



Submission to the
Queensland Competition Authority

Rail Connection Agreement

Anglo American Metallurgical Coal Pty Ltd

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1. Executive summary

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

Anglo American submits that the QCA should reject the RCA. In summary, Anglo American agrees with the submissions and draft amendments as submitted by the Queensland Resources Council (**QRC**) and makes the following additional submissions:

- (a) The structure of the RCA is fundamentally flawed. The purpose behind Anglo American (and others) requesting the QCA to insert into QR Network's Access Undertaking 2010 (**UT3**) a requirement to develop and lodge the RCA was to have a standard agreement which reduced the scope for disputes in respect of interconnection which would reduce the ability of QR Network to exercise market power. The RCA, as submitted by QR Network does not achieve this objective. The RCA fails to address fundamental issues (including the provision of train control, signalling, safety, the appointment of the infrastructure manager and the specifications of the Private and Connecting Infrastructure). These omissions leave significant scope for disagreement and has the effect that the RCA is not effective in constraining the market power of QR Network. Anglo American submits that the RCA should be amended to deal with each of these issues.
- (b) To the extent that the Base Annual Service Charge and the Annual Service Charge in the RCA include operation and maintenance costs, then this is inconsistent with clause 8.3(f) of UT3, and these costs should be excluded from the RCA and form part of the build up of costs for the Reference Tariffs.
- (c) The costs in respect of clauses 3.1(a) – (c) should be limited to "reasonable and prudent costs". The concept of prudence is a well known concept and will avoid QR Network having an incentive to seek to have the coal producers comply with higher standards than are necessary (that is, gold-plating) in respect of the Connecting Infrastructure;
- (d) The RCA, unusually, allows for the Owner to design and construct the initial Connecting Infrastructure but does not allow the Owner to design or construct any modification or upgrade. If Owners are entitled to design and construct the

initial Connecting Infrastructure, then they should also be able to design and construct any modification or upgrade;

- (e) The termination rights of QR Network, as currently drafted, involve a significant risk to Owners that they could sink significant capital expenditure into the construction of Private Infrastructure and, possibly, the Connecting Infrastructure and the RCA be terminated for a minor breach. Anglo American submits that the termination rights should be limited to where there has been wilful default by the Owner or there is a major default by the Owner and, in both cases, the Owner has been provided with reasonable notice of default and a reasonable opportunity to rectify the default. It is also important that in circumstances where there is a dispute in respect of whether there is a default or has been a default under the RCA, the termination should not be effective until after the dispute has been finally resolved.

2. Fundamental Structure of the RCA

The structure of the RCA is fundamentally flawed.

The purpose behind Anglo American (and others) requesting the QCA to insert into QR Network's Access Undertaking 2010 (**UT3**) a requirement to develop and lodge the RCA was to have a standard agreement which reduced the scope for disputes in respect of interconnection which would reduce the ability of QR Network to exercise market power. The RCA, as submitted by QR Network does not achieve this objective.

The RCA fails to address the fundamental issue of train control. Clause 11 provides for QR Network to be responsible for train movements on to and from the Private Infrastructure.

The QRC has suggested that the clause be removed in its entirety on the basis that Train Control is provided for in the Standard Access Agreement.

Anglo American does not believe it is sufficiently clear that Train Control on the Private Infrastructure will be covered by the Access Agreement. For example, the phrase "Train Control" is defined in the Standard Access Agreement as the management of train movements on the "Infrastructure" which is, in turn, defined as rail infrastructure for which QR Network is the Accredited Railway Manager. Under the RCA, QR Network is not obliged to be the Accredited Railway Manager for the Private Infrastructure and therefore QR Network could refuse to be the Accredited Railway Manager and therefore refuse to provide Train Control services on the Private Infrastructure. To ensure that the network (including the Private Infrastructure) operates safely and that the RCA is an

effective option for coal producers, it is necessary for QR Network to be required to be the Accredited Railway Manager and to provide Train Control services for the Private Infrastructure, for a commercially reasonable fee.

The other services which QR Network should provide (at a commercially reasonable fee) in respect of both Private Infrastructure and Connecting Infrastructure are:

- (a) provide of specifications (this is discussed in more detail below);
- (b) maintenance;
- (c) inspections;
- (d) safeworking systems,
- (e) signalling;
- (f) risk assessments; and
- (g) scheduling.

The above omissions leave significant scope for disagreement and have the effect that the RCA is not effective in constraining the market power of QR Network. Anglo American submits that the RCA should be amended to deal with each of these issues.

3. Term

Clause 2 of the RCA provides that the RCA will expire on an agreed date. It is essential to protect the commercial interests of the coal producers that the length of the RCA is co-terminus with the life of the mine. This is to ensure that a coal producer does not face the situation where QR Network refuses to renew an RCA and the coal producer has sunk a substantial amount of capital into the construction of its Private Infrastructure and Connecting Infrastructure. Therefore, it is necessary that there is a protection to ensure that coal producers cannot be forced to sign an agreement which is shorter than the life of the mine.

As the QRC has suggested, this clause should be amended to provide that the Expiry Date is a date nominated by the coal producer.

4. Charges, invoicing and payment

Clause 3 sets out the arrangements in respect of the charges, invoicing and payment for services relating to the interconnection of Private Infrastructure. It is essentially any

standard agreement approved by the QCA under UT3 providing certainty to the coal producers in respect of the charges to be paid for the relevant services. Anglo American therefore submits that the following amendments are necessary to clause 3:

- (a) Clause 3.1(a) provides for QR Network to charge the Annual Service Charge, which is defined by reference to Schedule 5. Schedule 5 provides for a fixed sum to be the Base Annual Service Charge which is then escalated. The Base Annual Service Charge does not contain any guidance or certainty as to how that sum will be determined. Clause 3.2(a) indicates that the Base Annual Services Charge includes an allowance for maintenance and inspection charges. This is inconsistent with clause 8.3(f) of UT3, which provides that QR Network will include operating and maintenance costs in the cost build up for Reference Tariffs and not through separate agreements with the Owner of the Private Infrastructure. Therefore, Anglo American's primary submission is that, to the extent that the Base Annual Service Charge and the Annual Service charge relate to operation and maintenance cost, they should be removed from the RCA and incorporated into the cost build up for the Reference Tariffs. In the alternative, Anglo American agrees with the submission of QRC that the RCA should provide that QR Network be paid its reasonable and proper costs or, alternatively, that some general principles should be set out in the RCA which provide guidance on how the fixed sum is to be calculated. Anglo American submits that if the first approach is adopted then the concept should be "reasonable and prudent costs" to avoid the situation where QR Network gold-plates the Connecting Infrastructure (and it is, at least, arguable that that would be a reasonable and proper cost but not a prudent cost);
- (b) Clauses 3.1(b) and (c) should incorporate the concept of "reasonable and prudent costs" for the reasons discussed above;
- (c) Clause 3.1(d) refers to the Owner paying the costs of QR Network "providing any other services" in accordance with the terms of the RCA. Anglo American cannot identify what other service may be provided under the RCA which does not fall within paragraphs 3.1(a) to (c) and, therefore, clause 3.1(d) should either be removed or should just refer to the costs of providing any other services as agreed between the Owner and QR Network; and
- (d) Clause 3.5 provides for interest to be payable on any costs, fees or charges which are not paid on or before the due date. These sorts of clauses are not usual in commercial contracts and Anglo American believes that usual commercial arrangement should apply, which is that if the Owner does not pay

an invoice, then it is a debt due and recoverable in the Supreme Court and the usual interest provisions will apply to that debt.

Anglo American supports the amendments made by the QRC to incorporate auditing provisions to allow the Owner to require an audit to ensure the charges referred to in clause 3.1 of the RCA.

5. Connecting Infrastructure

Clause 6 provides for two alternatives in respect of the initial construction of the Connecting Infrastructure. The first option is that the Owner constructs the Connecting Infrastructure and QR Network will inspect the Connecting Infrastructure to determine whether it is "suitable". Although the alternative is appropriate, the provisions set out in the RCA are unacceptable for the following reasons:

- (a) As drafted, this alternative involves a significant risk to the Owner that they have incurred capital costs in respect of the construction of the Connection Infrastructure prior to the inspection by QR Network, without any guidance as to whether QR Network is likely to consider it "suitable" for connection and operation. QR Network should be required to provide clear and appropriate specifications prior to the construction of the Connecting Infrastructure and the inspection should be limited to determining whether the Owner has complied with those specifications. These specifications should be designed to ensure that the Connecting Infrastructure and Private Infrastructure is fit and proper for its purpose, which is not necessarily the same specifications for the mainline network. There should also be a process which allows for the Owners to submit a design to QR Network for approval and QR Network responding within a specified time frame.
- (b) Clause 6.1 also refers to the fact that any modification or upgrade to, or replacement of, the Connecting Infrastructure is required to be done by QR Network. Anglo American does not understand the rationale for Owners to be able to design and construct the initial Connecting Infrastructure but only allowing QR Network to modify, upgrade or replace the Connecting Infrastructure. There should be no distinction. For consistency, Owners should be able to design and construct any modifications, upgrades or replacement infrastructure.
- (c) It is entirely inappropriate for there to be a limitation on Owners being able to dispute the scope of the work determined by QR Network or the identity of the

third party who QR Network chooses to carry out the works. It is, in fact, necessary to be able to dispute the scope of the works to avoid any imprudent "gold-plating" of the infrastructure by QR Network. If the scope of the work is necessary for a safety reason, then any dispute will identify that issue and will be assessed by an independent body to determine whether there is, in fact, a safety concern which requires the scope of the work determined by QR Network.

The second alternative is that QR Network will design, construct and commission the Connecting Infrastructure, at the cost of the Owner, in accordance with the terms of a separate construction agreement. The reason that coal producers requested that there be a standard RCA was to ensure there could not be disputes as to the fundamental terms of a Connection Agreement and one of the most likely areas for dispute in that agreement is the provision in respect of the actual construction of the Connecting Infrastructure. Anglo American agrees with the submissions of the QRC in respect of the terms and conditions which should be included to deal with the construction of the Connecting Infrastructure.

Clause 6.8 provides for a licence for QR Network, upon reasonable notice to the Owner, to be entitled to enter and remain upon the Private Infrastructure to fulfil its obligations in respect of the maintenance and repair of the Connecting Infrastructure. As an Owner is entitled to construct the initial Connecting Infrastructure under clause 6.1, it is necessary to have a provision which provides a licence to the Owner to enable the Owner to enter and remain upon the property and rail infrastructure of QR Network for the purposes of constructing the Connecting Infrastructure.

Anglo American otherwise agrees with the submissions of the QRC that the circumstances in which QR Network may undertake works under clause 6.5 should be limited to the circumstances outlined in clauses 8.3(a)(i), (ii) and (iii) of UT3. Anglo American also agrees that clause 6.5 should include an acknowledgement that QR Network may not require the Connecting Infrastructure to meet standards which are greater than QR Network's own infrastructure.

6. Construction, maintenance, modification or upgrade of Private Infrastructure

Clause 7.1 sets out the circumstances in which QR Network may require modifications or upgrades to the Private Infrastructure. This clause is wide and, as the QRC suggests, it should be limited to circumstances where the Owner has failed to comply with clause 7.4 (which is the obligation on the Owner to ensure that the Private Infrastructure is constructed to a particular standard).

Clause 7.4 requires that Private Infrastructure be constructed to a standard which "satisfies the minimum technical, engineering and safety standards that would be expected of a competent Accredited Rail Infrastructure Manager". This obligation is uncertain. It is also inconsistent with clause 8.3 of UT3 which envisages that QR Network will provide technical specifications for connection to the Rail Infrastructure. In clause 8.3 of UT3 the phrase "Connecting Infrastructure" includes any aspect of the Private Infrastructure that impacts upon QR Network's management of the Rail Infrastructure. To avoid disputes as to the appropriate specifications of the Private Infrastructure, QR Network should be required to provide reasonable technical specifications to a standard that is required only to the extent that there is an impact on safety or the operation of the Rail Infrastructure.

7. Suspension and termination

Clause 18 provides for significant termination rights by QR Network including the ability to terminate the RCA if the Owner has failed to pay an invoice for 14 days.

As outlined above, it is essential that the RCA is only able to terminate in appropriate circumstances because otherwise the Owner will be left in a position where the RCA has been terminated and it has sunk significant capital expenditure into the construction of Private Infrastructure and, possibly, the Connecting Infrastructure. Therefore, the RCA should only be able to be terminated in circumstances where there has been:

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

In circumstances where there is a dispute in respect of whether there is a default under the RCA, termination should not be effective until after the dispute has been finally resolved.

8. Other comments

Anglo American supports the submission of the QRC that the provisions in respect of coal loss mitigation should be removed from the RCA as they are not relevant to the construction of Connecting Infrastructure.

Anglo American also supports the submissions of the QRC in respect of force majeure, insurances, assignment, security and liability and indemnity issues.