



Submission to the Queensland Competition Authority

Rail Connection Agreement

Anglo American Metallurgical Coal Pty Ltd

17 November 2011

Table of Contents

1.	Executive Summary	1
2.	Definition of Connecting Infrastructure (clause 1.1)	2
3.	Design of Connecting Infrastructure (clause 6)	2
4.	Train control and the exchange of safety and interface information (clause 10)	4
5.	Termination and suspension provisions (clause 18)	6

1. Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) welcomes the opportunity to make further submissions to the Queensland Competition Authority (**QCA**) in respect of the Rail Connection Agreement (**RCA**) submitted by QR Network Pty Ltd (**QR Network**) as a response to the publication of the submissions on the website of the QCA.

In summary, Anglo American makes the following submissions in relation to issues raised in the submission of Queensland Resources Council (**QRC**) and other coal producers:

- (a) The definition of "Connecting Infrastructure" is potentially ambiguous and does not provide any limitation on the extent of the infrastructure (in particular the spur line) which may fall within the definition. In the absence of agreement to the contrary, the Connecting Infrastructure should be limited to the first 20 metres of the spur line (and all associated infrastructure within that area). This approach to the definition of "Connecting Infrastructure" will include the relevant signalling equipment but will provide certainty to the parties as to the scope of the Connecting Infrastructure. The issue is an important one because QR Network will own the Connecting Infrastructure whereas the coal producer will own the Private Infrastructure and any ambiguity will have significant consequences.
- (b) Anglo American agrees with the QRC's proposal to introduce a process for approving the design of Connecting Infrastructure where the Owner will design and construct the Connecting Infrastructure. This will give Owner's certainty that the Connecting Infrastructure will be acceptable to QR Network before the Owner commits significant capital to construction.
- (c) The provisions in clause 10 regarding the exchange of safety and interface information should be amended to ensure that QR Network provides the required information to the Owner in a timely manner. At present, there are no timelines specifying when this information must be provided, and QR Network could use this fact to delay the interconnection process.
- (d) Anglo American remains concerned about QR Network's extensive termination rights and the possibility that minor breaches of the RCA by an Owner may lead to the RCA being terminated and the Owner being left with significant sunk costs that cannot be recovered. At a minimum, Owners should have at least 60 days to remedy a breach (other than insolvency) and termination should not be allowed while the breach is the subject of a dispute under the RCA.

For the avoidance of doubt, capitalised terms that are not defined in this submission have the meaning given in the RCA (unless otherwise indicated).

2. Definition of Connecting Infrastructure (clause 1.1)

Anglo American is concerned that the definition of Connecting Infrastructure used in both the RCA as drafted by QR Network and the marked-up version is potentially ambiguous and may result in a dispute between Owners and QR Network. The intention of the definition appears to be that the precise scope of the Connecting Infrastructure will be agreed by the parties and set out in a plan contained in Schedule 2. However this is not entirely clear from the wording of the definition. The definition of Connecting Infrastructure also could be interpreted to simply mean "all infrastructure...managed, constructed or owned by QR Network, which connects the Network to Private Infrastructure." This interpretation is very broad and arguably covers a whole spur line (particularly in respect of a short spur line), which is clearly not what is intended.

Anglo American submits that, in the absence of agreement to the contrary, the Connecting Infrastructure should be limited to the first 20 metres of the spur line (and all associated infrastructure within that area).

To clarify and properly limit the definition, Anglo American suggests that the definition of Connecting Infrastructure be amended as follows:

Connecting Infrastructure means:

- (a) the infrastructure that the Parties agree is Connecting Infrastructure as set out in the plan detailed in Schedule 2; or
- (b) if the Connecting Infrastructure is not clearly shown in the plan detailed in Schedule 2, all infrastructure (including, without limitation, track, signalling and overhead traction electricity (if applicable)) managed, controlled or owned by QR Network, which connects the Network to the Private Infrastructure and comprises or is contained within the first 20 metres of the spur line starting from its point of physical connection to the Network. ~~as shown on the Plan detailed in Schedule 2, and as modified or upgraded from time to time.~~

3. Design of Connecting Infrastructure (clause 6)

In the initial submission lodged by Anglo American, it raised concerns that, where the Owner will design and construct the Connecting Infrastructure, there is a risk that the Owner may incur considerable capital costs without any guidance as to whether QR Network is likely to consider the Connecting Infrastructure suitable for connection and operation.

The new clauses 6.1 and 6.2 set out in the marked-up version of the RCA provide a mechanism for the Owner to request information from QR Network in relation to the design of the Connecting Infrastructure. The provisions also require the Owner to submit a design of the Connecting Infrastructure to QR Network for approval, and sets out specific time frames and criteria that apply to QR Network's decision.

Anglo American is satisfied these amendments proposed by the QRC substantially address the concerns raised by Anglo American in its initial submission. However, Anglo American submits that some minor amendments to clauses 6.1 and 6.2 are necessary to clarify the meaning of the provisions. These amendments are as follows:

6.1 ~~[Alternative 1: to apply where the Connecting Infrastructure is to be, or has already been, constructed by the Owner. If the Connecting Infrastructure has already been constructed by the Owner, clauses 6.1 and 6.2 should be deleted].~~

- (a) To enable the Owner to plan, design, construct and otherwise carry out the construction of the Connecting Infrastructure QR Network must, promptly following a written request from the Owner, provide all assistance reasonably requested by the Owner so that the Connecting Infrastructure satisfies the minimum technical, engineering and safety standards required by QR Network to connect the Private Infrastructure to the Network, including:
- (i) the provision of technical and engineering information in relation to the Network, including all information relating to the design specifications, infrastructure standards and scope of the rail infrastructure adjacent to the Private Infrastructure or to which the Private Infrastructure will connect;
 - (ii) advice in connection with the design specifications, infrastructure standards and the scope of the rail infrastructure for the coal system which the Owner of the Private Infrastructure is developing;
 - (iii) providing access to planning procedures developed and maintained by QR Network which would reasonably have an impact on the operation of Train Services using the Connecting Infrastructure including any planned or anticipated upgrades or augmentation of the Network;
 - (iv)– the provision of information relating to any capacity analysis associated with the Private Infrastructure, including capacity modelling assumptions and modelled simulation outputs required for planning and design purposes;
 - (v) the provision of the information set out in Schedule 10; and
 - (vi) access to employees, agents or officers of QR Network who have knowledge of the Network, in particular the matters identified in clauses 6.1(a)(i) to (iv).

6.2

- (a) Prior to commencing construction of the Connecting Infrastructure ~~T~~he Owner must submit the Design to QR Network for approval in accordance with this clause 6.2.
- (b) Within [10] Business Days of submission of the Design in accordance with clause 6.2(a), QR Network must give written notice to the Owner:
- (i) approving the Design; or

- (ii) rejecting the Design, in which case QR Network:
 - (A) must give reasons for the rejection; and
 - (B) may give details of any modifications that it requires to be made to the Design so that it is suitable for the purpose of connecting the Private Infrastructure to the Network and for the operation of the Train Services contemplated in the Train Services Plan.
- (iii) QR Network must approve the Design of the Connecting Infrastructure where it:
 - (A) meets the technical specifications reasonably required by QR Network for connection to the Network;
 - (B) has been constructed to a standard appropriate to the nature of the traffic and the current service standards of the adjoining part of the Network, and there is no adverse impact on safety; and
 - (C) will not, by virtue of its existence, reduce ~~€~~Capacity or ~~€~~Supply ~~€~~Chain ~~€~~Capacity ([as those terms are defined in the QR Network Access Undertaking](#)).
- (c) Following receipt of a notice under clause 6.2(b)(ii), the Owner may:
 - (i) modify and resubmit the Design, in which case clause 6.2(b) will reapply; or
 - (ii) dispute any of QR Network's reasons for rejecting the Design in which case the matter will be resolved in accordance with clause 10.1 of the QR Network Access Undertaking.

4. Train control and the exchange of safety and interface information (clause 10)

In its initial submission Anglo American expressed the view that the RCA needed to specifically deal with the question of the provision of Train Control by QR Network to the coal producer in respect of the Private Infrastructure. This was because Anglo American was of the view that the Standard Access Agreement did not necessarily deal with this issue in circumstances where QR Network was not the Accredited Railway Manager in respect of the Private Infrastructure.

The QRC has suggested a new clause 10 which sets out information that must be exchanged by the parties where the Owner (or its nominee other than QR Network) is the Rail Infrastructure Manager for the Private Infrastructure. The issue is whether the information provided under clause 10 will be sufficient to allow the Owner (or a third party nominated by the Owner) to act as the Rail Infrastructure Manager for the Private Rail Infrastructure where QR Network either refuses to act as the Rail Infrastructure Manager for the Private Infrastructure or offers to act as the Rail Infrastructure Manager for an unreasonable fee.

Anglo American considers that clause 10 broadly identifies the type of information that would be required by a Rail Infrastructure Manager of the Private Infrastructure. However, Anglo American is concerned that the lack of a clear process or timelines for exchanging the information may allow QR Network to significantly delay interconnection. If the QRC's approach is to be used (as opposed to Anglo American's preferred option of requiring QR Network to be the Rail Infrastructure Manager for the Private Infrastructure), then Anglo American submits that clause 10 should be amended as follows:

10 EXCHANGE OF SAFETY AND INTERFACE INFORMATION

This clause 10 applies where the Owner (or its nominee other than QR Network) is the Rail Infrastructure Manager for the Private Infrastructure.

10.1 If the Owner intends to act as (or appoint a nominee other than QR Network to act as) the Rail Infrastructure Manager for the Private Infrastructure, the Owner must notify QR Network of this fact not less than [90] days before the Commitment Date.

10.42 Within 14 days of receiving a notification under clause 10.1, QR Network must notify the Owner of all interface standards required by QR Network for the Private Infrastructure to connect to the Network and to maintain that connection. [Note: *This reflects clause 7.5.3(b)(iii) of the QR Network Access Undertaking ~~el~~ 7.5.3((b)(iii))*]

10.23 The Parties must collaborate for the purpose of the development, management and continuous improvement of all interface matters relating to the Private Infrastructure, the Connecting Infrastructure and the Network, including:

- (a) implementing and maintaining measures for managing interface and safety risks;
- (b) evaluating, testing and, if necessary, ~~revision of~~ revising those measures;
- (c) identifying accountabilities, authorities and reporting requirements of each party, including safety requirements, roles and responsibilities of staff; and
- (d) monitoring compliance with obligations of the Parties under this and related interface agreements.

10.43

(a) As required by a Party (Requesting Party), the other Party (Providing Party) must provide the Requesting Party (and any other personnel nominated by the Requesting Party) with the latest published versions of ~~and provide to all those personnel nominated by the Requesting Party,~~ all documents relating to the following interface matters that may occur, or have an impact, on the operation of the Connecting Infrastructure:

- (i) the Providing Party's safety policies, including compliance arrangements with legislative safety requirements;
- (ii) safety documentation associated with all accountabilities, authorities and reporting of safety requirements and relevant competencies for relevant staff and safety audit regimes;
- (iii) procedures for managing notifiable occurrences or reportable incidents;
- (iv) interface risk management plans;
- (v) interface management plans;

- (vi) where QR Network is the Providing Party, changes to rail infrastructure standards of the Network;
 - (vii) where QR Network is the Providing Party, Network operating requirements and operating procedures;
 - (viii) relevant timetabling and scheduling information ~~and~~ and procedures;
 - (ix) operational interface procedures;
 - (x) emergency response plans;
 - (xi) rolling stock standards;
 - (xii) train operating protocols;
 - (xiii) planning and management of possessions;
 - (xiv) communications protocols; and
 - (xv) such other procedures and protocols as the Providing Party publishes or develops relating to functions associated with undertaking the role of Rail~~way~~ Infrastructure Manager.
- (b) Each Party must participate in:
- (i) reviews of the safety management systems and safety assurance matters;
 - (ii) meetings, workshops and forums reasonably requested by the other Party which involve safety and operational interface matters (including general engineering standards and operational safety requirements);
 - (iii) identification of relevant engineering standards and procedures and operational systems safety standards; and
 - (iv) development of interface risk management planning activities reasonably required by the other Party.

5. Termination and suspension provisions (clause 18)

Anglo American remains concerned about QR Network's extensive termination rights and the possibility that minor breaches of the RCA by an Owner may lead to the RCA being terminated and the Owner being left with significant sunk costs that cannot be recovered.

Anglo American acknowledges that the marked-up version of the RCA goes some way to rectifying this issue by providing the Owner with 30 days (in most instances) to remedy a default and by providing that non-payment of a disputed amount will not give rise to a right of termination. However, Anglo American considers that these amendments do not go far enough.

Given the likely size of the investment being made by each Owner and the long duration of the RCAs, it is essential that the Owner is given ample opportunity to remedy any default (other than Insolvency) before QR Network is able to terminate the RCA. Anglo American's

preferred position, as specified in its initial Submission, is that QR Network should only be able to terminate the RCA where the Owner is insolvent or there has been:

- (a) a wilful or major default by the Owner; and
- (b) the Owner has been provided with reasonable notice of the default and a reasonable opportunity to rectify the default.

A wilful default would be any act or omission by an Owner that, at the time of the act or omission to act, the Owner knew was a material breach of the RCA and was not authorised or agreed by QR Network.

The acts or omissions that would constitute a major default under the RCA include a failure to pay amounts owing, a failure to obtain the required security, a failure to comply with the accreditation requirements in clause 9, and a failure to comply with the construction and maintenance standards in clause 7.4.

Anglo American proposes that, as a minimum, the general cure period for all breaches other than insolvency should be 60 days, and any acts or omissions that are the subject of a dispute should not be grounds for termination by QR Network. The required amendments to clause 18 are as follows:

- 18.1 Without prejudice to any other rights of QR Network, and subject to clause 18.2, QR Network may terminate this Agreement by notice to the Owner, upon the occurrence of any one or more of the following events or circumstances:
- (a) the Owner abandons, terminates or permanently ceases operation of the whole of the Private Infrastructure;
 - (b) the Owner fails to pay when due any amount payable under this Agreement ~~which is not the subject of a bona fide dispute under clause 17~~, and such default continues for 3060 days after notice from QR Network to the Owner demanding payment of the outstanding amount;
 - (c) the Owner is in default of its obligation to establish or to maintain a security as required under clause 20, and such default continues for 3060 days after ~~the date on which~~ notice from QR Network to the Owner ~~gave notice~~ of such default;
 - (d) the Owner is in default of its obligation to maintain insurance in accordance with clause 16 of this Agreement, and such default continues for 3060 days after notice from QR Network to the Owner of the default;
 - (e) an Insolvency Event occurs in relation to the Owner;
 - (f) the Owner, and if the Owner is not the Rail Infrastructure Manager for the Private Infrastructure, the Rail Infrastructure Manager for the Private Infrastructure, fails, in any material respect, to comply with the Emergency Response Plan, the Interface Risk Management Plan or the interface agreement entered into under clause 10.10(a) (as applicable) or any relevant laws, and that default is not remedied within 3060 days after notice from QR Network to the Owner of the default;

- (g) the Owner fails to comply with:
 - (i) clause 9 (Accreditation Requirements), including, if the Owner is not the Rail Infrastructure Manager for the Private Infrastructure, where the Owner fails to ensure that the Rail Infrastructure Manager for the Private Infrastructure maintains its Accreditation or complies with all conditions of its Accreditation; or
 - (ii) clause 7.4 (Construction and Maintenance Standards),
and such default continues for ~~30~~60 days after notice from QR Network to the Owner of the default;
- (h) not used;
- (i) the Owner conducts activities which cause or contribute to Environmental Harm on the Connecting Infrastructure or the Network and does not remedy the Environmental Harm (to the extent caused ~~by~~ or contributed to by the Owner) within ~~30~~60 days after notice from QR Network to remedy the Environmental Harm;
- (j) the Owner is in default of the due performance of any other material obligation under this Agreement and the Owner has not remedied the default within ~~30~~60 days after notice from QR Network specifying the nature of such default and requiring such default to be remedied; or
- (k) the Construction Agreement is terminated for any reason whatsoever (other than by agreement or expiry).

18.2 QR Network may not terminate this Agreement under clauses 18.1 (b), (c), (d), (f), (g), (i) or (j), to the extent that the relevant act or omission of default that gave rise to the right of termination is the subject of a bona fide dispute between the Parties under clause 17.