilpie, Dalby to Glenmorgan, Miles to Wandoan and Tycanba to Jandowae. The

<sup>168</sup> Part B, section 12.5.3 at page 162.

<sup>169</sup> Part B, section 12.7.3 at page 173.

<sup>170</sup> Part B, section 12.7.3 at page 174.

<sup>171</sup> Part B, section 12.5.3 at page 164.

<sup>172</sup> Part B, section 12.7.3 at page 174.

<sup>173</sup> Part B, section 12.5.5 at page 166.

Western system adjoins the western section of the West Moreton system at Miles, with Western system branch lines running directly off the West Moreton system;<sup>174</sup>

- (c) the Central Western system:
  - (i) is approximately 704 kms in length; and
  - (ii) runs from Emerald west to Winton via Longreach and includes the Emerald to Clermont and Blair Athol branch line. It connects to Aurizon Network's Blackwater system at Emerald/Nogoa. Freight traffic on the Central Western system typically travels via the Blackwater system from/to the North Coast Line, and from/to various ports including Rockhampton, Gladstone and Brisbane.<sup>175</sup>

5.7.2 In reaching my decision in relation to the application of Criterion C to the Agricultural lines, I consider that I do not need to determine whether each of the Agricultural lines is significant having regard to its importance to the economy, as Criterion C can be satisfied on the basis that each of the Agricultural lines is significant in terms of size alone.

### 5.8 Criterion C - Tablelands system service

5.8.1 I accept the QCA's recommendation that the Tablelands system is significant having regards to its size. I note and accept:

- (a) the Tablelands system is 575 kms in length, comprised of two corridors (non-adjointing) and covers a substantial area of the North Queensland region; and
- (b) it accommodates also substantial passenger numbers for regional tourism services.<sup>176</sup>

5.8.2 In reaching my decision in relation to the application of Criterion C to the Tablelands system, I consider that I do not need to determine whether the Tablelands system is significant having regard to its importance to the economy, as Criterion C can be satisfied on the basis that the Tablelands system is significant in terms of size alone.

### 5.9 Overall finding - Criterion C

5.9.1 I have found for the reasons set out above that Criterion C is satisfied in relation to:

- (a) the facility for the service as a whole;
- (b) the North Coast Route service;
- (c) the Mount Isa Route service;
- (d) the West Moreton Route service;
- (e) the Agricultural lines; and
- (f) the Tablelands system.

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<sup>174</sup> Part B, section 12.5.6 at page 167.

<sup>175</sup> Part B, section 12.5.7 at page 168.

<sup>176</sup> Part B, section 12.5.8 at page 169.

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**6 Criterion D – Promote the public interest****6.1 Overview**

- 6.1.1 Section 76(2)(d) of the QCA Act (Criterion D) requires that I consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.
- 6.1.2 Section 76(5) of the QCA Act provides that, in considering Criterion D, I must have regard to the following matters—
- (a) if the facility for the service extends outside Queensland—
    - (i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and
    - (ii) the desirability of consistency in regulating access to the service;
  - (b) the effect that declaring the service would have on investment in—
    - (i) facilities; and
    - (ii) markets that depend on access to the service;
  - (c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and
  - (d) any other matter I consider relevant.

*Overall QCA recommendations on Criterion D*

- 6.1.3 The QCA recommended that Criterion D:
- (a) is not satisfied for the Queensland Rail service as a whole or the Tablelands system service; and
  - (b) is satisfied for the North Coast Route service, Mount Isa Route service, West Moreton Route service and each of the Agricultural lines.

**6.2 The relevant service**

6.2.1 I have stated my findings identifying the relevant service(s) at paragraph 3.2.5 above.

**6.3 Whether the facility for the service extends outside Queensland**

6.3.1 I accept the QCA's recommendation<sup>177</sup> that the Queensland Rail facility does not extend outside Queensland. Therefore, I am not required to consider section 76(5)(a) of the QCA Act further.

**6.4 Whether there would be access (or increased access) to the service, on reasonable terms and conditions, as result of declaration**

6.4.1 I have stated my findings in relation to whether there would be access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration when addressing Criterion A above in section 4 above.

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<sup>177</sup> Part B, section 13.1; See footnote 636, page 177.

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**6.5 Criterion D - Queensland Rail service as a whole**Investment in facilities

- 6.5.1 I accept the QCA's recommendation for the reasons given by the QCA<sup>178</sup> that declaration is likely to have a small positive effect on investment in Queensland Rail's below-rail network. I note and accept that:
- (a) Queensland Rail's incentives to invest in the facility are unlikely to be significantly affected by whether or not the service is to be declared;<sup>179</sup>
  - (b) declaration would likely have the effect of promoting investment by users in the network;<sup>180</sup> and
  - (c) a user (who may also invest in the facility) may be deterred from investing in a future without declaration due to hold-up.<sup>181</sup>

Investment in markets that depend on access to the service

- 6.5.2 I accept the QCA's recommendation for the reasons given by the QCA<sup>182</sup> that, in considering Criterion D, and having regard to the conclusion reached in Criterion A, the QCA:
- (a) was unable to identify a market that depends on access to the service as a whole, in which the QCA considers that declaration would be likely to promote investment; and
  - (b) considers that declaring the service as a whole would be unlikely to have an effect on investment in markets that depend on access to the service as a whole.

- 6.5.3 In accepting that recommendation, my consideration has included reference to Queensland Rail's submission that declaration of Queensland Rail's services does not promote competition in any dependent market because Queensland Rail has no ability or incentive to exercise market power due to the presence of binding competition constraints which apply irrespective of declaration and that there is no change to the nature and degree of competition in dependent markets as a result of declaration.<sup>183</sup> I do not accept that submission for the reasons given in respect of my consideration of the constraints on Queensland Rail's market power in my consideration of Criterion A (see, in particular, paragraphs 4.3.34 and 4.3.35 above).

Administration and compliance costs

- 6.5.4 I accept the QCA's recommendation for the reasons given by the QCA<sup>184</sup> that Queensland Rail would incur additional administrative and compliance costs if the service was declared compared to a future without declaration,<sup>185</sup> however, I note and accept:
- (a) no evidence has been provided to the QCA (or to me) to suggest that, if the Queensland Rail service was declared, the costs incurred by Queensland Rail will be materially different in the absence of declaration;<sup>186</sup> and

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<sup>178</sup> Part B, section 13.4.3 at page 182.

<sup>179</sup> Part B, section 13.4.3 at page 182.

<sup>180</sup> Part B, section 13.4.3 at page 182.

<sup>181</sup> Part B, section 13.4.2 at page 182.

<sup>182</sup> Part B, section 13.5.3 at page 188.

<sup>183</sup> QR, 11 March 2019 at paragraph 405.

<sup>184</sup> Part B, section 13.6.4 at pages 202-203.

<sup>185</sup> Part B, section 13.6.4 at page 203.

<sup>186</sup> Part B, section 13.6 at pages 195-196.

- (b) many of these costs are ultimately borne by the users of the service, rather than by Queensland Rail itself.<sup>187</sup>

6.5.5 In accepting that recommendation, my consideration included reference to the following submissions:

- (a) Queensland Rail submitted that there are significant indirect costs associated with declaration, namely:
- (i) declaration introduces the risk of regulatory error;
  - (ii) declaration is inconsistent with the object of Part IIIA of the CCA and Part 5 of the QCA Act which provides for consistency in the regulation of access within industries;
  - (iii) there is intrinsic public detriment in superfluous regulation; and
  - (iv) declaration reduces the efficiency of substantial Government investment in Queensland Rail's network;<sup>188</sup>
- (b) Watco, Linfox and GrainCorp submitted that the costs of the QCA administered regime are small compared to the considerable benefits of declaration.<sup>189</sup> South West Producers and Glencore submitted that the alleged indirect costs asserted by Queensland Rail arising from declaration are either not relevant or not substantiated or actually weigh in favour of declaration promoting the public interest;<sup>190</sup>
- (c) South West Producers and Glencore submitted that if the future without declaration is Queensland Rail's proposed Access Framework, the burden of establishing and administering the proposed Access Framework will (when assessed across the community, rather than just from Queensland Rail's perspective) be far greater than any burden which exists in a declared climate.<sup>191</sup>

6.5.6 I accept the submission of South West Producers and Glencore that the indirect costs asserted by Queensland Rail were not substantiated by it.<sup>192</sup> I otherwise accept the submissions of Watco, Linfox, GrainCorp, South West Producers and Glencore to the extent that they provide evidence of the additional costs incurred.

Other matters

6.5.7 I have had regard to the following other matters:

- (a) costs of regulation that are borne by access seekers and holders;<sup>193</sup>
- (b) promotion of employment and regional development;<sup>194</sup> and
- (c) environmental and safety issues.<sup>195</sup>

<sup>187</sup> Part B, section 13.6.4 at page 203.

<sup>188</sup> QR, 30 May 2018 at paragraph 47.

<sup>189</sup> Watco, 8 May 2019 at page 6; Linfox, 11 June 2019 at paragraph 3.12; GrainCorp, 11 June 2019 at page 14.

<sup>190</sup> South West Producers, 30 May 2018 at page 54; South West Producers, 16 July 2018 at pages 30-31; Glencore, 16 July 2018 at pages 24-25.

<sup>191</sup> South West Producers, 16 July 2018 at page 28; Glencore, 16 July 2018 at pages 22-23.

<sup>192</sup> South West Producers, 16 July 2018 at page 30; Glencore 16 July 2018 at page 24.

<sup>193</sup> Part B, section 13.7.2 at pages 205-206.

<sup>194</sup> Part B, section 13.7.3 at pages 206-209.

<sup>195</sup> Part B, section 13.7.4 at pages 209-210.

6.5.8 In addition to the matters raised above I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

6.5.9 Given my conclusions set out above, I do not regard a decision not to declare the Queensland Rail service as a whole as inconsistent with that object.

6.5.10 Apart from the matters set out above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.<sup>196</sup>

Overall finding – Criterion D – Queensland Rail service as a whole

6.5.11 In light of the above:

- (a) I agree with the QCA's recommendation that the declaration of the Queensland Rail service as a whole would:
- (i) have a small beneficial effect on investment in facilities;
  - (ii) cause Queensland Rail to incur administrative and compliance costs, although many of these costs would be ultimately borne by users of the service; and
  - (iii) I am not satisfied that the declaration of the Queensland Rail service as a whole would have a positive effect on investment in dependent markets, as set out in paragraph 4.2.3 above, as I was unable to identify a market that is dependent on the service as a whole, and in which I considered that declaration would promote investment.

6.5.12 I have, however, been unable to conclude with any certainty whether the small beneficial effect on investment in facilities outweighs the cost of regulation, and therefore cannot conclude that access (or increased access) to the Queensland Rail service as a whole, on reasonable terms and conditions, as a result of declaration of the service, would promote the public interest.

6.5.13 I therefore find that Criterion D is not satisfied for the Queensland Rail service as a whole.

**6.6 Criterion D - North Coast Route service**

Investment in facilities

6.6.1 I accept the QCA's recommendation for the reasons given by the QCA<sup>197</sup> that declaration is likely to have a positive, albeit small, effect on investment in below-rail facilities used in relation to the North Coast Route service.

6.6.2 I note and accept that, to the extent that users may be incentivised or required to invest in improvements to the North Coast Route infrastructure, declaration is likely to promote such investments as the users can have confidence that they will reap the benefits of their current investments in the future.<sup>198</sup>

6.6.3 I also consider that a user (who may also invest in the facility) may be deterred from investing in a future without declaration due to hold-up.

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<sup>196</sup> As I explain in section 7, I have found it unnecessary to consider whether declaration of the service would be compatible with the *Human Rights Act 2019 (HR Act)*.

<sup>197</sup> Part B, section 13.4.4 at pages 182-183. See also Part B, section 13.8.2 at page 211.

<sup>198</sup> Part B, section 13.4.4 at pages 182-183.

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- 6.6.4 In accepting the QCA's recommendation, my consideration included reference to the following submissions:
- (a) Queensland Rail submitted that declaration does not result in any economic benefits which would not otherwise be promoted without declaration given Queensland Rail's lack of market power on this heavily underutilised, subsidised railway system:
    - (i) Queensland Rail has strong incentives to maximise utilisation of its network, and promote efficient investment and entry irrespective of declaration; and
    - (ii) these incentives are substantial given the North Coast Line's dependence on TSC funding and significant spare capacity.<sup>199</sup>
  - (b) Linfox submitted, in relation to the North Coast Route, that declaration of the rail networks owned by Queensland Rail and Aurizon Network has proven critical to ensuring efficient investment and appropriate pricing and terms of access.<sup>200</sup>
- 6.6.5 I do not accept Queensland Rail's submission for the reasons stated in relation to my consideration of Criterion A (see, in particular paragraphs 4.3.21 to 4.3.22 and 4.3.32 to 4.3.33 above). I accept Linfox's submission.
- Investment in markets that depend on access to the service*
- 6.6.6 I accept the QCA's recommendation for the reasons given by the QCA,<sup>201</sup> that a future with declaration is likely to promote efficient investment in the above-rail haulage market on the North Coast Route, as above-rail operators can be more certain that they will reap the benefits of their investments (e.g. into rollingstock efficiency) into the future.
- Administration and compliance costs*
- 6.6.7 I accept the QCA's conclusion<sup>202</sup> that, as with the Queensland Rail service as a whole, declaration would cause Queensland Rail to incur administrative and compliance costs, but that many of these costs would ultimately be borne by users of the service.
- Other matters*
- 6.6.8 I accept the QCA's recommendation that declaration may result in other small benefits, drawing on its conclusion that for the Queensland Rail service as a whole, declaration will promote a small positive benefit having regard to the costs of regulation that are borne by access seekers and holders,<sup>203</sup> regional employment and growth<sup>204</sup> as well as environmental and safety issues.<sup>205</sup>
- 6.6.9 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:
- The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*
- 6.6.10 Given my conclusions set out above, I regard declaration of the service as consistent with that object.
- 6.6.11 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the HR Act. For the reasons set out in sections 7.1 and 7.2, I consider that the

<sup>199</sup> QR, 11 March 2019 at paragraphs 403 and 417.

<sup>200</sup> Linfox, 11 June 2019 at page 2.

<sup>201</sup> Part B, section 13.5.4 at pages 188-190. See also Part B, section 13.8.2 at page 211.

<sup>202</sup> Part B, section 13.8.2 at page 211.

<sup>203</sup> Part B, section 13.7.2 at page 206.

<sup>204</sup> Part B, section 13.7.3 at page 208.

<sup>205</sup> Part B, section 13.7.4 at page 210.



declaration of the service would be consistent with the obligations imposed on public entities under that Act.

- 6.6.12 Apart from the matters set out above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.

Conclusion regarding Criterion D – North Coast Route service

- 6.6.13 In light of the above, I accept the QCA's recommendation that there is a net public benefit and Criterion D is satisfied.<sup>206</sup>

**6.7 Criterion D - Mount Isa Route service**

Investment in facilities

- 6.7.1 I accept the QCA's recommendation for the reasons given by the QCA<sup>207</sup> that declaration is likely to have a positive, albeit small, effect on investment in below-rail facilities used in relation to the Mount Isa Route service to the extent that:

- (a) an increase in competition in the dependent tenements market could promote higher utilisation of the Mount Isa Route, although the need for additional below-rail investment is not evident in the near future; and
- (b) users may be incentivised or required to invest in improvements to the Mount Isa Route infrastructure.

- 6.7.2 I also consider that a user (who may also invest in the facility) may be deterred from investing in a future without declaration due to hold-up.

- 6.7.3 In accepting the QCA's recommendation, I also considered Queensland Rail's submission that declaration does not result in:

- (a) any economic benefits which would not otherwise be promoted without declaration, given Queensland Rail's competitive constraints (increasing competition with road operators) and spare capacity (no portion of the system operates over 73 per cent utilisation) on the Mount Isa Line; and
- (b) a materially different environment for investment, given Queensland Rail's incentives to maximise utilisation, and incentives to promote efficient investment.<sup>208</sup>

- 6.7.4 I do not accept those submissions for the reasons given in respect of my consideration of Criterion A for the Mount Isa Route service (see, in particular, paragraphs 4.4.11 to 4.4.14, 4.4.15 to 4.4.18 and 4.4.23 to 4.4.24 above).

Investment in markets that depend on access to the service

- 6.7.5 I accept the QCA's recommendation for the reasons given by the QCA<sup>209</sup> that declaration is likely to have a positive effect on investment in the North West Queensland minerals tenements market as declaration will promote additional positive investment effects in the North West Queensland minerals tenements market, compared to a future without declaration.

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<sup>206</sup> Part B, section 13.8.2 at page 211.

<sup>207</sup> Part B, section 13.4.5 at page 183. See also, Part B, section 13.8.3 at page 211.

<sup>208</sup> QR, 11 March 2019 at paragraphs 403, 409, 419, 420, 439, 440, 450.

<sup>209</sup> Part B, section 13.5.5 at pages 191-192. See also Part B, section 13.8.3 at page 211.

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Administration and compliance costs

- 6.7.6 I accept the QCA's conclusion<sup>210</sup> that declaration would cause Queensland Rail to incur administrative and compliance costs, but that many of these costs would ultimately be borne by users of the service.

Other matters

- 6.7.7 I accept the QCA's recommendation that declaration may result in other small benefits, drawing on its conclusion that for the system as a whole, declaration will promote a small positive benefit having regard to the costs of regulation that are borne by access seekers and holders,<sup>211</sup> regional employment and growth<sup>212</sup> as well as environmental and safety issues.<sup>213</sup>
- 6.7.8 I accept the QCA's recommendation that, in respect to costs borne by users, the user with the majority of the freight and minerals transported on the Mount Isa Route service (namely, Glencore), has indicated that it is willing to pay for the QCA Levy as it sees 'real benefits from the [regulatory] regime in advance of the costs incurred'.<sup>214</sup>
- 6.7.9 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

- 6.7.10 Given my conclusions set out above, I regard declaration of the service as consistent with that object.
- 6.7.11 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the HR Act. For the reasons set out in sections 7.1 and 7.2, I consider that the declaration of the service would be consistent with the obligations imposed on public entities under that Act.
- 6.7.12 Apart from the matters set out above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.

Overall finding – Criterion D – Mount Isa Route service

- 6.7.13 In light of the above, I accept the QCA's recommendation that there is a net public benefit and Criterion D is satisfied.<sup>215</sup>

**6.8 Criterion D - West Moreton Route service**Investment in facilities

- 6.8.1 I accept the QCA's recommendation for the reasons given by the QCA,<sup>216</sup> that declaration is likely to have a positive, albeit small, effect on investment in below-rail facilities used in relation to the West Moreton Route service.
- 6.8.2 I note and accept that:<sup>217</sup>
- (a) the stable market environment created by declaration is likely to promote a material increase in competition in the coal tenements market in the West Moreton region, which is dependent on access to the West Moreton Route service; and

<sup>210</sup> Part B, section 13.8.3 at page 211.

<sup>211</sup> Part B, section 13.7.2 at pages 206-207.

<sup>212</sup> Part B, section 13.7.3 at page 208.

<sup>213</sup> Part B, section 13.7.4 at page 210.

<sup>214</sup> Part B, section 13.6.2 at page 200.

<sup>215</sup> Part B, section 13.8.3 at page 211.

<sup>216</sup> Part B, section 13.4.6 at pages 183-184. See also Part B, section 13.8.4 at pages 211-212.

<sup>217</sup> Part B, section 13.4.6 at page 184.

- (b) to the extent that this increases utilisation and the demand for below-rail services, it could also trigger investment in the network, although at least in the medium term, this may mainly be required to alleviate capacity constraints on the Toowoomba Range.
- 6.8.3 I also consider that a user (who may also invest in the facility) may be deterred from investing in a future without declaration due to hold-up.
- 6.8.4 In accepting the QCA's recommendation, my consideration included reference to the submissions of Queensland Rail that:
- (a) declaration does not result in a materially different environment for investment given Queensland Rail's incentives to maximise utilisation (currently 42 per cent spare capacity overall, with maximum utilisation of 70 per cent for any section of the system), and incentives to promote efficient investment; and
- (b) there is significant volume uncertainty relating to the New Acland Stage 3 development, and uncertainty surrounding future viability of the rail system once the Inland Rail project becomes operational. Queensland Rail bears significant volume risk and asset stranding risk, strengthening its incentives to encourage efficient investment.<sup>218</sup>
- 6.8.5 I do not accept those submissions for the reasons given in respect of my consideration of Criterion A for the West Moreton Route service (see, in particular, paragraphs 4.5.13 and 4.5.17 to 4.5.18).
- Investment in markets that depend on access to the service*
- 6.8.6 I accept the QCA's recommendation for the reasons given by the QCA,<sup>219</sup> that declaration is likely to have a positive effect on investment in the coal tenements market in the West Moreton region.
- Administration and compliance costs*
- 6.8.7 I accept the QCA's recommendation<sup>220</sup> that, declaration would cause Queensland Rail to incur administrative and compliance costs, and those costs would likely be greater for the West Moreton Route, compared to other routes as it has a reference tariff. Similar to the conclusion for the Queensland Rail service as a whole, these costs would ultimately be borne by users of the service.<sup>221</sup>
- 6.8.8 I note and accept the South West Producers and Glencore submissions that they are willing to pay for those costs where they see real benefits from the regulatory regime.<sup>222</sup>
- 6.8.9 In accepting the QCA's recommendation, my consideration included reference to Queensland Rail's submissions that:
- (a) the Access Framework reflects an appropriate and cost-effective regulatory model for the West Moreton system which is in the public interest, given the substantial degree of prescription and regulatory burden associated with the current price regulation of this system;<sup>223</sup> and
- (b) any efficiency benefits arising from declaration, that would not otherwise arise without declaration, are substantially outweighed by significant compliance and administrative costs associated with the reference tariff approval process and the capital expenditure approval process.<sup>224</sup>

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<sup>218</sup> Paragraphs 403, 409, 419, 420, 421, 430-433, 449 QR 11 March 2019.

<sup>219</sup> Part B, section 13.5.6 at page 193. See also, Part B, section 13.8.4 at pages 211-212.

<sup>220</sup> Part B, section 13.6.4 at page 203.

<sup>221</sup> This may be a relevant matter to consider "other relevant matters" discussed below.

<sup>222</sup> South West Producers 26 April 2019 at page 48; Glencore 26 April 2019 at page 29.

<sup>223</sup> QR, 11 March 2019 at paragraphs 403, 409, 419, 420, 421, 430-433, 449.

<sup>224</sup> QR, 11 March 2019 at paragraphs 403, 409, 419, 420, 421, 430-433, 449.

6.8.10 I do not accept those submissions for the reasons outlined in paragraphs 4.3.34, 6.8.7 and 6.8.9 above.

Other matters

6.8.11 I accept the QCA's recommendation that declaration may result in other small benefits, drawing on its conclusion that for the system as a whole, declaration will promote a small positive benefit having regard to the costs of regulation that are borne by access seekers and holders,<sup>225</sup> regional employment and growth<sup>226</sup> as well as environmental and safety issues.<sup>227</sup>

6.8.12 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

6.8.13 Given my conclusions set out above, I regard declaration of the service as consistent with that object.

6.8.14 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the HR Act. For the reasons set out in section 7, I consider that the declaration of the service would be consistent with the obligations imposed on public entities under that Act.

6.8.15 Apart from the matters set out above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.

Overall finding – Criterion D – West Moreton Route service

6.8.16 In light of the above, I accept the QCA's recommendation that there is a net public benefit and Criterion D is satisfied.<sup>228</sup>

**6.9 Criterion D - Agricultural lines**

Investment in facilities

6.9.1 I accept the QCA's recommendation for the reasons given by the QCA,<sup>229</sup> that declaration is likely to have a positive, albeit small, effect on investment in facilities used in relation to the Agricultural lines based on the presence of commercial, (i.e. non-subsidised) above-rail operators on the Agricultural lines which enhances the possibility that a third party may make investments in facilities over the proposed declaration period.

6.9.2 I also consider that a user (who may also invest in the facility) may be deterred from investing in a future without declaration due to hold-up.

Investment in markets that depend on access to the service

6.9.3 I accept the QCA's recommendation for the reasons given by the QCA<sup>230</sup> that declaration is likely to have a positive effect on investment in the above-rail haulage markets, which are dependent markets of the Agricultural lines.

Administration and compliance costs

6.9.4 I accept the QCA's recommendation for the reasons given by the QCA<sup>231</sup> that the costs incurred in dealing with multiple users of these services are unlikely to be materially different in a future with

<sup>225</sup> Part B, section 13.7.2 at page 206.

<sup>226</sup> Part B, section 13.7.3 at page 208.

<sup>227</sup> Part B, section 13.7.4 at page 210.

<sup>228</sup> Part B, section 13.8.4 at page 212.

<sup>229</sup> Part B, section 13.4.7 at page 185. See also Part B, section 13.8.5 at page 212.

<sup>230</sup> Part B, section 13.5.7 at pages 194-195. See also Part B, section 13.8.5 at page 212.

<sup>231</sup> Part B, section 13.6.3 at pages 202-203.

declaration (as access is currently negotiated directly between users and Queensland Rail) compared to a future without declaration.

Other matters

6.9.5 I accept the QCA's recommendation that declaration may result in other small benefits, drawing on its conclusion that for the system as a whole, declaration will promote a small positive benefit having regard to the costs of regulation that are borne by access seekers and holders,<sup>232</sup> regional employment and growth<sup>233</sup> as well as environmental and safety issues.<sup>234</sup>

6.9.6 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

6.9.7 Given my conclusions set out above, I regard declaration of the service as consistent with that object.

6.9.8 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the HR Act. For the reasons set out in sections 7.1 and 7.2, I consider that the declaration of the service would be consistent with the obligations imposed on public entities under that Act.

6.9.9 Apart from the matters set out above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.

Overall finding – Criterion D - Agricultural lines

6.9.10 In light of the above, I accept the QCA's recommendation that there is a net public benefit and Criterion D is satisfied in relation to each of the Agricultural lines.<sup>235</sup>

**6.10 Criterion D - Tablelands system service**

Investment in facilities

6.10.1 I accept the QCA's recommendation for the reasons given by the QCA<sup>236</sup> that declaration would be unlikely to have a positive effect in promoting investment in below-rail facilities on the Tablelands system given both above-rail and below-rail services are heavily dependent on TSC subsidies for their continued operation,<sup>237</sup> particularly as the presence of below-rail subsidies (TSCs), and not declaration, is the decisive factor informing a decision to invest in below-rail facilities in relation to the Tablelands system service.

Investment in markets that depend on access to the service

6.10.2 I accept the QCA's recommendation that declaration would be unlikely to have a positive effect in promoting investment in the above-rail passenger market dependent on the Tablelands system service.<sup>238</sup>

6.10.3 In reaching this view, I note that:

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<sup>232</sup> Part B, section 13.7.2 at page 206.

<sup>233</sup> Part B, section 13.7.3 at page 208.

<sup>234</sup> Part B, section 13.7.4 at page 210.

<sup>235</sup> Part B, section 13.8.5 at page 212.

<sup>236</sup> Part B, section 13.4.8 at page 185.

<sup>237</sup> Part B, section 13.4.8 at page 185.

<sup>238</sup> Part B, section 13.5.8 at page 195.

- (a) my decision, set out at paragraphs 4.7.7 - 4.7.8 above, is that Criterion A is not satisfied for the Tablelands system service; and
- (b) the prominent factor promoting investment in the above-rail passenger market on the Tablelands system service appears to be the presence of government subsidies, rather than the declaration.

Administration and compliance costs

- 6.10.4 I accept the QCA's recommendation that there is insufficient information to form a view on the quantum of administration and compliance costs in relation to the Tablelands system service<sup>239</sup> and I am therefore unable to form a view on whether administration and compliance costs, due to declaration of the Tablelands system, would be a material public benefit or detriment.

Other matters

- 6.10.5 I acknowledge the findings of the QCA that the Kuranda Scenic Railway and other tourism services on the Tablelands system contribute to the tourism economy in North Queensland. In particular, the passengers travelling on the Kuranda Scenic Railway accounted for 55 per cent of all customers travelling on Queensland Rail's regional passenger services in 2017–18.<sup>240</sup>
- 6.10.6 However, as no estimates were provided of how much of this benefit would be foregone in the absence of declaration, or how much additional output and investment declaration may promote additional benefits in employment and regional development as a result of declaration, I accept the QCA's recommendation that this benefit cannot be quantified in order to be taken into account in relation to Criterion D.<sup>241</sup>
- 6.10.7 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:
- The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*
- 6.10.8 Given my conclusions set out above, I do not regard a decision not to declare the Tablelands system service as inconsistent with that object.
- 6.10.9 Apart from the matters set out in detail above, I do not consider that there are any other matters that are relevant in my decision on Criterion D.<sup>242</sup>

Overall finding – Criterion D – Tablelands system service

- 6.10.10 In light of the above, I accept the QCA's Recommendation that the Tablelands system service does not satisfy Criterion D.<sup>243</sup>

<sup>239</sup> Part B, section 13.6.3 at page 202.

<sup>240</sup> Part B, section 13.7.3 at page 208.

<sup>241</sup> Part B, section 13.7.3 at page 208.

<sup>242</sup> As I explain in section 7, I have found it unnecessary to consider whether declaration of the service would be compatible with the HR Act.

<sup>243</sup> Part B, section 13.8.6 at page 212.

**6.11 Overall finding – Criterion D**

6.11.1 I have found for the reasons set out above that Criterion D is satisfied in relation to:

- (a) the North Coast Route service;
- (b) the Mount Isa Route service;
- (c) the West Moreton Route service; and
- (d) the Agricultural lines.

6.11.2 I have found for the reasons set out above that Criterion D is not satisfied in relation to:

- (a) the Queensland Rail service as a whole; and
- (b) the Tablelands system service.

**7 Human rights considerations****7.1 Overview**

7.1.1 Section 58(1) of the HR Act makes it unlawful for a public entity to:

- (a) act or make a decision in a way incompatible with a human right; or
- (b) in making a decision, fail to give proper consideration to a human right relevant to the decision.

7.1.2 Section 58(5) of the HR Act provides that, for section 58(1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to:

- (a) identifying the human rights that may be affected by the decision; and
- (b) considering whether the decision would be compatible with human rights.

7.1.3 I accept that the threshold for engaging a human right is low, and that for this purpose human rights must be construed in the broadest possible way.

7.1.4 In accordance with section 58(1) of the HR Act, I have considered whether declaration of the Queensland Rail service would be compatible with human rights.

7.1.5 The only human rights which I consider may be affected by the declaration of the Queensland Rail service (including parts of that service) are:

- (a) the right of individuals to freedom of movement (HR Act section 19);
- (b) the right to life (HR Act section 16);
- (c) the right to equality and non-discrimination (HR Act section 15) (on the basis of intergenerational equity); and
- (d) the right of children to protection in their best interests (HR Act section 26(2)).

7.1.6 I refer to the human right in paragraph 7.1.5(a) above as “freedom of movement”. The human rights in paragraphs 7.1.5(b), (c) and (d) above can be described as “rights potentially related to climate change”.

**7.2 Freedom of movement**

7.2.1 The declaration of the Queensland Rail service as a whole or the declaration of any part of the Queensland Rail service may engage passengers’ human right to freedom of movement (section 19 of the HR Act). Passengers travel, using above-rail passenger services, on Queensland Rail’s below-rail facility. It is conceivable that this class of passengers could have their freedom to move freely within

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Queensland affected, even if not directly, by any decision to declare the Queensland Rail service as a whole or to declare part of the Queensland Rail service.

7.2.2 In relation to those parts of the Queensland Rail service which, for the reasons set out above, I have decided to declare as they meet all of the Access Criteria, namely:

- (a) North Coast Route service;
- (b) Mount Isa Route service;
- (c) West Moreton Route service; and
- (d) Agricultural lines;

any effect of my decision to declare on the right of freedom of movement, would be, in my view, positive or neutral.

7.2.3 I, therefore, consider that my decision to declare those parts of the Queensland Rail service would not limit the right of freedom of movement, and would therefore be compatible with that right under section 8(a) of the HR Act.

7.2.4 Because I have not decided to declare the system as a whole or the Tablelands system service (as neither meet all of the Access Criteria), it is unnecessary to consider whether any declaration in relation to them would limit the right of freedom of movement.

### **7.3 Human rights potentially relating to climate change**

7.3.1 Decisions which facilitate emissions contributing to climate change may conceivably limit a range of human rights, including the right to life, the right to equality and non-discrimination (on the basis of intergenerational equity) and the right of children to protection in their best interests.

7.3.2 In the context of the Queensland Rail service as a whole, coal is hauled to a significant extent only on the West Moreton Route service.<sup>244</sup> I have, therefore, considered whether a decision under section 84 of the QCA Act to declare the part of the service, the West Moreton Route service, would have the consequence of increasing the level of coal production in Queensland over the period of the declaration. Such an increase may lead to an increase in emissions, potentially affecting climate change.

7.3.3 In relation to the West Moreton Route service which predominantly carries coal, the declaration of that part of the Queensland Rail service is likely to promote investment in the coal tenements market in the West Moreton region. There is, however, no evidence that this declaration would have a material effect on the volume of coal exported and consumed overseas. That will primarily depend on market factors such as demand and price.

7.3.4 I therefore consider that the declaration would not limit any of the human rights potentially relating to climate change, and would therefore be compatible with those rights under section 8(a) of the HR Act.

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<sup>244</sup> I note that a small amount of coal is hauled on the North Coast Route service (i.e. less than 1% of gross tonne kilometres on the North Coast Route service is coal), see Part B, section 5.4.3 at page 32. The QCA did not find that any coal tenements markets were dependent on that service.

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*Queensland Competition Authority Act 1997*

**NOTICE OF DECISION TO DECLARE A SERVICE UNDER SECTIONS 84 - 87**

**1. Declaration**

I, the Honourable Cameron Dick MP, Treasurer and Minister for Infrastructure and Planning, as Minister administering the *Queensland Competition Authority Act 1997 (QCA Act)* have decided to declare “the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator” as a service under section 84(1)(a) of the QCA Act.

The phrase “the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator” has the same meaning as the same expression which appears in section 250(1)(c) of the QCA Act as at the date this notice is gazetted.

**2. Period of the Declaration**

This declaration starts to operate at the beginning of 9 September 2020 and expires at the end of 8 September 2030.

Cameron Dick MP  
Treasurer  
Minister for Infrastructure and Planning

31 May 2020

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**STATEMENT OF REASONS CONCERNING THE DECLARATION OF THE HANDLING OF  
COAL AT DALRYMPLE BAY COAL TERMINAL BY THE TERMINAL OPERATOR**

*Queensland Competition Authority Act 1997, sections 84 - 87*

**1 Background**

**1.1 Current declaration**

1.1.1 The handling of coal at Dalrymple Bay Coal Terminal by the terminal operator is currently declared as a service under section 250(1)(c) of the *Queensland Competition Authority Act 1997 (QCA Act)*. That declaration will expire on 8 September 2020 (**Current Expiry Date**).

1.1.2 In this statement of reasons, the service currently declared under section 250(1)(c) of the QCA Act will be referred to as the "DBCT service" (**DBCT service**) and the facility used to provide the service will be referred to as Dalrymple Bay Coal Terminal (**DBCT**).

**1.2 QCA's recommendation**

1.2.1 Section 87A of the QCA Act requires the Queensland Competition Authority (**QCA**), at least six months, but not more than 12 months, before the Current Expiry Date, to recommend to the Minister administering the QCA Act, that, with effect from the Current Expiry Date:

- (a) the service be declared;
- (b) part of the service, that is itself a service, be declared; or
- (c) the service not be declared.

1.2.2 On 4 April 2018, the QCA commenced the declaration review process with respect to the DBCT service by issuing notices of review and investigation to the owner of the service, DBCT Holdings Pty Ltd, and the operator of the service, DBCT Management Pty Ltd (**DBCTM**) (in accordance with sections 87B and 87E of the QCA Act). The investigation notice indicated that the subject matter of the investigation was whether the DBCT service should be declared in whole or in part following the expiry of the existing declaration.

1.2.3 As part of the declaration review process, the QCA has done the following:

- (a) On 4 April 2018, the QCA published a staff issues paper to assist stakeholders in making submissions in the declaration review process and provided stakeholders with the opportunity to provide initial submissions by 30 May 2018.
  - (b) On 6 June 2018, the QCA published a staff questions paper to assist stakeholders in preparing submissions on the initial submissions (cross submissions), and invited stakeholders to make these cross submissions by 16 July 2018.
  - (c) On 18 December 2018, the QCA published its draft recommendations in relation to the DBCT service (**Draft Recommendations**).
  - (d) The QCA then gave stakeholders the opportunity to provide:
    - (i) submissions on the Draft Recommendations by 11 March 2019 (draft recommendation submissions); and
    - (ii) cross submissions on the draft recommendation submissions by 26 April 2019.
  - (e) The QCA conducted a stakeholder forum for the DBCT service on 20 March 2019.
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- (f) The QCA released a staff questions paper on 5 April 2019 seeking further submissions on aspects of the DBCT service.
- (g) The QCA held a subsequent stakeholder forum in relation to the DBCT service on 24 July 2019.
- (h) The QCA released a consultation paper on 4 October 2019 on one further aspect of the DBCT service.
- (i) The QCA also accepted submissions in response to the staff questions paper and the consultation paper. In addition, the QCA received and accepted late information from DBCT Users and DBCTM in July and August 2019.
- 1.2.4 The QCA published on its website most of the submissions which it accepted from stakeholders of the DBCT service in relation to this review. The QCA further accepted a small number of submissions, which, due to their confidential content, were not published on the QCA website. I have been provided with un-redacted versions of the submissions accepted by the QCA (**Stakeholder Submissions**).
- 1.2.5 On 2 March 2020 and pursuant to section 87A of the QCA Act, the QCA provided to the Minister administering the QCA Act, its recommendation in relation to the DBCT service within a document entitled *Final recommendations Declaration Review: Aurizon Network, Queensland Rail and DBCT (QCA's Recommendation)*. The QCA's Recommendation comprises four parts as follows:
- (a) Declaration review: Aurizon Network, Queensland Rail and DBCT which includes an executive summary and overview and the QCA's approach to the statutory criteria (**QCA Approach**);
- (b) Part A: Aurizon Network declaration review (**Part A**);
- (c) Part B: Queensland Rail declaration review (**Part B**); and
- (d) Part C: DBCT declaration review (**Part C**).<sup>1</sup>
- 1.2.6 The QCA's Recommendation included a summary and analysis of the Stakeholder Submissions.
- 1.2.7 The QCA's Recommendation included a determination, in relation to DBCT, that it was not satisfied about all of the criteria in section 76(2) of the QCA Act (**Access Criteria**). Specifically:
- (a) while the QCA was satisfied that Criteria B and C were met:
- (i) Criterion B—that the facility for the service could meet the total foreseeable demand in the market:
- (A) over the period for which the service would be declared; and
- (B) at the least cost compared to any two or more facilities (which could include the facility for the service);
- (ii) Criterion C—that the facility for the service is significant, having regard to its size or its importance to the Queensland economy;
- (b) the QCA was not satisfied that Criteria A and D were met:
- (i) Criterion A—that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

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<sup>1</sup> Reference in this statement of reasons is to the relevant part, section and page.

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- (ii) Criterion D—that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

### 1.3 Role of the Minister

1.3.1 Under section 84(1) of the QCA Act I am required, having received the QCA's Recommendation, to do one of the following:

- (a) declare the service;
- (b) declare part of the service, that is itself a service; or
- (c) decide not to declare the service.

1.3.2 I must:

- (a) declare the DBCT service if I am satisfied about all of the Access Criteria for the service; or
- (b) decide not to declare the DBCT service if I am not satisfied about all of the Access Criteria for the service.

1.3.3 I may declare part of the DBCT service if I am satisfied about all of the Access Criteria for the part of the service.

1.3.4 If I declare the DBCT service, or part of the service, I must decide the expiry date of the declaration.

## 2 Decision

2.1.1 I am satisfied about all of the Access Criteria for the DBCT service. Accordingly, I have decided to declare the DBCT service for a period of 10 years, with the declaration to start to operate at the beginning of 9 September 2020 and expiring at the end of 8 September 2030.

2.1.2 For the purposes of making this decision, I have been provided with:

- (a) the QCA's Recommendation;
- (b) briefing papers from Treasury which summarise issues, contentions and submissions made by stakeholders during the QCA declaration review process; and
- (c) access to all the Stakeholder Submissions to enable me, if necessary, to consider them further.

2.1.3 In making my decision I have paid appropriate regard to the QCA's Recommendation as the QCA is the independent regulator which has considered these matters in detail. I have, however, as I am required to, considered all matters afresh when reaching my decision. As a result, in some respects I have not adopted the conclusions and reasons of the QCA.

2.1.4 When making this decision, I did not find it necessary to resolve any of the issues raised in the Stakeholder Submissions concerning different possible constructions of the QCA Act, save for those specifically mentioned below.

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**Reasons****3 Criterion B — Meet total foreseeable demand at least cost****3.1 Overview**

3.1.1 Criterion B (section 76(2)(b) of the QCA Act) requires that I consider whether the facility for the service could meet the total foreseeable demand in the market:

- (a) over the period for which the service would be declared; and
- (b) at the least cost compared to any 2 or more facilities (which could include the facility for the service).

3.1.2 Under section 76(3) of the QCA Act, if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, I may have regard to the facility as if it had that expanded capacity. Section 76(4) of the QCA Act provides that the cost referred to in paragraph 3.1.1(b) above includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

**3.2 Identify the relevant service**

3.2.1 I accept the QCA's recommendation for the reasons set out in the QCA analysis<sup>2</sup> that, as currently defined in section 250 of the QCA Act:

- (a) the relevant service is the handling of coal at DBCT by the terminal operator; and
- (b) handling of coal includes unloading, storing, reclaiming and loading.

**3.3 Identify the relevant facility**

3.3.1 I accept the QCA's recommendation for the reasons set out in the QCA analysis<sup>3</sup> that the relevant facility is the port infrastructure as currently defined in section 250 of the QCA Act, namely the port infrastructure located at the port of Hay Point owned by Ports Corporation of Queensland or the State, or a successor or assign of Ports Corporation of Queensland or the State, and known as DBCT and which includes the following which form part of the terminal:

- (a) loading and unloading equipment;
- (b) stacking, reclaiming, conveying and other handling equipment;
- (c) wharfs and piers;
- (d) deepwater berths;
- (e) ship loaders.

**3.4 Identify the market in which the service is provided**

3.4.1 I accept the QCA's recommendation that the relevant market for Criterion B is the market for DBCT's coal handling services for mines connected to the Goonyella system and that in this market there are no close substitutes for DBCT. I do so for the reasons set out in the QCA analysis.<sup>4</sup> In particular, I note and accept that:

- (a) the majority of demand for DBCT's contracted capacity comes from mines in the Goonyella coal chain;

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<sup>2</sup> Part C, section 2.2.1 at page 7.

<sup>3</sup> Part C, section 2.3.1 at page 8.

<sup>4</sup> Part C, section 2.4.3 at pages 13–37; Part C, Appendix B at pages 264–269.

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- (b) mines in the Goonyella coal chain are unlikely to seek coal handling services from terminals outside the Goonyella coal chain in response to price or quality incentives given the significant cost and non-cost advantages to them in using DBCT compared to other coal terminals;
- (c) certain mines in the Goonyella system have been, or are, using terminals other than DBCT but this has been behaviour based on strategic and commercial considerations rather than in response to price or quality incentives; and
- (d) mines outside the Goonyella system are unlikely to seek to use DBCT on price or quality grounds.

3.4.2 In addition, Hay Point Coal Terminal (HPCT) has to date not been operated as a common user terminal. I accept the submission provided by BHP to the effect that BMA has no incentive or intention to operate HPCT as a common user facility in the future.<sup>5</sup>

3.4.3 Accordingly, I do not accept the market definition proposed by DBCTM, that the relevant market is the market for coal handling services for mines that are proximate to the Port of Hay Point. This is particularly because:

- (a) while mines within the Goonyella system may use other terminals, as set out above, I accept the QCA's conclusion that this is based on strategic and commercial considerations rather than in response to price or quality incentives—this is not evidence of close substitutability between terminals;
- (b) HPCT is not in the relevant market, given it is not currently operated as a common user facility and I accept BHP's evidence that BMA has no incentive or intention to operate HPCT as a common user facility in the future.

### **3.5 Identify total foreseeable demand in the market (including the period for assessing total foreseeable demand)**

3.5.1 I accept the QCA's recommendation that the appropriate period for assessing foreseeable demand is 10 years, for the reasons given in the QCA analysis.<sup>6</sup>

3.5.2 The QCA arrived at its estimate of total foreseeable demand over the 10 year period by reconciling various estimates provided by stakeholders. The QCA's reconciliation is outlined in detail in Appendix D of Part C and section 2.6.3 at pages 44–54 of Part C. I consider the approach adopted by the QCA in estimating total foreseeable demand to be a reasonable and objective one, and I accept the QCA's estimate of foreseeable demand for the 10 years from 2021, being demand over the period in a range from 80 mtpa<sup>7</sup> to 96 mtpa on a throughput basis<sup>8</sup> and 89 mtpa to 107 mtpa on a contract entitlements basis.<sup>9</sup>

### **3.6 Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand, over the relevant period**

3.6.1 I accept DBCT currently has a capacity of 85 mtpa, for the reasons given in the QCA analysis.<sup>10</sup>

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<sup>5</sup> BHP, 26 April 2019, section 2 at pages 2–3.

<sup>6</sup> Part C, section 2.5.2 at pages 37–41.

<sup>7</sup> Million tonnes per annum.

<sup>8</sup> Part C, section 2.6.3, table 8 at page 50.

<sup>9</sup> Part C, section 2.6.3, table 9 at page 51.

<sup>10</sup> Part C, section 2.5.2 at page 56.

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- 3.6.2 The estimate of total foreseeable demand within the declaration period that I have accepted (89 mtpa to 107 mtpa on a contract entitlement basis) exceeds the current capacity of DBCT (85 mtpa). However, I am satisfied that incremental expansions of DBCT are reasonably possible which would enable DBCT to meet the total foreseeable demand. In this regard, for the reasons given in the QCA analysis,<sup>11</sup> I note and accept the following:
- (a) it is reasonably possible to expand DBCT to at least 102 mtpa within the declaration period (i.e. 10 years);
  - (b) DBCT, expanded to a capacity of 102 mtpa, would be able to meet foreseeable demand. This is because, while total demand for contract entitlements is estimated to exceed 102 mtpa (by at most 5.1 mtpa) for a period of five years during the proposed declaration period (2022–2026):
    - (i) in this five year period the estimated throughput demand ranges between 92 mtpa to 96 mtpa, which is well below DBCT’s expanded capacity of 102 mtpa; and
    - (ii) users may acquire capacity in the secondary trading market to meet those limited and short-term capacity requirements; and
  - (c) if, contrary to the conclusion in subparagraph (b) above, DBCT does require additional capacity beyond 102 mtpa to meet the foreseeable demand, it would be reasonably possible to further expand DBCT’s capacity within the declaration period to meet that additional demand.
- 3.6.3 I have considered, but do not accept, DBCTM’s submission to the effect that there is an implicit timing aspect to section 76(3) of the QCA Act, namely that the Minister cannot treat a facility as having an expanded capacity for the entire declaration period, unless it is reasonably possible to expand the facility to that capacity by the *commencement* of the declaration period.<sup>12</sup> I agree with and accept the QCA’s approach to section 76(3) of the QCA Act as set out in the QCA Approach.<sup>13</sup>
- 3.6.4 Accordingly, I am satisfied that DBCT (having regard to it as if it had such expanded capacity as is reasonably possible to obtain within the declaration period) could meet total foreseeable demand in the market.
- 3.7 At least cost compared to any two or more facilities**
- 3.7.1 I agree with the QCA,<sup>14</sup> and accept, that on the proper construction of the QCA Act:
- (a) section 76(2)(b) of the QCA Act requires all costs of meeting total foreseeable demand in the market for the service to be taken into account; and
  - (b) in circumstances where there are no close substitutes for the relevant service (here, the DBCT service), the relevant comparison for the “least cost” analysis is the cost of meeting total foreseeable demand by expanding the existing DBCT facility compared to the cost of duplicating (or partially duplicating) DBCT.

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<sup>11</sup> Part C, section 2.7.2 at pages 55–58.

<sup>12</sup> DBCTM 11 March 2019 at paragraph 155.

<sup>13</sup> QCA Approach, section 2.3.7 at page 14.

<sup>14</sup> QCA Approach, section 2.3.8 at pages 14–15; section 2.3.9 at pages 15–16.

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- 3.7.2 It follows from my conclusion in paragraph 3.7.1(b) above that, for the reasons given in the QCA analysis,<sup>15</sup> I accept that an approach which focusses only on identifying the incremental costs to society is not consistent with the proper construction of section 76(2)(b) of the QCA Act.
- 3.7.3 I accept the QCA's recommendation that an expanded DBCT is able to meet total foreseeable demand in the market at least cost compared to the existing DBCT facility and a duplicated (or partially duplicated) facility, for the reasons given in the QCA analysis.<sup>16</sup> In particular, while I note that the QCA undertook a qualitative assessment, and did not quantitatively model the costs of a new partial duplication of DBCT, I accept the QCA's finding about the characteristics of coal terminals—that they are high cost, sunk infrastructure assets<sup>17</sup>—and accept the QCA's recommendation that there are likely to be significant economies of scale in expanding DBCT as opposed to partially duplicating DBCT.
- 3.7.4 In particular, I note and accept the following evidence relied upon by the QCA in its assessment:
- (a) DBCTM estimated that the capital cost associated with expanding DBCT's capacity from 85 mtpa to 102 mtpa is \$1,460 million;
  - (b) the development of WICET to provide 27 mtpa cost approximately \$5,000 million; and
  - (c) an 11 mtpa expansion of HPCT to 55 mtpa equated to a capital cost of \$3,000 million.<sup>18</sup>
- 3.7.5 My conclusion set out in paragraph 3.7.1(b) above means that I do not accept DBCTM's submission that the relevant comparison for the "least cost" comparison can be made by reference to the option of using facilities that are not close substitutes to DBCT—that is, facilities outside the market.<sup>19</sup>
- 3.7.6 Assuming, however, that my conclusion in paragraph 3.7.1(b) is incorrect and the "least cost" comparison can be made by reference to the option of using facilities that are not close substitutes to DBCT, I would still conclude that an expanded DBCT is able to meet total foreseeable demand in the market at least cost compared to any two or more facilities. This is because I accept the QCA's conclusions that:
- (a) HPCT is not a common user terminal and, in any event, is currently operating at, or near, full capacity<sup>20</sup>—so does not have excess capacity to meet the excess demand unable to be met by the existing DBCT;
  - (b) the cost of meeting foreseeable demand using an expanded DBCT is likely to be lower than the cost of meeting such demand by using the existing DBCT and any of AAPT, RG Tanna and WICET; and
  - (c) I accept this conclusion for the reasons given in the QCA analysis.<sup>21</sup>
- 3.8 Overall finding - Criterion B**
- 3.8.1 In light of the above, I accept the QCA's recommendation that Criterion B is satisfied.

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<sup>15</sup> Part C, section 2.8.1 at pages 59–60.

<sup>16</sup> Part C, section 2.8 at pages 59–68.

<sup>17</sup> Part C, section 2.8.2 at page 66.

<sup>18</sup> Part C, section 2.8.2 at page 66.

<sup>19</sup> DBCTM 24 April 2019 at page 75.

<sup>20</sup> Part C, Annexure B at page 269.

<sup>21</sup> Part C, section 2.8.2 at pages 68–71; Part C, Appendix A.

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**4 Criterion A—Promote a material increase in competition****4.1 Overview**

4.1.1 Subsection 76(2)(a) of the QCA Act (**Criterion A**) provides that one of the criteria about which I must be satisfied in order to declare the service is that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia) other than the market for the service.

**4.2 The relevant service**

4.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above.

**4.3 The relevant market for the service**

4.3.1 I have stated my findings identifying the relevant market for the service at paragraph 3.4.1 above.

**4.4 The relevant dependent (upstream or downstream) markets**

4.4.1 I accept the QCA's recommendation<sup>22</sup> that the coal tenements markets are relevant dependent markets for the assessment of Criterion A.

4.4.2 I also accept the QCA's recommendation that there are three separate and functionally distinct markets for coal tenements that are relevant for the consideration of Criterion A:

- (a) exploration stage tenements—the market for the supply and acquisition of new or early stage exploration permits for coal in the Central Queensland region;
- (b) development stage tenements—the market for the supply and acquisition of late stage exploration and development tenements for metallurgical coal in the Hay Point catchment; and
- (c) operating mines—the market for the supply and acquisition of operating mines in relation to metallurgical coal in the Hay Point catchment.

4.4.3 I do so for the reasons set out in the QCA analysis.<sup>23</sup>

4.4.4 I further accept the QCA's recommendation<sup>24</sup> that each of the following markets is relevant for the assessment of Criterion A:

- (a) the coal export market;
- (b) the coal haulage services market (above-rail services);
- (c) the DBCT secondary capacity trading market;
- (d) the rail access market (below-rail services); and
- (e) other markets such as port services (e.g. pilotage and towage services); coal shipping services; and various mining inputs and services markets (such as geological and drilling services, construction services, mining safety services, and mining technology services).

4.4.5 I accept the dependent markets identified in paragraphs 4.4.2 and 4.4.4 above are separate from the market for the coal handling service at DBCT.<sup>25</sup>

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<sup>22</sup> Part C, section 3.2 at pages 74 – 75.

<sup>23</sup> Part C, section 4.4 at pages 117–127, section 4.4.1 at pages 127–141, section 4.4.2 at pages 193–194 and section 4.4.3 at pages 195–196.

<sup>24</sup> Part C, section 3.2 at pages 74–75.

<sup>25</sup> See QCA's analysis at Part C, section 3.2 at pages 74–75.

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**4.5 Access arrangements with and without declaration**

- 4.5.1 I accept that the approach to assessing the service under Criterion A taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach<sup>26</sup>).
- 4.5.2 In relation to access arrangements **with** declaration, I accept the approach taken by the QCA,<sup>27</sup> that as the required assessment is of whether a currently declared service should remain declared, the terms and conditions of access that exist now (and the state of competition in related markets) reflect the current outcome of declaration, including the application of the QCA Act, the operation of access undertakings and user agreements entered into under these arrangements. While a future scenario in which there is declaration does not necessarily involve a continuation of the status quo, the existing conditions help illustrate this future scenario.
- 4.5.3 In relation to access arrangements **without** declaration:
- (a) I accept the QCA's recommendation that existing users (**Existing Users**) would continue to get the benefit of constraints in existing user agreements (so long as they remain in operation) up to the volumes in those agreements (as these agreements are evergreen, the QCA Act provides that an access agreement entered into before expiry or revocation of declaration is protected for its life);<sup>28</sup>
  - (b) where, for example, an Existing User sought to increase its contracted tonnage and was unable to obtain additional capacity from another user, or if a potential new entrant sought access to the DBCT service (together, **New Users**), they would be subject to whatever access arrangements existed in the absence of declaration;
  - (c) for those New Users, DBCTM has developed the Access Framework, which it has said will apply in a future without declaration, in the form of an annexure to the executed Deed Poll. The Access Framework would remain in effect throughout its term, which is 10 years (that is, until 9 September 2030), unless the relevant service is declared under the QCA Act with effect on or after 9 September 2020 (in which case the term ends).<sup>29</sup>
- 4.5.4 Accordingly, I have assessed whether the Deed Poll and Access Framework should form part of the counterfactual for the "future without" declaration for the purpose of applying Criterion A.
- 4.5.5 I accept the QCA's recommendation<sup>30</sup> that the Deed Poll and Access Framework are a part of the appropriate counterfactual where New Users seek access in a future scenario where the DBCT service is not declared, for the reasons set out in the QCA analysis.<sup>31</sup> In particular, I note and accept:
- (a) as a matter of fact the Deed Poll was executed by DBCTM in March 2019, to come into effect from September 2020 should DBCT not be declared, and can be assessed on its terms;<sup>32</sup> and

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<sup>26</sup> QCA's Approach, section 2.4.5 at page 18.

<sup>27</sup> Part C, section 3.3.6 at page 85. See also QCA's Approach, section 2.4.5 at page 18.

<sup>28</sup> Part C, section 3.3.3 at page 77; section 3.3.6 at page 100.

<sup>29</sup> Part C, section 3.3.6 at pages 85–86.

<sup>30</sup> Part C, section 3.3.6 at pages 90–91.

<sup>31</sup> Part C, section 3.3.6 at pages 86–87; 89–92; QCA's Approach, section 2.4.5 at pages 18–20.

<sup>32</sup> Part C, section 3.3.6 at page 90.

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- (b) DBCTM has manifested an intention to be legally bound by the Deed Poll and Access Framework such that DBCTM considers it to be irrevocable.<sup>33</sup>

4.5.6 I note that the conclusion I (and the QCA) have reached differs from the views of some stakeholders, who submitted that the Deed Poll and Access Framework should not form part of the counterfactual because they are an artificial contrivance, with uncertain application. As noted above, I accept the QCA's recommendation that the Deed Poll and Access Framework should be considered on their own terms.

4.5.7 I note that DBCT Users consider the Deed Poll is legally ineffective because:

- (a) if none of the covenantees accepts or relies upon the Deed Poll, then no "delivery" of the Deed Poll will have occurred and the Deed Poll "would not be legally binding on DBCTM"; and
- (b) any of the covenantees may disclaim the benefits of the Deed Poll, from which time "the deed has no legal effect as between DBCTM and any covenantee who disclaims".<sup>34</sup>

4.5.8 I accept the QCA's recommendation that it is not necessary to form a concluded view on these arguments, because:

- (a) I accept the conclusion of the QCA<sup>35</sup> that it is not a realistic scenario that DBCTM will change its mind and in effect repudiate its obligations under the Deed Poll prior to acceptance or reliance. DBCTM has asserted on numerous occasions during the course of the QCA's declaration review process that it is bound by the Deed Poll it executed. Were it to simply reverse this position, after the declaration of the DBCT service has lapsed, it would face the prospect of a fresh application for declaration, which would be founded, in part at least, on the ability of the service provider to repudiate commitments given in a deed to prospective users apparently entered into in good faith. I agree with the QCA's conclusion that this is highly unlikely to occur even if, as a matter of law, it is permitted; and
- (b) I also accept the conclusion of the QCA that the Deed Poll, by its terms, will apply to access seekers only where those parties complete required forms specified in the Access Framework. Where this is done, the factual foundation for the proposition that there is no acceptance or delivery will fall away.<sup>36</sup>

#### 4.6 Constraints on exercising market power in the absence of declaration

4.6.1 I accept the QCA's recommendation<sup>37</sup> that DBCTM has market power, for the reasons given in the QCA analysis.<sup>38</sup>

4.6.2 For the reasons set out below, I accept the QCA's recommendation<sup>39</sup> that DBCTM's ability and incentive to exert market power in the absence of declaration would **not** be constrained by:

- (a) competition from other coal terminals;
- (b) countervailing power of users;

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<sup>33</sup> Part C, section 3.3.6 at page 90.

<sup>34</sup> DBCT Users, 26 April 2019, schedule 8, pages 1–4 (O'Donnell QC Advice).

<sup>35</sup> Part C, section 3.3.6 at page 90.

<sup>36</sup> Part C, section 3.3.6 at page 90.

<sup>37</sup> Part C, section 3.3.5 at page 83.

<sup>38</sup> Part C, section 3.3.5 at page 83.

<sup>39</sup> Part C, section 3.3.7 at page 108.

- (c) DBCTM's lease arrangements (including the Port Services Agreement (**PSA**) with the State); and
- (d) DBCTM not being vertically integration.

4.6.3 For the reasons set out below, I have determined that:

- (a) I accept the QCA's recommendation that the threat of declaration by itself would not effectively constrain DBCTM;<sup>40</sup> and
- (b) the Deed Poll and Access Framework (including the pricing constraint introduced in response to the QCA's draft recommendations) in combination with the threat of declaration provide **some** constraint on DBCTM's ability and incentive to exert market power in the absence of declaration, but those constraints are not as strong as the QCA has recommended and therefore not sufficient to constrain DBCTM's ability and incentive to exercise market power.

Competition from other coal terminals

4.6.4 I accept the QCA's recommendation<sup>41</sup> that other terminals would not provide a competitive constraint on DBCTM's behaviour towards mines in the Goonyella system seeking terminal access. I have set out my finding at paragraph 3.4.1 above that DBCT is the only terminal in the relevant market for the service. In such circumstances, I accept that competition from other coal terminals would not be an effective constraint on DBCT's exercise of market power.

Countervailing power of users

4.6.5 I accept the QCA's recommendation<sup>42</sup> that for Existing Users, in relation to the capacity provided for in their existing user "evergreen" contracts, those existing user agreements are an effective constraint on DBCTM's ability and incentive to exercise market power with and without declaration up to the volumes specified in those agreements.

4.6.6 I accept the QCA's recommendation<sup>43</sup> that New Users are unlikely to have countervailing power against DBCTM in a future without declaration, in the absence of the Deed Poll and Access Framework. This is because for those users, there is no credible threat of switching terminals.

DBCTM's lease arrangements

4.6.7 I accept the QCA's recommendation<sup>44</sup> that the PSA would not be an effective constraint on DBCTM's exercise of market power in a future without declaration, for the reasons given in the QCA analysis.<sup>45</sup>

No vertical integration

4.6.8 I accept the QCA's recommendation<sup>46</sup> that DBCTM, despite not being vertically integrated, would have the ability and incentive to exert market power in the absence of declaration, for the reasons given in the QCA analysis.<sup>47</sup> In particular, I note and accept:

- (a) there are no close substitutes for the DBCTM service; and

<sup>40</sup> Part C, section 3.3.7 at page 108.

<sup>41</sup> Part C, section 3.3.1 at page 76.

<sup>42</sup> Part C, section 3.3.2 at pages 76–77.

<sup>43</sup> Part C, section 3.3.2 at pages 76–77.

<sup>44</sup> Part C, section 3.3.3 at pages 78–79.

<sup>45</sup> Part C, section 3.3.3 at pages 78–79.

<sup>46</sup> Part C, section 3.3.4 at pages 80–81.

<sup>47</sup> Part C, section 3.3.4 at pages 80–81.

- (b) DBCTM would have both the ability and incentive to maximise profits by charging more, which would not necessarily align with maximising throughput.

*Deed Poll/Access Framework*

4.6.9

I accept that the Deed Poll and Access Framework, combined with the threat of declaration, operate as **some** constraint on DBCTM's ability to exercise market power. However, I have determined that the Deed Poll and Access Framework, either alone or in combination with the threat of declaration, are not sufficient to constrain DBCTM's ability and incentive to exercise market power, in the periods 2020–2030, and 2030 and beyond. That is for the following reasons:

- (a) The QCA acknowledges (and I accept) that the access environment under the Deed Poll would be less favourable for New Users than access under declaration given the uncertainty about potential amendments to the Access Framework (other than to the pricing constraint) and about aspects of enforcement of the Deed Poll, because there would be no independent regulator to monitor access arrangements and enforce compliance.<sup>48</sup>
- (b) As to uncertainty arising from the ability to amend the Access Framework:
- (i) I accept that the restrictions on DBCTM's ability to amend the Deed Poll and Access Framework are relatively weak, given the wide discretion it has to make amendments (e.g. by incrementally amending its Access Framework<sup>49</sup> on the non-pricing terms (such as queuing, terminal regulations, capacity expansion or arbitration provisions) which may have a cumulative impact<sup>50</sup>) and the lack of remedies, other than litigation, available to affected individual stakeholders. As a result, the Deed Poll and Access Framework provide little certainty as to the future terms of access;<sup>51</sup>
- (ii) while the amendment provisions adopt similar language to the QCA Act, in a future with declaration an independent regulator weighs the various considerations and determines whether amendments to access arrangements are appropriate, whereas under the Deed Poll DBCTM determines what amendments are appropriate and this decision is then subject to court proceedings;<sup>52</sup> and
- (iii) given the scope of the mandatory considerations in the amendment provisions in the Deed Poll, it may be difficult for a court to determine that a challenged amendment by DBCTM to the Access Framework is contrary to those provisions.<sup>53</sup>
- (c) As to the limitations of the negotiation and arbitration procedures:
- (i) particularly from the perspective of users of DBCT, referring a dispute to an arbitrator is inferior (and materially different<sup>54</sup>) to the dispute resolution mechanisms currently available under the QCA Act. The QCA as a "known entity" can be relied on to be consistent and rigorous in its approach to

<sup>48</sup> Part C, section 3.3.6 at page 96.

<sup>49</sup> Paragraph 7, 27–29, 30–31 Peabody 26 April 2019.

<sup>50</sup> Part C, Appendix F at page 310.

<sup>51</sup> Pages 20–21, DBCT User Group 28 October 2019.

<sup>52</sup> Part C, Appendix F at page 310.

<sup>53</sup> Paragraph 2.28–2.32 Glencore Coal Assets 26 April 2019; Page 17–18 Pacific National 24 April 2019; Section 5.2, DBCT User Group 20 August 2019.

<sup>54</sup> Page 91–92, DBCT Users 26 April 2019; see also Part C, Appendix F at page 313.

- determining access matters.<sup>55</sup> In contrast, where a third party is appointed under the Access Framework there will be a high degree of uncertainty around how any dispute will be determined;<sup>56</sup>
- (ii) uncertainty is likely to attend DBCTM's compliance with its obligations under the negotiation and arbitration provisions in the Deed Poll and Access Framework as they are highly reliant on potentially protracted and costly litigation and arbitration (i.e. a series of bilateral disputes with individual users);<sup>57</sup> and
  - (iii) there may be a reluctance on the part of access seekers to commence arbitration due to information asymmetry, which prevents an access seeker from making an assessment of probable arbitration outcomes.<sup>58</sup>
- (d) Compliance and enforcement:
- (i) in a future without declaration, the QCA will no longer have the powers to monitor and enforce compliance with the Access Framework<sup>59</sup> and will not be able to oversee amendments to the framework, determine the terms of access for users or resolve disputes.<sup>60</sup> I have weighed the importance of regulatory oversight in favour of declaration,<sup>61</sup> as without such oversight the risk profile of users could increase.<sup>62</sup>
  - (ii) certain protections under the QCA regime have been removed in the Deed Poll and Access Framework which results in access seekers not knowing the pricing prior to being required to agree to an access agreement. This imposes a pricing risk on access seekers, with their only recourse being to an arbitration process in which the arbitrator would not be as fully informed as the QCA and is unlikely to have the same level of specialist expertise and capacity as the QCA.<sup>63</sup>
  - (iii) I do not consider that the ability of users to challenge DBCTM amendments to the Deed Poll and Access Framework or other compliance and enforcement issues under the Framework are a credible threat to DBCTM<sup>64</sup>, because:
    - (A) (as the QCA accepts) there may be limitations on the ability of a covenantee to enforce the pricing covenant (including the \$3 per tonne price difference cap) in the Deed Poll—or at least a difficulty in proving a breach (e.g. proving that the Terminal Infrastructure Charge (**TIC**) had not been calculated in accordance with the prescribed methodology or that an amendment was made in breach of the relevant provisions of the Deed Poll) or perception that it will be difficult to obtain relief;<sup>65</sup>
    - (B) the costly and time-consuming nature of litigation or an arbitration process;<sup>66</sup>

<sup>55</sup> Paragraph 37–38, Peabody 26 April 2019.

<sup>56</sup> Paragraph 3.1, Page 7, Pacific National 24 April 2019.

<sup>57</sup> Page 6, section 2, DBCT User Group 26 April 2019.

<sup>58</sup> Pages 8–11, Glencore Coal Assets 26 April 2019; see also Part C, Appendix F at page 314.

<sup>59</sup> Section 4.1, Page 18, Pacific National 24 April 2019.

<sup>60</sup> Section 4.1, Page 17, Pacific National 24 April 2019.

<sup>61</sup> Paragraph 22, Peabody 26 April 2019.

<sup>62</sup> Paragraph 2, Page 2, Pacific National 28 October 2019.

<sup>63</sup> Paragraph 2.22.2(b), Page 9, Glencore Coal Assets 26 April 2019.

<sup>64</sup> Section 17.7(a), pages 85–87, DBCT User Group 26 April 2019.

<sup>65</sup> Part C, section 3.3.6 at page 95.

<sup>66</sup> Section 22, page 113, DBCT User Group 26 April 2019.

- (C) the lack of effective remedies: both the Deed Poll and the Access Framework exclude damages for breach; only specific performance is available for breaches of the price cap in the Deed Poll; and only declaratory relief is available for breaches of the Access Framework and breaches of the requirements for amendments to the Access Framework;<sup>67</sup> and
- (D) the current (QCA-regulated) Access Undertaking does not impose a cost obligation on an unsuccessful party to arbitration. The Access Framework has removed this cost protection, which means that the risk of an adverse costs outcome could result in an access seeker with a *bona fide* dispute either not pursuing an arbitration at all or pursuing it in a manner that reduces the cost exposure.<sup>68</sup>

Pricing

- 4.6.10 I accept that Existing Users will not face materially different pricing in a future without declaration as compared to a future with declaration. This is because in either scenario the prices for Existing Users will be determined by the price review mechanisms in their existing “evergreen” user contracts.<sup>69</sup>
- 4.6.11 For New Users, however, the pricing regime will differ depending on whether or not DBCT is declared.
- 4.6.12 In the future with declaration, the pricing for New Users will be determined, failing agreement between the parties, by the QCA.
- 4.6.13 In the future without declaration, the pricing for New Users will be determined in accordance with the Deed Poll and Access Framework. This TIC will be negotiated between the parties and, failing agreement, the matter will be resolved by referral to an independent arbitrator who will apply the pricing methodology specified in the Access Framework. I accept that under that pricing methodology:<sup>70</sup>
- (a) the arbitrator must determine a TIC that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines that are proximate to the Port of Hay Point, but must determine the TIC between a floor TIC and ceiling TIC;
  - (b) the floor TIC is the TIC for the existing terminal that would apply under a QCA-administered pricing regime;
  - (c) the ceiling TIC is:
    - (i) the floor TIC referred to in paragraph (b) above plus \$3 per tonne; or
    - (ii) in relation to expansion capacity, if the arbitrator determines differentiated pricing shall apply, the greater of:
      - (A) the TIC that would apply under a QCA-administered pricing regime for that expansion capacity; and
      - (B) the ceiling TIC determined in accordance with paragraph (c)(i) above.

<sup>67</sup> Paragraph 2.34, Page 12, Glencore Coal Assets 26 April 2019.

<sup>68</sup> Paragraphs 2.19–20.20, 2.22–2.23, Glencore Coal Assets 26 April 2019.

<sup>69</sup> Part C, section 3.3.6 at page 101.

<sup>70</sup> Part C, section 3.3.6 at page 101.

- 4.6.14 Existing Users' evergreen user agreements do not allow for a price up to \$3 per tonne above the price that would apply under a QCA-administered pricing regime. Accordingly, I accept the QCA recommendation that in a future without declaration, New Users will potentially pay up to \$3 per tonne more for access at DBCT compared to the price payable by Existing Users.<sup>71</sup>
- 4.6.15 I have determined that the pricing mechanisms in the Deed Poll and Access Framework, combined with the right of an access seeker to refer a pricing dispute to an arbitrator, provide **some** constraint on DBCTM until the expiry of the Deed Poll and Access Framework in 2030, but that this constraint has limitations and would be less effective to constrain DBCTM's ability and incentive to exercise market power when compared to a future with declaration. I hold this view for the following reasons:
- (a) the QCA accepts<sup>72</sup>, as do I, that without declaration, given the pricing methodology set out in the Access Framework, there would be greater uncertainty for New Users than under declaration:
    - (i) there are various elements to be determined in the Access Framework pricing methodology (i.e. the floor TIC, the ceiling TIC and the price that would be agreed between a willing but not anxious buyer and seeker), aspects of which are untested;
    - (ii) there would likely be a range of views on the value of the floor TIC applicable under the Access Framework;<sup>73</sup>
    - (iii) there is no certainty about how an arbitrator would apply the "willing but not anxious" principle in the context of an arbitration between DBCTM and an access seeker;
  - (b) it is not possible for third parties definitively to estimate with any precision what TIC the QCA would have, hypothetically, arrived at, in the future, under a QCA-administered regime, because of:
    - (i) the range of possible approaches and estimates for the building block parameters;
    - (ii) the QCA's residual discretion;
    - (iii) changes in approach over time; and
    - (iv) DBCT specific elements of calculating the TIC (such as the QCA's ongoing prudency assessments of capital expenditure);<sup>74</sup>
  - (c) the uncertainty in relation to estimating the hypothetical QCA-administered price is likely to increase over time as the period between actual QCA-administered prices and price setting under the Access Framework increases;<sup>75</sup>
  - (d) DBCTM as a profit maximising entity has an incentive to seek a floor TIC at the top of the possible range of outcomes. Further, past regulatory processes indicate that DBCTM may have an inflated view of what the regulated price should be compared to that of the QCA: for

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<sup>71</sup> Part C, section 3.3.6 at page 104.

<sup>72</sup> Part C, section 3.3.6 at page 107.

<sup>73</sup> Part C, section 3.3.6 at page 102.

<sup>74</sup> Section 17.4, pages 82–83, DBCT User Group 26 April 2019.

<sup>75</sup> Paragraph 2.21, page 8, Glencore Coal Assets 26 April 2019.

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example, DBCTM has historically submitted it should be allowed a greater weighted average cost of capital than that allowed by the QCA;<sup>76</sup>

- (e) given DBCTM's incentives to seek a higher floor TIC and the difficulties for an arbitrator in determining the hypothetical QCA-administered price, there will be a significant likelihood of access pricing being set at a level above the asserted cap of the QCA-administered price plus \$3 per tonne. To the extent it does, the price gap between Existing User and New Users will exceed the theoretical \$3 difference;<sup>77</sup>
- (f) the pricing approach is likely to require a series of costly disputes to establish pricing for New Users;<sup>78</sup> and
- (g) the pricing approach allows for at least some degree of monopoly pricing. The price under a QCA-administered regime represents the best estimate of the price that would apply in a workably competitive market. By providing for a maximum possible price \$3 per tonne above this price, the Access Framework allows for a price above the (best estimate of) the workably competitive market price. Only firms exercising market power can sustainably charge above the workably competitive market price.<sup>79</sup>

4.6.16 I also accept there is uncertainty concerning pricing for the period after 2030. I do not accept the QCA's recommendation that contractual constraints (in the form of agreements made under the Access Framework which continue in force after the expiry of the Framework, and (should DBCTM renew the Access Framework) constraints in the Deed Poll regarding permissible amendments to the Access Framework), combined with the threat of declaration will constrain DBCTM's ability to price from 2030 in a way that would materially impact on competition in a dependent market. Rather, I have determined, for the reasons I have set out in paragraphs 4.6.17 to 4.6.20 and 4.7.47 to 4.7.56 and below, that the contractual constraints and threat of declaration faced by DBCTM in 2030 and beyond are not sufficient to constrain DBCTM's incentive and ability to exercise market power.

*Threat of declaration or regulation*

4.6.17 I accept the QCA's recommendation<sup>80</sup> that on its own, the threat of declaration would not constrain DBCTM from exercising market power without declaration.

4.6.18 I accept the QCA's recommendation<sup>81</sup> that it is at least a relevant consideration that DBCTM, in response to the present threat of declaration, executed a Deed Poll and Access Framework which hard-coded a price differential cap of \$3 per tonne between the TIC that would apply under DBCTM's proposed pricing arrangements and the price that would apply under a QCA-administered pricing regime for the existing terminal.

4.6.19 I have considered the competing considerations, including the analysis of the QCA,<sup>82</sup> regarding whether the threat of declaration is such that, combined with commitments contained in the Deed Poll and Access Framework, it will constitute a constraint upon DBCTM's ability and incentive to exercise market power. I ultimately have determined that the threat of declaration is less of a constraint on DBCTM, in the periods 2020–2030, and 2030 and beyond, than recommended by the QCA, such that

<sup>76</sup> Pages 92–93 and figure 2.1 on page 93, DBCT User Group 26 April 2019.

<sup>77</sup> Section 18.4, pages 92–93, DBCT User Group 26 April 2019.

<sup>78</sup> Paragraph 6, page 1; paragraph 65, page 10, Peabody 26 April 2019.

<sup>79</sup> Paragraphs 33–34, Peabody 26 April 2019.

<sup>80</sup> Part C, section 3.3.5 at pages 83–84.

<sup>81</sup> Part C, section 3.3.5 at pages 83, under the heading "Threat of access regulation".

<sup>82</sup> Part C, section 3.3.5 at pages 83–84, under the heading "Threat of access regulation".

it is not sufficient to constrain DBCTM's ability and incentive to exercise market power. I have done so for the following reasons:

- (a) The threat of declaration is significantly greater during the declaration review process than it will be after the review process is completed with a determination not to declare the service. DBCTM has clear incentives in the current process to be responsive to the QCA's concerns, as the process is a specific opportunity to have the declaration of the service at DBCT removed. It is the very fact of an *existing declaration* which gives rise to this review and is constraining DBCTM's behaviour. There are different incentives when declaration is removed and all that remains is the threat of declaration.<sup>83</sup>
- (b) If DBCT is not declared, it necessarily means that, after an extensive review process, the Minister has determined that the Access Criteria are not satisfied. Accordingly, unless there is some material change in circumstances, it is likely that both DBCTM and access seekers would assess a further declaration application (which would rely upon the application of the same Access Criteria) in the future as having limited prospects of success.<sup>84</sup> This reduces the extent to which seeking declaration under the QCA Act can be regarded as a likely response by access seekers to a future exercise of market power by DBCTM.<sup>85</sup>
- (c) Accordingly, DBCTM's actions following the Draft Recommendation (that is, during the declaration review period), while relevant, are not strong evidence that the threat of declaration will be a constraint on DBCTM's exercise of market power where declaration has ceased.<sup>86</sup>
- (d) There is significant time involved in seeking declaration. Even if an application is successful, it may not be able to be obtained in a time period which could resolve the competition issues facing potential tenements buyers or access seekers.<sup>87</sup>
- (e) When determining whether to exercise market power, monopoly service providers are likely to consider the threat of a subsequent declaration application to be an acceptable commercial risk, considering the lengthy delays inherently involved in a declaration application.<sup>88</sup>

4.6.20 I also agree with the QCA's recommendation<sup>89</sup> that section 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) will not, in the absence of declaration, be a sufficient constraint on the ability and incentive of DBCTM to exercise market power in a way that could materially affect competitive conditions in a dependent market, for the reasons set out in the QCA analysis.<sup>90</sup>

*Conclusion on constraints on DBCT's ability and incentive to exercise market power*

4.6.21 For the reasons I have given above, I have determined that the operation of the Deed Poll and Access Framework and the contractual rights in the user agreement entered into under the Access Framework, and the threat of declaration, either on their own or in combination, are not sufficient to constrain DBCT's exercise of market power in the absence of declaration. Accordingly, I am required to determine whether, given this lack of constraint, access (or increased access) as a result of

<sup>83</sup> Page 4, DBCT User Group 28 October 2019.

<sup>84</sup> Page 7, DBCT User Group 28 October 2019.

<sup>85</sup> Page 16, DBCT User Group 28 October 2019.

<sup>86</sup> Page 4, DBCT User Group 28 October 2019.

<sup>87</sup> Section 5.3(f), page 70, DBCT User Group 11 March 2019.

<sup>88</sup> Paragraph 2.4, Glencore Coal Assets 26 April 2019.

<sup>89</sup> Part C, section 3.3.5 at page 84.

<sup>90</sup> Part C, section 3.3.5 at page 84.

declaration of the service would promote a material increase in competition in one of the identified dependent markets.

**4.7 Material increase in competition in the dependent market**

- 4.7.1 As set out above in paragraph 4.5.4 above, I accept that DBCTM's Deed Poll and Access Framework form part of the relevant counterfactual for the "future without" declaration.
- 4.7.2 As set out in paragraph 4.6.14 above, I accept that DBCTM's Access Framework, in combination with DBCTM's executed Deed Poll provides that the TIC that DBCTM will impose in the absence of declaration cannot be more than \$3 per tonne above that which would be imposed under a QCA-administered pricing regime for capacity at the existing terminal.
- 4.7.3 As set out in paragraph 4.6.14 above, I accept that New Users will likely pay more (up to a capped amount) than they would under declaration, and more than Existing Users (under their evergreen agreements) for current capacity and expansion capacity that is priced on a socialised basis. New Users would likely face a greater degree of uncertainty due to the operation of the Deed Poll and Access Framework as a means of providing access compared to access as a result of declaration.
- 4.7.4 It is therefore necessary to consider whether DBCTM's ability and incentive to exercise market power in a future without declaration would materially affect competitive conditions in a dependent market compared to a future with declaration, such that I can be satisfied that declaration would promote a material increase in competition in at least one dependent market.
- 4.7.5 I have identified the relevant dependent markets at paragraphs 4.4.2–4.4.4 above.
- 4.7.6 I now address, for each of those dependent markets, whether or not I am satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in that market. As it is in the QCA's Recommendation, the focus of my assessment is on the development stage tenements market as detailed below.
- The Coal Tenements Market—exploration stage tenements*
- 4.7.7 I accept the QCA's recommendation that the market for exploration stage tenements is already workably competitive, for the reasons set out in the QCA analysis.<sup>91</sup>
- 4.7.8 I further accept the QCA's recommendation that declaration of the DBCT service is unlikely to have a material impact on the environment for competition in the market for exploration stage, for the reasons set out in the QCA analysis.<sup>92</sup> In particular, I note and accept:
- (a) terms of access to infrastructure are unlikely to be a key consideration for participation in this market, which is demonstrated by the participation of non-coal miners in this market;
  - (b) whether a meaningful resource would be available for exploration is fundamental and far greater than any uncertainty about the terms and conditions of access.<sup>93</sup>
- 4.7.9 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the market for exploration stage tenements.

<sup>91</sup> Part C, section 4.4.2 at page 194.

<sup>92</sup> Part C, section 4.4.2 at page 195.

<sup>93</sup> Part C, section 4.4.2 at page 195.

*The Coal Tenements Market—development stage tenements*

- 4.7.10 In considering the likely competitive effects of the Access Framework in a future without declaration, I have focused on the ability of New Users of DBCT to enter the dependent market (i.e. to acquire development stage tenements).
- 4.7.11 I accept that both New Users and Existing Users will seek to compete for development stage tenements for which capacity will be required at the DBCT terminal:
- (a) I agree with the QCA that Existing Users have the option of using their terminal access rights for another mine in their portfolio as long as the tonnage is not in excess of the tonnage allowed for under their evergreen user agreement. In circumstances where DBCT is fully contracted, Existing Users have an incentive to preserve those access rights for future mining operations. In circumstances where there is approximately 23 mtpa of coal handling throughput at DBCT relating to mines operated by Existing Users that are expected to reach the end of their economic life over the next 10 years, I consider that within the proposed declaration period it is likely that Existing Users with spare capacity under their existing user agreements will be participants in the market for development stage tenements.<sup>94</sup>
- (b) For New Users, I consider that New Users will participate in the market for development stage tenements (as detailed below).
- 4.7.12 I accept that in order for New Users to compete for development stage tenements, New Users require capacity to be available at DBCT.
- (a) I accept the QCA's finding that DBCT is fully contracted.<sup>95</sup> Therefore capacity that can be obtained by a New User, would arise from one of the following:
- (i) capacity at the existing terminal becoming available from DBCTM (e.g. relinquishment by an Existing User at the end of a mine life);<sup>96</sup>
- (ii) Existing Users allowing a third party to use their capacity (for example, assigning their capacity on a temporary or permanent basis);<sup>97</sup>
- (iii) capacity becoming available through terminal expansion, with the cost either being shared between all users (i.e. socialised expansion) or only charged to users of the expansion capacity (i.e. differentiated expansion).<sup>98</sup>
- (b) In light of the QCA's recommendations (which I have accepted<sup>99</sup>) in relation to Criterion B (namely that DBCT has capacity of 85mtpa, and the foreseeable demand for the terminal over the declaration period is 80 mtpa to 96 mtpa (on a throughput basis) or 89 mtpa to 107 mtpa (on a contract entitlements basis)), while it is possible for New Users to obtain capacity through any of the mechanisms set out above, it appears most likely that New Users will obtain capacity from expansions of DBCT.

<sup>94</sup> Part C, section 4.4.1 at page 153.

<sup>95</sup> Part C, section 4.4.1 at page 154.

<sup>96</sup> Part C, section 4.4.1 at pages 153–154—The QCA notes, on the basis of the information available that approximately 23 mtpa of coal handling throughput at DBCT relates to mines operated by existing users that are expected to reach the end of their economic life over the next ten years.

<sup>97</sup> Part C, section 7.2.1 at page 208—The QCA notes that in relation to data submitted by DBCTM shows that since July 2015, 23 capacity transfer transactions accounting for about 88 mtpa of capacity took place, and of that: (a) 15 transactions for about 18.5 mtpa were capacity transfers for a time period of up to one year; (b) 2 transactions for about 18.3 mtpa were capacity transfers for a time period of six to ten years; (c) 6 transactions for about 51.5 mtpa were permanent capacity transfers.

<sup>98</sup> Part C, section 2.7.2 at page 55 and 58—The QCA finds that the following expansions are reasonably possible over the declaration period: (a) Zone 4—4mtpa; (b) 8X (Phase 1)—4.5 mtpa; (c) 8X (Phase 2)—8.5 mtpa; (d) 9X (Phase 1)—12 mtpa.

<sup>99</sup> See section 3 above.

- 4.7.13 I accept that in a future without declaration, when New Users seek to compete with Existing Users for development stage tenements, there is likely to be asymmetry between them with respect to the access arrangements (i.e. price and non-price terms) on which they could obtain capacity at DBCT (i.e. price and non-price terms). Among other things, this is because, as discussed at paragraph 4.6.14 above, New Users will potentially pay up to \$3 per tonne more for access at DBCT compared to the price payable by Existing Users.
- 4.7.14 I also accept that declaration is likely to reduce this asymmetry. In respect of price, this is because with declaration, Existing Users and New Users may be able to access existing capacity and expansion capacity priced on a socialised basis on the same terms. I note, however, that with respect to expansion capacity priced on a differentiated basis, New Users accessing the expansion capacity would still pay more than Existing Users accessing existing capacity under their evergreen access agreements.
- 4.7.15 As set out at paragraph 4.6.21 above, I have determined that in the absence of declaration, the constraints on DBCTM are not sufficient to constrain its ability and incentive to exercise market power.
- 4.7.16 In light of the above, I have assessed whether access (or increased access) to the service, on reasonable terms and conditions as a result of declaration would promote a *material increase* in competition in the development stage tenements market. This involves consideration of whether there is an improvement in the opportunities and environment for competition, such that competitive outcomes are materially more likely to occur in a future with declaration compared to a future without declaration.
- Material increase in competition in development stage tenements*
- 4.7.17 I accept the QCA's recommendation that the market for development stage tenements is currently workably competitive, for the reasons set out in the QCA analysis.<sup>100</sup> I note that the DBCT service is currently declared (and has been for some time). It is, accordingly, necessary to consider the environment for competition in this market in a future without the service being declared as the existing competitive conditions may not represent such a future. As discussed at paragraphs 4.5.5 above, considering the future without declaration includes considering DBCTM's Deed Poll and Access Framework.
- 4.7.18 I first consider whether the arrangements provided for in the Deed Poll and Access Framework, if continued over the economic life of a mine, would materially impact on the ability of New Users to acquire tenements relative to Existing Users and compared to a future with declaration. As the Deed Poll and Access Framework have a term of 10 years and will prima facie expire in 2030, I then consider likely pricing arrangements beyond 2030 in a future without declaration, and whether these arrangements would materially impact on the ability of New Users to acquire and develop tenements relative to Existing Users and compared to a future with declaration
- Pricing and access provisions in the Deed Poll and Access Framework*
- 4.7.19 As stated in paragraph 4.6.14 above, I accept that in a future without declaration, due to the effect of the Deed Poll and Access Framework and the on-going rights of Existing Users under their existing evergreen user agreements, a New User would expect to pay up to \$3 per tonne more than an Existing User would pay for the capacity in its existing user agreement. The question is whether such a price differential would have a material impact on competition in the coal tenements market.

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<sup>100</sup> Part C, section 4.4.2 at page 141–143.

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- 4.7.20 The DBCT Users submitted that a \$3 per tonne price differential (such as would apply under the Access Framework) would have a material impact on competition in the coal tenements market because it would:
- (a) reduce the value placed on tenements by potential DBCT users;<sup>101</sup> and
  - (b) accordingly, make it difficult for efficient potential DBCT users to acquire tenements.<sup>102</sup>
- 4.7.21 DBCT Users, supported by modelling developed by PwC and Castalia on their behalf, submitted that:
- (a) the relevant market is that for the acquisition of tenements, and not for the development of tenements;<sup>103</sup>
  - (b) the relevant consideration is the difference the \$3 per tonne additional charge would make to the profit margin of coal exploration and development projects. The proportion the \$3 per tonne charge forms of the costs of production or the coal sales price is not an appropriate consideration;<sup>104</sup>
  - (c) new entrants would factor in the \$3 per tonne cost differential when evaluating the price for coal tenements they would be prepared to pay, where the price is the residual value after discounting forecast future costs and revenues;<sup>105</sup>
  - (d) efficient potential buyers would be expected to take similar views on long term coal prices and project cost profiles, such that the difference in DBCT coal handling charges will stand out as a clear differentiating factor between new and existing users;<sup>106</sup>
  - (e) extra costs of \$3 per tonne has a significant impact on the assessment of value. PwC modelling indicates it can result in approximately 10–20% (or closer to 30% depending on the discount rate applied) lesser value of a tenement to a future user relative to an existing user;
  - (f) this substantial value gap created by DBCTM's asymmetric pricing between existing and future users would constitute a clear barrier to entry that will directly impact on efficient new users' ability to compete against existing users for the acquisition of coal exploration tenements in the Hay Point catchment.<sup>107</sup> It will be extremely challenging for efficient new users to acquire tenements;<sup>108</sup> and
  - (g) declaration would promote the environment and opportunities for competition in the Hay Point catchment coal tenement by preventing this asymmetric pricing developing.<sup>109</sup>
- 4.7.22 Glencore, in supporting submissions, provided modelling indicating the \$3 per tonne could reduce the internal rate of return on coking coal projects by 0.7% to 1.5% (and by 1.8% for a thermal coal project).<sup>110</sup>
- 4.7.23 I note that the basic conclusion of the PwC analysis (the \$3 per tonne price differential is likely measurably to reduce New Users' valuations of tenements) is consistent with calculations derived

<sup>101</sup> DBCT Users, 28 October 2019 schedule 1 PwC report.

<sup>102</sup> DBCT Users, 28 October 2019 section 2.3 at pages 5–6.

<sup>103</sup> Section 18.5, page 94, DBCT User Group 26 April 2019.

<sup>104</sup> Section 18.5, page 95, DBCT User Group 26 April 2019.

<sup>105</sup> Schedule 6, page 8, DBCT User Group 26 April 2019.

<sup>106</sup> Page 37, DBCT User Group 28 October 2019.

<sup>107</sup> Page 5, DBCT User Group 28 October 2019.

<sup>108</sup> Page 5, DBCT User Group 28 October 2019.

<sup>109</sup> Section 2.3 at pages 5–6; section 5.7 at pages 36–37, DBCT User Group 28 October 2019.

<sup>110</sup> Table 1, page 6, Glencore Coal Assets 26 April 2019.

from the QCA's own analysis<sup>111</sup> (namely, that the \$3 per tonne would be equivalent to 6.6% of the average profit margin over the 12 projects analysed,<sup>112</sup> and up to 19% for the project with the lowest profit margin (with the full range being 3% to 19%). However, the QCA in its Final Recommendations did not find DBCT Users' submissions, or the PwC analysis underlying them, convincing (and did not comment on the Glencore analysis). This was at least in part because PwC's methodology and data underpinning its analysis were not provided to the QCA, so that the QCA was unable to examine PwC's conclusions. I consider further below in paragraph 4.7.34, the extent to which I regard it appropriate to rely on the PwC analysis.

4.7.24 DBCTM submitted, by contrast, that:

- (a) potential DBCT users (or more particularly, new entrants to the Goonyella system) have been buying tenements in recent years, in the knowledge that:
  - (i) DBCT could be undeclared as from September 2020 (which would mean that its price could increase);<sup>113</sup> and
  - (ii) even if DBCT remains declared, expansion capacity (being the capacity most likely to be available to new users) at DBCT could be differentially priced above existing capacity, with this difference being estimated by the QCA at \$3.50 per tonne;<sup>114</sup>
- (b) despite this prospect of higher or differentiated pricing, there is no evidence to suggest any detrimental impact on the coal tenements markets. Rather, the data produced by HoustonKemp show a number of miners transacting exploration and development tenements without access to DBCT.

4.7.25 DBCTM further submitted that even if differentiated pricing was not possible with declaration (so that, contrary to DBCTM's primary submission, asymmetric pricing would only arise under its Access Framework) a pricing differential in the order of \$3 per tonne between new and existing users would be immaterial and would not impact competition in the coal tenement markets. This is because:

- (a) global coal prices are the key driver for the valuation of tenements. In this context, \$3 per tonne represents a tiny fraction of the price for metallurgical coal and is so immaterial that it could not have a material impact on competition; and
- (b) similarly, coal handling costs are a very small portion of overall costs.

4.7.26 DBCTM made further submissions that:

- (a) uncertainty of access to coal handling services, not the price of that access, is the fundamental driver of differences in the valuation of coal projects between parties with existing access to DBCT and those without;
- (b) more generally, uncertainty regarding terminal access is only a small fraction of overall uncertainty (geological, political and regulatory, coal price) relevant to a decision to invest in a coal tenement. For example, DBCTM submitted that uncertainty associated with a \$3 per tonne change in DBCT costs is unlikely to be a material factor in decisions to enter the coal tenements market when considered against the volatility in the metallurgical coal price which

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<sup>111</sup> Which I discuss in paragraph 4.7.29

<sup>112</sup> Calculated by dividing the \$3 by the 2020's profit margin (base case scenario, future with declaration).

<sup>113</sup> Paras 78–83, DBCTM 24 April 2019.

<sup>114</sup> Paras 52–54, DBCTM 28 October 2019. DBCTM submits that differential pricing has been a feature of DBCTM's Access Undertaking since 2015.

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varied between \$US278 per tonne and \$US76 per tonne between 2011 and 2018.<sup>115</sup>

Despite this volatility, entrants have continued to acquire tenements in the Goonyella;<sup>116</sup>

- (c) access holders' rights to use the coal handling services at DBCT at existing charges are limited to the tonnages specified under the existing user agreements. Existing users wishing to ship greater tonnages of coal will be subject to the same terms of access as new users. This means that any increase in the TIC paid under the Access Framework would affect equally the valuation of any tenements that are traded at the margin;
- (d) users without access to DBCT can develop tenements and on-sell them to existing users with capacity at DBCT to operate, meaning they do not need access to DBCT to enter the exploration and development markets; and
- (e) in the unlikely circumstances where a potential entrant to the coal tenements market was deterred from entering by a \$3 per tonne cost increase, that entrant would be inefficient in any event. As a result, this will not materially impact competition in the coal tenements markets.<sup>117</sup>

4.7.27 DBCTM also submitted that, because the QCA had previously concluded that a \$3.50 per tonne price differential was not material, the \$3 per tonne price cap prescribed by the Deed Poll and Access Framework addressed concerns that a pricing asymmetry between new and existing users would result in efficient new entrants being deterred from entering the coal tenements market.<sup>118</sup> The QCA rejected this submission in the Final Recommendations, and considered it relevant to examine if the price difference between potential DBCT users and existing DBCT users under the Deed Poll and Access Framework would have a detrimental impact on the ability of potential DBCT users to develop tenements relative to those developed by existing users and compared to if the tenements were developed in a future with declaration.<sup>119</sup>

4.7.28 The QCA stated in the Final Recommendations that:

- (a) it is possible that the prospect of paying a higher charge (at most \$3 per tonne higher) than Existing Users may lessen the value of a tenement to a potential DBCT User, all other things being equal. The QCA, however, considers that this does not necessarily mean that the absence of declaration would materially impact on the ability of New Users to develop tenements into mining operations;
- (b) as long as mining projects are expected to remain profitable, it is not evident that there would be a material difference in the investment decisions of potential DBCT users with or without declaration;
- (c) the higher charge may merely have the effect of redistributing the economic surplus generated within a supply chain; and
- (d) all other things being equal the profit margin estimates of those projects would likely to lower in a future without declaration than in a future with declaration, but that would represent a transfer of rents.<sup>120</sup>

<sup>115</sup> Paras 306–310, DBCTM 11 March 2019.

<sup>116</sup> See Part C, section 4.4.1 at page 142 and Figure 3–2 of the April 2019 HoustonKemp report titled, "Transactions of coal tenements in the Goonyella system".

<sup>117</sup> Pages 13–14, DBCTM 28 October 2019.

<sup>118</sup> Page 6, paragraph 13, DBCT Management, 11 March 2019.

<sup>119</sup> Part C, 4.4.1 at page 150.

<sup>120</sup> Part C, section 4.4.1 at pages 188–189.



- 4.7.29 The QCA conducted its own analysis in the Final Recommendations to examine whether there would be a material difference in the investment decisions of potential DBCT users with or without declaration. The QCA concluded that the effect of a future with declaration and a future without declaration (based on the \$3 per tonne price difference cap over the economic life of a mine) on the ability of New Users to develop mining projects is likely to be similar. The QCA's conclusion was based on the outcome of its profit margin analysis which showed that:
- (a) if the TIC was set as per the \$3 per tonne price difference cap throughout the economic life of a mine, the average profit margin estimates for some projects owned by New Users are negative in one scenario and positive in the other two scenarios;
  - (b) a similar pattern is observed in a future with declaration—that is, the average profit margin estimates for one project is negative in one scenario and positive in the other two scenarios;
  - (c) the analysis does not provide consistent evidence to suggest that if the TIC was set as per the \$3 per tonne price difference cap over the economic life of a mine, it would necessarily affect the economic viability of projects developed by New Users, compared to if those tenements were developed in a future with declaration;
  - (d) for the period beyond 2030, it would be in DBCTM's economic interests if the TIC reflected a price difference cap that was greater than \$3 per tonne, even if that level of TIC made some projects by New Users potentially unviable.<sup>121</sup>
- 4.7.30 I note that the QCA profit margin analysis set out above was not provided to stakeholders to comment on during the course of the QCA's declaration review process; instead, it appears that it was an analysis undertaken by the QCA, at least in part, in response to submissions by stakeholders on the QCA's Draft Recommendations. Accordingly, the QCA analysis has not been tested as rigorously as might have occurred if it had been available to stakeholders for comment.
- 4.7.31 In my view, there are limitations to the analysis undertaken by the QCA. As noted earlier, while New Users' assessment of the profitability (or viability) of potential projects is relevant, the more pertinent question is whether the pricing differential is likely to cause New Users to assess a tenement as having a value materially below that assessed by Existing Users. Where it does, I agree with the DBCT Users' submission that the pricing differential may act as a barrier to entry for New Users, even in circumstances where New Users assess a tenement as being profitable. This is because the higher valuation arrived at by Existing Users will tend to result in Existing Users offering higher prices for tenements, thus effectively outbidding the potential new entrants.
- 4.7.32 The answer to the question posed in the previous paragraph—whether the pricing differential is likely to cause New Users to assess a tenement as having a value materially below that assessed by Existing Users, such that it constitutes a material barrier to entry—is not clear cut.
- 4.7.33 DBCTM cites entry of New Users into the market in recent years notwithstanding (it submits) those entrants being aware of the risks of higher prices (if the DBCT declaration lapses) or differentiated pricing for expansion capacity (if the DBCT service remains declared). However, this analysis assumes that market participants have, in fact, assessed these risks as material. Whether they have done so is unknown; it is possible that market participants in truth have regarded these risks as negligible. This lack of information about the market's assessment of risks limits the inferences that I can confidently draw from market activity in recent years.
- 4.7.34 DBCT Users rely on modelling to demonstrate that a \$3 per tonne cost difference has a material impact on valuations. I accept, as a matter of principle, that the cost differential will depress valuations

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<sup>121</sup> Part C, section 4.4.1 at page 167.

by New Users. The question is whether this will result in a material barrier to entry. On their face, the results reached by PwC in its analysis (relied upon by the DBCT Users), and also the profit margin percentages calculated from the QCA margin analysis referred to at paragraph 4.7.23 above, indicate that the impact is material and, accordingly, would be likely to result in a material barrier to entry. However, as it lacked the underlying data and methodology, the QCA was unable properly to review the PwC analysis. Similarly, I do not have sufficient access to the underlying data and methodology relating to the QCA's margin analysis to analyse its validity, and further, as noted above, I have some concerns about the focus of the QCA's analysis. In these circumstances, I do not consider the PwC and QCA analyses as sufficiently probative to support, on their own, a finding that a \$3 per tonne cost difference will result in a material barrier to entry for New Users. There is also the difficulty of determining the extent to which such a difference in price would exist even if the service were declared, because of the potential for differentiated charges to apply to expansion capacity.

*Pricing arrangements beyond 2030*

- 4.7.35 As to the second issue, the Deed Poll and Access Framework have an express term of 10 years. As such, *prima facie* they will expire in 10 years, i.e. in 2030, whereas the economic life of a coal mine typically lasts longer (about 30 years). In these circumstances I agree with the QCA that it is necessary to consider likely pricing arrangements beyond 2030 in a future without declaration, and whether these arrangements would materially impact on the ability of New Users to acquire development stage tenements.
- 4.7.36 I accept the QCA's recommendations<sup>122</sup> that:
- (a) DBCTM has market power, as DBCT is a 'bottleneck' or essential service for mines in the Goonyella, and it is not constrained by any close substitutes;
  - (b) as a business DBCTM has an incentive to maximise profits by seeking to achieve as high an access charge as possible. Given this, and without regard to other potential constraints, DBCTM would have the ability and incentive to exercise market power in the absence of declaration;
  - (c) prospective mine investors make long term investment decisions (over the length of the mine life over approximately 30 years) requiring the commitment of sunk investment; and
  - (d) mine owners seeking to invest in the 2020–2030 period would need to consider DBCTM's conduct over the economic life of the mine.
- 4.7.37 Accordingly, I accept the QCA's recommendation that a New User's view when considering investing during the period 2020–2030, of what DBCTM will do at and beyond 2030, will have an impact on the New User's decision to enter the development stage tenements market in 2020–2030.<sup>123</sup>
- 4.7.38 In the scenario where DBCT is not declared as a result of the current declaration review process, and the Deed Poll and Access Framework govern the access conditions for New Users investing in the coal tenements market in the period 2020–2030, I agree with the QCA's recommendation<sup>124</sup> that the pricing mechanism that may apply beyond 2030 would depend on DBCTM's action at that time.
- 4.7.39 It is not evident that DBCTM would voluntarily submit an access undertaking under the QCA Act or under Part IIIA of the CCA in 2030, as DBCT has an incentive to maximise profit and an access undertaking would likely lead to a reduction in rents that DBCTM receives.
- 4.7.40 Rather, for the period post 2030, I agree with the QCA that:

<sup>122</sup> Part C, section 3.3.4 at page 83.

<sup>123</sup> Part C, section 4.4.1 at page 192.

<sup>124</sup> Part C, section 3.3.6 at page 107.

- (a) DBCTM could renew the Deed Poll and Access Framework beyond 2030, and thereby retain the pricing arrangements (or some variation of them); or
- (b) DBCTM could decide not to renew the Deed Poll and Access Framework, and instead attempt to put in place an entirely new form of pricing arrangement beyond 2030.
- 4.7.41 DBCT Users submitted that this uncertainty over pricing terms after expiry of the Access Framework term in 2030 would harm the environment for competition in the development stage tenements market in the period 2020–2030.<sup>125</sup>
- 4.7.42 This submission was addressed by DBCTM in its submissions of 26 April 2019.<sup>126</sup> DBCTM understood the DBCT User Group’s theory of harm to be:
- (a) New Users will have no certainty as to the terms of access beyond the expiration of the Access Framework in 2030;
- (b) this means there will be an asymmetry in the valuations of development stage tenements by New and Existing Users leading up to the expiry of the Access Framework;
- (c) as a result, efficient New Users will be deterred from entering the development stage tenements market a number of years before those users would seek access to DBCT; and
- (d) therefore, this will result in a material impact on competition during the declaration period.
- 4.7.43 In particular, DBCTM submitted that if the effect referred to by the User Group were valid, then it would be observable now, given DBCT’s declaration status post-2020 is uncertain as the declaration expires in 2020. DBCTM presented analysis by HoustonKemp which is said shows that there is no evidence of new entrants to the coal tenements market being deterred as argued by the User Group.<sup>127</sup>
- 4.7.44 DBCTM submitted that if the User Group’s theory was valid, one would expect to see a material increase in the proportion of acquisitions involving Existing Users (who would value tenements more highly given their evergreen rights to access post-2020), and a decrease in the proportion of tenements acquired by New Users (given the purported reduction in valuation and deterrent effect cited by the User Group), leading up to the expiry of declaration at DBCT. Instead what is shown is a thriving tenements market, with significant acquisitions by miners who are not Existing Users with capacity at DBCT.<sup>128</sup>
- 4.7.45 DBCTM submitted that in 2018 (the year in which the declaration review process began and DBCT’s impending declaration expiry was made clear to stakeholders), tenement acquisitions by miners without existing capacity at DBCT were at a historic high. DBCTM stated that this is clear evidence that the User Group’s theory of harm (that an asymmetry in terms and conditions of access will deter efficient new entrants from entering the coal tenements markets, including the purported uncertainty that exists from access being required after the *possible* expiry of the Access Framework in 2030) is nothing more than assertion.<sup>129</sup>
- 4.7.46 DBCTM submitted that Criterion A requires a comparison of the with and without declaration. In both scenarios, the declaration/Access Framework will expire in 2030. To presume that the 10-year declaration period was ongoing would be erroneous.<sup>130</sup> DBCTM will likely renew the operation of the

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<sup>125</sup> Slide 24, DBCT User Group stakeholder forum slides, 20 March 2019.

<sup>126</sup> DBCTM 24 April 2019 at pages 18–22.

<sup>127</sup> Para 81 DBCTM 24 April 2019.

<sup>128</sup> Para 82, 83 DBCTM 24 April 2019.

<sup>129</sup> Para 5 DBCTM 24 April 2019.

<sup>130</sup> Para 68 DBCTM 24 April 2019.

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Framework for a further term prior to expiration. The Deed Poll sets out this process and requires DBCTM to notify its intention to renew or not renew the Access Framework 12 months before it expires.<sup>131</sup> DBCTM stated that if DBCTM chose not to renew the Access Framework before its expiration it would be at risk of being declared. As such, DBCTM considers it highly likely that it will renew the term of the Access Framework, beyond 2030.<sup>132</sup> If DBCTM did not renew the Access Framework and the QCA found that DBCTM was not constrained by other factors, access seekers would be able to successfully apply for declaration, and access charges post-2030 would be determined by the QCA.<sup>133</sup>

*Finding*

4.7.47 I accept that, in the context of the DBCT service, a decision by mine owners seeking to invest in new mines will involve substantial sunk investment. I also accept that the presence of sunk investments, given the length of a mine's life and the uncertainty (discussed above) about the pricing regime to apply after 2030, create the potential for hold-up of new investments.

4.7.48 The QCA described the hold-up problem in detail in the Queensland Rail Final Recommendation at Part B, Appendix A<sup>134</sup> where the QCA stated the following:

*'Hold-up' is an economic problem that occurs where the value of an economic agent's relationship-specific investment is potentially appropriable by that agent's trading partner(s). Relationship-specific investments are, by definition, particular to a given business relationship. For example, a supplier's purchase of specialised equipment or machinery to produce inputs specific to a buyer represents a relationship-specific investment.*

*A relevant feature of this type of investment is that, once made (sunk), its value in alternative uses is lower than its value in the current trading relationship. Further, the more specific the assets are to the current relationship, the more difficult it becomes for the investor to redeploy them to other uses. As a result, exit from the relationship is costly.*

*Accordingly, at the time of the initial investment decision, both parties have an incentive to make the relationship 'work'. However, once the investment is made (i.e. costs are sunk), the incentives of the parties change. This is because the gains from trade are only realised after the initial investment occurs. As such, the parties have an incentive post-investment to behave strategically — should an opportunity arise — in order to appropriate a greater share of the gains from trade. The risk of this type of opportunistic behaviour is known as the hold-up problem.*

4.7.49 Although hold-up may be a risk in a future with declaration as well as a future without declaration, I consider that the risk of hold-up is heightened in a future without declaration. I do so for the following reasons.

4.7.50 In a future without declaration, with access conditions in the 2020–2030 period governed by the Deed Poll and Access Framework, for the post-2030 period:

- (a) Existing Users will be protected by the terms of their evergreen agreements and will likely have minimal concern regarding the risk of hold-up in the post-2030 period.
- (b) For New Users, although the QCA concluded (as set out in paragraph 4.6.16 above) that contractual constraints and the threat of declaration would constrain DBCTM such that it is likely that DBCTM, post-2030, would retain the pricing arrangements (or some variation of them) in the Deed Poll and Access Framework beyond 2030, I have determined that is not so. That is because:

<sup>131</sup> Para 68 DBCTM 24 April 2019.

<sup>132</sup> Para 72 DBCTM 24 April 2019.

<sup>133</sup> Para 68, 74 DBCTM 24 April 2019.

<sup>134</sup> Part B, Appendix A at pages 214–224.

- (i) DBCTM is under no obligation to renew the Deed Poll and Access Framework beyond 2030. Accordingly, the only factors that would cause DBCTM to do so are the threat of declaration and a desire to avoid the uncertainty that would result in the absence of the Deed Poll and Access Framework. I have already determined that if DBCTM is not declared as a result of the current declaration review process, the threat of declaration is unlikely to be a significant constraint on DBCTM in the future.
- (ii) Given DBCTM's profit maximising incentive, post-2030 (as accepted by the QCA) it would be in DBCTM's interests to seek to increase its prices, either by not renewing the Deed Poll and Access Framework or renewing them in an amended version that imposed a price difference cap of greater than \$3 per tonne<sup>135</sup> or otherwise increased prices.<sup>136</sup>
- (iii) I do not think that the user agreements entered into by New Users in the period 2020–2030 will impose a material pricing constraint on DBCTM post-2030 if the Deed Poll and Access Framework are not renewed. This is because it is proposed that those user agreements will prescribe the use of the pricing methodology in the Deed Poll and Access Framework, but the Deed Poll and Access Framework do not set out the pricing mechanisms that are to apply in the period post 2030 in the event they are not renewed. As such, the pricing provisions of the user agreements will cease to be a binding constraint once the Deed Poll and Access Framework have expired.
- (iv) Further, if DBCTM were to renew the Deed Poll and Access Framework, it is likely to want to do so in an amended form that allows it to charge a higher price. In this scenario, the only constraints on DBCTM are, first, the threat of declaration and, secondly, the ability of users (via arbitration and litigation, if necessary) to prevent the changes taking effect on the basis they contravene the amendment provisions of the Deed Poll and Access Framework. I have already determined these are only limited constraints.
- (v) Accordingly, a New User considering entering a user agreement under the Access Framework in the period 2020–2030 would face considerable uncertainty as the pricing regime to which it will be subject after 2030.

4.7.51 In considering these issues, I have considered DBCTM's submissions, based on HoustonKemp's analysis, that if New Users were likely to be deterred from entering the development stage tenements market because of uncertainty about terms of access in the absence of declaration, this would have been seen in the period leading up to 2020. However, I am not persuaded by this submission because:

- (a) given declaration already exists the competitive nature of the market does not indicate that declaration would not promote material increase in competition; and
- (b) as discussed earlier, it assumes that market participants regard there as being a material risk that DBCT will not be declared, but it is not known that participants had this expectation. Indeed, given the focus of the access regime on natural monopolies, it seems probable that market participants have been operating an assumption that DBCT will continue to be

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<sup>135</sup> Part C, section 4.4.1 at page 174.

<sup>136</sup> Part C, section 3.3.4 at page 83.

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regulated until there is a competitive option in the market (that is, until DBCT is no longer a natural monopoly).

- 4.7.52 In my view, given the significant sunk costs involved in acquiring and developing a mine, the uncertainty for New Users as to the pricing that will apply after 2030 is likely to give rise to concerns on the part of those New Users about the risk of hold-up.
- 4.7.53 I am of the view that the risk of hold-up for New Users is sufficient to discourage New Users from entering the development stage tenements market. In particular, given the concern of users expressed in the various stakeholder submissions regarding the impact on investment decisions of an increase in pricing (or uncertainty in pricing) and uncertainty in other terms of access, I regard it as reasonable to conclude, and do conclude, that New Users' decisions to invest in the development stage tenements market will be materially impacted by that uncertainty beyond 2030.
- 4.7.54 In addition, the presence of hold-up risk for New Users is likely to create a further asymmetry in the market. This is because for Existing Users, the evergreen nature of their existing user agreements (including the pricing provisions) mean that they do not face the risk of hold-up in respect of capacity governed by those existing user agreements. To the extent that Existing Users have spare capacity under their user agreements which they can apply to a new tenement, this will provide those Existing Users with a risk (and hence cost) advantage over New Users when competing for the acquisition of tenements.
- 4.7.55 The question then is whether declaration would remove this risk of hold-up, or at least do so to an extent such that it would lead to access or increased access that would promote a material increase in competition. I have determined that it would. Declaration is unlikely to completely remove the risk of hold-up. This is because declaration is only for a finite period—in the current case, 10 years is proposed—and potential users will face some uncertainty during the declaration period as to the access regime that will apply after that period (that is, after the then-current declaration is due to expire). However, I have determined that declaration will substantially reduce the risk of hold-up. This is because access agreements entered into under the declaration are likely to be evergreen agreements.<sup>137</sup> As such, New Users entering the development stage tenements market in the period 2020–2030 will know they will get the protection of an evergreen user agreement that will continue to apply after 2030. New Users therefore will likely have significantly less concern regarding the risk of hold-up in the post-2030 period. The adverse competition effects resulting from the risk of hold-up, discussed above, would thereby largely if not entirely be avoided.
- 4.7.56 As a result, by reducing the risk of hold-up, I am satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the development stage tenements market.

*The Coal Tenements Market—operating mines*

- 4.7.57 I accept the QCA's recommendation that the market for operating mines is already workably competitive, for the reasons set out in the QCA analysis.<sup>138</sup>
- 4.7.58 I further accept the QCA's recommendation that declaration of the DBCT service is unlikely to have a material impact on the environment for competition in the market for predominantly metallurgical coal mines in the Hay Point catchment, for the following reasons:

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<sup>137</sup> DBCTM's 2019 Draft Access Undertaking Standard Access Agreement includes "evergreen" provisions: see clause 20.

<sup>138</sup> Part C, section 4.4.3 at page 196.

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- (a) Existing Users would be able to exit and sell their mining operation and other Existing Users or New Users would be able to acquire those mines and access DBCT capacity on the same terms as the seller (i.e. as an Existing User);<sup>139</sup> and
- (b) in respect of Existing Users' evergreen agreements there is a requirement that DBCTM act reasonably in relation to change of control and permanent capacity assignments and this would apply in a future with and without declaration.<sup>140</sup>

4.7.59 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the market for operating mines.

The Coal Export Market

4.7.60 I accept the submission of DBCTM, noted in the QCA analysis,<sup>141</sup> that the seaborne metallurgical coal market is already effectively competitive with a large number of participants and prices set by reference to international spot prices.

4.7.61 I accept the QCA's recommendation that declaration is unlikely to promote a material increase in competition in the coal exports market. I do so:

- (a) for the reasons set out in the QCA analysis;<sup>142</sup> and
- (b) because declaration would not have any demand side impacts on the market for metallurgical coal, as this is driven by global demand for steel production, which is unaffected by declaration.

4.7.62 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the coal exports market.

The Coal Haulage Services Market (Above-Rail Services)

4.7.63 The QCA recommended that declaration would not promote a material increase in competition in the coal haulage services market in the Goonyella system. I agree with and accept the reasons for this conclusion set out in the QCA analysis,<sup>143</sup> except that (for the reasons set out in my discussion of Criterion A) I do not accept the QCA's recommendation that the pricing regime under the Deed Poll and Access Framework would be unlikely to have a detrimental impact on the ability of New Users to develop tenements into mines. However, for the other reasons set out in the QCA analysis, I accept that declaration would not promote a material increase in competition in the coal haulage services market in the Goonyella system.

4.7.64 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the coal haulage services market.

The DBCT Secondary Capacity Trading Market

4.7.65 I accept the QCA's recommendation that declaration would not promote a material increase in competition in the DBCT secondary capacity trading market. I do so for the reasons set out in the QCA analysis.<sup>144</sup>

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<sup>139</sup> Part C, section 4.4.3 at pages 196–7.

<sup>140</sup> Part C, section 4.4.3 at pages 196–7.

<sup>141</sup> Part C, section 5.2.2 on pages 199–200.

<sup>142</sup> Part C, section 5.2.2 at page 200.

<sup>143</sup> Part C, section 6.2.2 at pages 204–205.

<sup>144</sup> Part C, section 7.2.2 at pages 209–211.

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4.7.66 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the DBCT secondary capacity trading market.

*The Rail Access Market (Below-Rail Market)*

4.7.67 I accept the QCA's recommendation that declaration would not promote a material increase in competition in the rail access market. I do so for the reasons set out in the QCA analysis.<sup>145</sup>

4.7.68 Accordingly, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the rail access market.

*Other Markets*

4.7.69 A number of other dependent markets were identified in stakeholder submissions—port services (e.g. pilotage and towage services); coal shipping services; and various mining inputs and services markets (such as geological and drilling services, construction services, mining safety services, and mining technology services).<sup>146</sup>

4.7.70 The QCA recommended that declaration of the DBCT service would not promote a material increase in competition in these other markets.<sup>147</sup> I do not accept all the reasons for this conclusion set out in the QCA analysis<sup>148</sup>, as I have determined that declaration is likely to promote a material increase in competition in the development stage tenements market. However, I note the lack of stakeholder material to support a conclusion that declaration would promote a material increase in competition in these other markets.<sup>149</sup> Given this lack of material, I am not satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in any of the other identified markets.

**4.8 Overall finding—Criterion A**

4.8.1 For the foregoing reasons, I have determined that access (or increased access) to the DBCT service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in a dependent market (i.e. the development stage tenements market).

4.8.2 In light of this, I am satisfied that Criterion A is met in relation to the service.

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<sup>145</sup> Part C, section 7.2.2 on pages 212.

<sup>146</sup> Part C, section 9.2 at page 213.

<sup>147</sup> Part C, section 9.2 at page 213.

<sup>148</sup> Part C, section 9.2 at page 213.

<sup>149</sup> Part C, section 9.1 at page 213.

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## 5 Criterion C—State significance

### 5.1 Overview

5.1.1 Section 76(2)(c) of the QCA Act (**Criterion C**) provides that one of the criteria about which I must be satisfied in order to declare the service is that the facility for the service is significant, having regard to its size or its importance to the Queensland economy.

### 5.2 The relevant facility for the service

5.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above and identifying the facility for the service at paragraph 3.3.1 above.

### 5.3 Size or importance

5.3.1 In considering whether the relevant facility for the service is significant having regard to its size or importance to the Queensland economy, I note and accept:

- (a) from the QCA, that the DBCT site is 2.38km from the rail in-loading stations to the shore-side jetty head, with the wharves a further 3.8km offshore;<sup>150</sup>
- (b) from the QCA, that DBCT is Queensland's largest common-user coal export terminal;<sup>151</sup>
- (c) from DBCT Users, that in 2016–17, coal royalties delivered \$3.4 billion in revenue to the Queensland Government, DBCT handled 31% of Queensland's total coal exports, and that coal exported through DBCT contributed approximately \$1.2 billion of the revenue;<sup>152</sup> and
- (d) from Peabody, that the facility directly and indirectly employs approximately 350 workers.<sup>153</sup>

### 5.4 Overall finding – Criterion C

5.4.1 On the basis of this information, I have accepted the QCA's recommendation<sup>154</sup> that given DBCT's physical size and capacity, as well as its contribution to Queensland's coal exports, royalties and employment, the facility for the coal handling service at DBCT satisfies Criterion C.

## 6 Criterion D—Promote the Public Interest

### 6.1 Overview

6.1.1 Section 76(2)(d) of the QCA Act (**Criterion D**) provides that the one criteria about which I must be satisfied in order to declare the service is that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

6.1.2 Section 76(5) of the QCA Act provides that, in considering Criterion D, I must have regard to the following matters-

- (a) if the facility for the service extends outside Queensland:
  - (i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and
  - (ii) the desirability of consistency in regulating access to the service;

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<sup>150</sup> Part C, section 10.2.2 at page 214.

<sup>151</sup> Part C, section 10.2.2 at page 217.

<sup>152</sup> DBCT Users, 30 May 2018, schedule 3 at pages 43–44.

<sup>153</sup> Peabody, 30 May 2018, section 3.4 at page 12.

<sup>154</sup> Part C, section 10.3 at page 218.

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- (b) the effect that declaring the service would have on investment in:
  - (i) facilities; and
  - (ii) markets that depend on access to the service;
- (c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and
- (d) any other matter I consider relevant.

6.1.3 In assessing Criterion D, I agree with the analysis of the QCA<sup>155</sup> that there is no particular level at which the public interest needs to be promoted to satisfy Criterion D, and I agree with and have applied the approach set out in the QCA Approach.<sup>156</sup>

6.1.4 I note that section 76(5)(c) of the QCA Act may limit the consideration of DBCTM's administrative and compliance costs to those costs that it bears directly, but I have considered costs that are passed through to access holders via access charges in the "other matters" set out below.

## 6.2 The relevant service

6.2.1 I have stated my findings identifying the relevant service at paragraph 3.2.1 above.

## 6.3 Whether the facility for the service extends outside Queensland

6.3.1 As it is not in dispute that the facility for the service does not extend outside Queensland, I have not considered the matters in section 76(5)(a) of the QCA Act any further.

## 6.4 Whether there would be access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration

6.4.1 I have stated my findings in relation to whether there would be access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration when addressing Criterion A, at section 4 above.

## 6.5 Investment in DBCT

6.5.1 I am satisfied that declaration would have a net positive impact on the incentives to invest in facilities. I consider that access as a result of declaration of the DBCT service would promote efficient entry into the development stage tenements market, such that efficient entry into that market would be materially affected, compared to without declaration (see the consideration of Criterion A, above). This is likely to result in efficient investment in mining operations that is likely to have an overall impact on the incentives to invest in the coal supply chain more generally.

6.5.2 In reaching this conclusion I note and accept the QCA analysis that:<sup>157</sup>

- (a) the risk of asset stranding is low;
- (b) regulatory error is unlikely to have a material negative impact on investment incentives;
- (c) declaration is unlikely to lead to investment delays compared to a future without declaration; and
- (d) declaration is unlikely to distort the inter-terminal pattern of investment.

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<sup>155</sup> Part C, section 11.2.2 at page 221.

<sup>156</sup> QCA Approach, section 2.6.4 at pages 26–27.

<sup>157</sup> Part C, section 11.3.2 at pages 226–229.

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**6.6 Investment in other facilities**

6.6.1 As set out in paragraph 6.5.1, I consider that declaration is likely to result in efficient investment in mining operations that is likely to have an overall impact on the incentives to invest in the coal supply chain more generally. It follows I regard declaration as likely to promote investment in the coal supply chain, for example, in the coal haulage services market (above-rail services) and the rail access market (below-rail services) compared to a future without declaration.

6.6.2 I am therefore satisfied that declaration would have a net positive impact on investment in other facilities.

**6.7 Investment in markets that depend on access to the service**

6.7.1 I am satisfied that the declaration of the DBCT service will promote investment in a market that depends on access to the service.

6.7.2 In reaching this view, I note my decision, set out above, that Criterion A is satisfied for DBCT. I accept that the impact of declaration on investment in dependent markets depends in part on the extent to which declaration impacts competition in those markets, as the perceived ability to compete effectively in the market will underpin investment incentives and investor confidence.

6.7.3 Accordingly, I note and accept that:

- (a) declaration of the DBCT service will promote efficient investment in the development stage tenements market for the reasons set out in section 4 above, in particular because:
  - (i) New Users would be exposed to DBCTM seeking to expropriate the value of their sunk investment following the expiry of the Deed Poll and Access Framework in September 2030, whereas Existing Users would not face this same risk due to their evergreen agreements;
  - (ii) without declaration this risk of hold-up faced by New Users would create a barrier to efficient entry in the development stage tenements market, which would have a material and adverse impact on efficient entry in that market;
- (b) the market for development stage tenements in the Hay Point region is of sufficient size and significance<sup>158</sup> to mean that incentivising investment in this market would promote the public interest; and
- (c) if this investment is foregone, the community also, in my view, foregoes the wider economic benefits of maximising the value of the State's coal resources, including increased coal royalties, employment and associated regional development (see further below).

**6.8 Administration and compliance costs**

6.8.1 I accept the QCA's recommendation for the reasons set out in the QCA analysis<sup>159</sup> that administrative and compliance costs with declaration would not be materially different compared to the costs in a future without declaration. I note and accept that:

- (a) the Deed Poll and Access Framework are intended to mirror in all material respects DBCT's 2017 QCA regulated access undertaking;

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<sup>158</sup> Part C, section 4.4.1 at pages 131–132 which notes that the Hay Point (Goonyella) region accounts for 74% of Queensland's metallurgical coal production by catchment over the 2015–2016 to 2017–2018 period; See also my findings on Criterion C in section 5 above.

<sup>159</sup> Part C, section 11.5.2 at page 234–237.

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- (b) that the coordination costs incurred by DBCTM of dealing with multiple users are unlikely to be different with or without declaration. DBCT will remain an open-access, common-user terminal without declaration, and the costs associated with DBCT remaining an open access facility will continue to be incurred without declaration;<sup>160</sup> and
- (c) the QCA levy amounts to only a small subset of administrative and compliance costs, such that it is unlikely to create a consequential difference in the overall costs of declaration (compared to those incurred in a future without declaration), and the evidence of DBCTM<sup>161</sup> that the QCA levy is a minor part of the total administrative and compliance costs.<sup>162</sup>

## 6.9 Other matters

6.9.1 In reaching my decision regarding Criterion D, I have considered the following other matters:

- (a) costs incurred by access seekers and holders: For the reasons set out in the QCA analysis,<sup>163</sup> I consider that while there may be a minor difference in administrative and compliance costs incurred by access seekers and holders between declaration and non-declaration, any difference is unlikely to be material enough to affect the public interest;
- (b) environmental considerations: I accept, for the reasons set out in the QCA's analysis<sup>164</sup> that environmental considerations have not been shown to have a material impact (either positive or negative) on the issue of whether increased access resulting from declaration would promote the public interest; and
- (c) wider economic benefits and efficiency benefits: I have determined that if the investment in the development stage tenements market referred to in paragraph 6.7.3 above is foregone, the community also foregoes wider economic benefits in the form of maximising the value of the State's coal resources, including increased coal royalties, employment and associated regional development.

6.9.2 I have had regard to the object of part 5 of the QCA Act (see section 69E), namely that:

*The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.*

6.9.3 Given my conclusions set out above, I regard a decision to declare the DBCT service as consistent with that object.

6.9.4 In the context of Criterion D, I have also considered whether declaration of the service would be compatible with the *Human Rights Act 2019 (HR Act)*. For the reasons set out in the section 7, I consider that the declaration of the service would be consistent with the obligations imposed on public entities under that Act.

6.9.5 Apart from the matters set out above, I do not consider that there are any other matters that are relevant to my decision on Criterion D.

<sup>160</sup> Part C, section 11.5.2 at page 237.

<sup>161</sup> DBCTM, 16 July 2018, section 4.4, figure 19 at page 110 (Issue 13).

<sup>162</sup> Part C, section 11.5.2 at page 237.

<sup>163</sup> Part C, section 11.6.2 at pages 240–241.

<sup>164</sup> Part C, section 11.6.3 at page 242 and section 11.7 at pages 246–247.

**6.10 Overall finding – Criterion D**

6.10.1 I have found that declaration is:

- (a) likely to promote investment in the DBCT facility;
- (b) likely to promote investment in dependent markets;
- (c) unlikely to lead to a material difference in administrative and compliance costs; and
- (d) likely to promote other potential public interest benefits.

6.10.2 Having weighed all of the costs and benefits, I consider that there is a net public benefit in declaring the DBCT service. Accordingly, I am satisfied that Criterion D is met in relation to the DBCT service.

**7 Human rights considerations****7.1 Overview**

7.1.1 Section 58(1) of the HR Act makes it unlawful for a public entity:

- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

7.1.2 Section 58(5) of the HR Act provides that, for section 58(1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to:

- (a) identifying the human rights that may be affected by the decision; and
- (b) considering whether the decision would be compatible with human rights.

7.1.3 I accept that the threshold for engaging a human right is low, and that for this purpose human rights must be construed in the broadest possible way.

7.1.4 In accordance with section 58(1) of the HR Act, I have considered whether declaration of the DBCT service would be compatible with human rights.

7.1.5 The only human rights which I consider may be affected by the declaration of the DBCT service are:

- (a) the right of individuals not to be arbitrarily deprived of property (HR Act section 24(2));
- (b) the right to life (HR Act section 16);
- (c) the right to equality and non-discrimination (HR Act section 15) (on the basis of intergenerational equity); and
- (d) the right of children to protection in their best interests (HR Act section 26(2)).

7.1.6 I refer to the human right in paragraph 7.1.5(a) above as “arbitrary deprivation of property”. The human rights in paragraphs 7.1.5(b), 7.1.5(c) and 7.1.5(d) above can be described as “rights potentially related to climate change”.

**7.2 Arbitrary deprivation of property**

7.2.1 The declaration of the DBCT service may limit the human right not to be arbitrarily deprived of property (section 24 of the HR Act).

7.2.2 The concept of “arbitrary deprivation of property” is a wide one and a deprivation may be arbitrary notwithstanding that it is authorised by law.

7.2.3 Although the entities whose property may be directly affected by the declaration are corporations, and although the stakeholders in the review of the declarations are corporations, it is conceivable that

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declarations may affect individuals' right not to be arbitrarily deprived of their property (e.g. shares in relevant companies).

7.2.4 However, if the declaration of the DBCT service limits the right not to be "arbitrarily deprived of property", I consider that any limitation would be justified under section 13 of the HR Act (and therefore compatible with that right under section 8(b) of the HR Act), for these reasons:

- (a) the purpose of the limitation, as indicated in section 69E of the QCA Act, is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, and thereby promote competition in upstream and downstream markets;
- (b) that purpose is important;
- (c) the nature of the limitation on the human right is consistent with a free and democratic society based on human dignity, equality and freedom. A declaration of a service that promotes third party access, a material increase in competition in markets that depend on access to that service and that promotes the public interest is not contrary to those democratic values;
- (d) the limitation helps to achieve its purpose. That is apparent from the Access Criteria which I must be satisfied of in section 76 of the QCA Act before making the declaration of the service (or part of the service);
- (e) I am not satisfied that there is a less restrictive and reasonable available alternative that would achieve the purpose of the limitation;
- (f) any effect of the limitation on individuals is likely to be minor: the declaration has been in force for several years and there is no suggestion that it has sterilised the use of anyone's property or prevented them earning a living; and
- (g) while any deprivation of property must be taken seriously, given that the limitation would be likely to have only a minor impact on individuals, that the purpose that it serves is important, and that there are no less restrictive, reasonable alternatives to achieve the same purpose, the limitation would not result in arbitrary deprivation. It would not be capricious, unjust or unreasonable (in the sense of being disproportionate to a legitimate purpose).

### 7.3 Human rights potentially relating to climate change

7.3.1 Decisions which facilitate emissions contributing to climate change may conceivably limit a range of human rights, including the right to life, the right to equality and non-discrimination (on the basis of intergenerational equity) and the right of children to protection in their best interests.

7.3.2 Against that background, I have considered whether a decision under section 84 of the QCA Act to declare the DBCT service would have the consequence of materially increasing the level of coal production in Queensland over the period of the declaration. Such an increase may lead to an increase in emissions, potentially affecting climate change.

7.3.3 While the declaration of the DBCT service is likely to promote investment in the development stage tenements market, there is no evidence before me that the declaration would have a material effect on the volume of coal exported and consumed overseas. This will primarily depend on market factors such as demand and price.

7.3.4 I therefore consider that the declaration of the DBCT service would not limit any of the human rights potentially relating to climate change, and would therefore be compatible with those rights under section 8(a) of the HR Act.

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