

Submission to QCA

Standard Rail Connection Agreement

Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001
By Email: rail@qca.org.au

This submission is made by [REDACTED] Bandanna Energy Limited, and Cockatoo Coal Limited (**Submitters**) in response to the Queensland Competition Authority's (QCA's) request for submissions on its Draft Decision on QR Network's (QRN's) proposed Standard Rail Connection Agreement June 2011 (SRCA).

The QCA has acknowledged many of the concerns raised by stakeholders during the initial consultation on QRN's SRCA and the Submitters wish to endorse the QCA's approach and respond to a number of the issues raised for further comment in the Draft Decision.

1. Applicability of the SRCA

QRN states that the SRCA will only be available for 'customer specific branch lines'. Therefore parties involved in major new extensions, non-coal services connections and projects with multiple loading points will not have the certainty of a default connection agreement to rely upon in negotiations with QRN. The Submitters can appreciate that the more complex the connection, the greater may be the need to vary from the SRCA however it is still preferable to have a template from which to commence negotiations and to have as a line in the sand in the event of disagreement. The Submitters support the QCA's draft decision 3.1 in this regard.

2. Transparency of Charges

QRN's approach to charges and payments is unnecessarily complex and open to conflicting interpretations. The alternative approach suggested by the QCA is far preferable. The Submitters support the annual service charge being tied to actual costs incurred for the particular connecting infrastructure, subject to a test of reasonableness and prudence, and explicitly excluding those costs otherwise included in the build-up of reference tariffs.

The Submitters also support the use of a 'reasonable and prudent' check on the costs of design, construction, commissioning, decommissioning and removal of connecting infrastructure, as well as the entitlement to appoint an independent auditor to assess such costs, fees or charges. In terms of responsibility for the expense of any audit, the Submitters suggest that rather than leaving it solely with the private infrastructure owner, the costs should be shared equally between the parties in

respect of one audit per year. If any further audits are requested within the same year, the cost should be borne by the requesting party.

3. Infrastructure Standards

QRN's proposed approach to this issue leaves too much discretion in QRN's hands to reject the connecting infrastructure as unsuitable for the purpose of connecting the private infrastructure to the QRN network. The provisions dealing with QRN's right to require modifications, upgrades and replacement of connecting infrastructure and/or private infrastructure, are also too subjective to provide private infrastructure investors with sufficient certainty. Overall, the QCA's modified approach in the Draft Decision provides far greater comfort around the question of infrastructure standards. The sequential process by which a private infrastructure owner may submit a design for connecting infrastructure, and obtain ongoing indications from QRN regarding the suitability of design and construction works makes practical sense. The criteria listed in clause 8.3(a) of the Access Undertaking provide an appropriate check on QRN's ability to dictate an unreasonable standard for connecting and/or private infrastructure. Also important is the explicit right for private infrastructure owners to dispute the scope and cost of any work that QRN may require.

In relation to the drafting proposed by the QCA, the Submitters note that a slight change may need to be made to the proposed 6.2(b)(iii)(B) to reflect the fact that the connecting infrastructure will not yet have been constructed at this time in the process.

4. Coal Loss Mitigation Provisions

QRN includes compliance with Coal Loss Mitigation Provisions as one of the circumstances in which it can require modifications, upgrades and replacements of the private infrastructure. QRN has also included reference to the Coal Loss Mitigation Provisions in the Train Control clauses of the SRCA. The QCA's Draft Decision has removed the Coal Loss Mitigation Provisions from the scope of the SRCA. Whilst the Submitters agree that these provisions are not relevant to the construction, maintenance or operation of the connecting infrastructure, it may be that a private infrastructure owner agrees to include these obligations in this agreement because they may not be party to the relevant access agreement, provided that QRN does not link them to unreasonable powers on its part.

5. Mutual obligations in relation to Rail Safety Accreditation, Insurance, Access to land and Assignment of rights

QRN has included obligations on private infrastructure owners regarding rail safety accreditation, insurance and assignment of rights, without providing reciprocal obligations on its part. The Submitters consider that the QCA's proposed amendments make the SRCA a more balanced document by requiring QRN to confirm obligations upon itself in relation to these matters.

6. Security

The Submitters agree that the setting of an objective threshold such as an “acceptable credit rating” for security gives private infrastructure owners greater certainty when it comes to negotiating connection to the QRN network. Given the suspension and termination provisions included in the SRCA for QRN’s protection, it is appropriate that QRN bears some commercial risk under the agreement. The exact quantum of security is probably a matter that is best determined on a case by case basis. Security is not always going to need to be as high as the costs of decommissioning and removing the connecting infrastructure. The Submitters agree that this would likely be the greatest security amount required, and as such it is appropriate for it to be a cap. In terms of the details around security, the Submitters offer the following additional comments:

- the “acceptable credit rating” should not be higher than QRN’s own credit rating;
- if security is provided in cash form, the SRCA should provide for interest to be payable by QRN;
- review of security should be triggered by a change in the private infrastructure owner’s financial performance or performance under the connection agreement, rather than on a regular basis; and
- 6 months seems way too long for QRN to have to return security after the expiration or termination of a connection agreement. This obligation should apply ‘as soon as reasonably practicable, and by the latest within 3 months’ after expiration or termination.

7. Liability

QRN has specified that it will have a liability cap (unspecified) under the SRCA but it did not seek to limit the liability of the private infrastructure owner. The QCA has proposed that both parties to the SRCA should be entitled to a liability cap, and has sought submissions on the appropriate quantum. The Submitters offer the following comments on this issue:

- If a liability cap is to be included, it should be available to both parties, as the QCA has proposed;
- Insurance is a related issue because if adequate insurance is held risk exposure is minimised. So even if liability is capped, this should not limit liability to the extent:
 - the party is paid or indemnified, or entitled to be paid or indemnified, by an insurer under an insurance policy required by the SRCA, whether or not they have in fact obtained and maintained that insurance; and
 - the party recovers compensation for its liability, or is entitled to recover compensation for its liability, from another person (including any subcontractor).
- The quantum of the liability cap will depend on a range of matters, including whether the liability cap is expressed as an annual aggregate amount, a total agreement amount, or a per event amount. The term of the SRCA will influence this decision. For the purposes of establishing a default position under the SRCA, the Submitters suggest that an aggregate annual cap is preferable although it is difficult to suggest a default quantum for an annual cap. The significance of the connecting infrastructure in terms of its potential to cause

disruptions to QRN's network, as well as the potential for it to disrupt the private infrastructure owner's operations are issues the parties may wish to address individually in specific negotiations.

8. Criteria for Investigating Incidents on Private Infrastructure

The QCA has proposed to establish criteria for incidents on private infrastructure for which QRN will be entitled to prescribe who will conduct the safety investigation, and how it will be conducted. It has asked for comment on appropriate thresholds in terms of trains cancelled, value of damage to QRN network, or potential exposure to claims in excess of a certain value.

The Submitters consider that if QRN is not the Rail Infrastructure Manager (RIM) of the private infrastructure, it should not be entitled to direct who should conduct or how any investigation should proceed on the private infrastructure. The responsible RIM is the appropriate party to determine these issues. It may be that under the Interface Agreement, referred to in clause 11.9 of the QCA's draft SRCA, the RIM agrees that QRN will have a role in the investigation of incidents on the private infrastructure. However, the RIM should not be required to delegate this responsibility under the SRCA regardless of any threshold in relation to the number of trains cancelled, the value of damage to the QRN network or quantum of potential claims.

The Submitters would be happy to provide further comment on any of the issues above and participate in any consultative process to determine viable alternatives.