

# Submission to Queensland Competition Authority

## **Aurizon Network's 2013 Draft Amending Access Undertaking (UT4)**

**Anglo American Metallurgical Coal Pty Ltd**

October 2013

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## 1 Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) thanks the Queensland Competition Authority (**QCA**) and welcomes the opportunity to make submissions in respect of the Aurizon Network Ltd (**Aurizon Network**) 2013 Draft Access Undertaking (**UT4**).

Anglo American generally supports the submissions of the Queensland Resources Council (**QRC**) and the suggested drafting proposed by the QRC.

In summary, Anglo American makes the following submission:

- (a) **Overall approach to UT4:** Anglo American believes that the 'principles-based' approach taken by Aurizon Network, using a 'negotiate / arbitrate' model is unacceptable and would be detrimental to economically efficient rail access. A principles-based approach may be appropriate where a natural monopoly provider of infrastructure is not vertically integrated. Aurizon Network, however, is vertically integrated and is proposing to extend its vertically integrated interests under UT4 into port terminals (the terminal at Abbot Point) and rail infrastructure other than the Central Queensland Coal Network (**CQCN**) (the Galilee Basin railway). The past behaviour of Aurizon Network in respect of key negotiations leads Anglo American to the view that it is absolutely essential that UT4 is prescriptive in nature, as any other approach will be open to allowing Aurizon Network to be opportunistic in use of its monopolistic power not only for its own benefit but also its parent and related subsidiaries;
- (b) **Application of UT4 to ancillary services:** The approach of Aurizon Network in seeking to limit the scope of UT4 to 'Core Access-related Functions' is unacceptable. In circumstances where there is a natural monopoly provider then all aspects of its functions which are necessary to enable coal producers to get access to the network to transport their coal must be the subject of the access regime. Of course, any ancillary services which are contestable should not be subject to the access regime. In assessing whether an ancillary service is contestable, it must be truly contestable and only not weakly so, or at the margins. Anglo American believes that ancillary services must include those listed by the QRC in its submission, and also rail and related infrastructure relocations and Transfer Facilities Licences (**TFLs**) where not provided for elsewhere in access or other standard QCA-approved agreements;
- (c) **Ring-fencing and confidentiality:** Anglo American agrees with the submissions of the QRC and its proposed mark-up of Part 3 of UT4. Anglo American supports the retention of the Confidentiality Agreement which was Schedule B1 of the 2010 Access Undertaking (**UT3**) in the terms suggested by the QRC, except that Anglo American believes that the QRC draft should also include liquidated damages provisions in the same terms as clauses 4 and 5 of the Confidentiality Agreement at Schedule B1 of UT3 (including clause 4.2 which specifically provided that any dispute in respect of the clause may be referred to the QCA);
- (d) **Important regulatory protections moved from the Undertaking to the Access Agreement:** There are a number of important matters dealt with in UT3 which do not appear in UT4 and have been moved to the Access Agreements. These include resumptions, transfers and relinquishments. These are all important issues to ensure access on appropriate and transparent terms including any related charges. Further, the dispute resolution clause in the Access Agreements does not allow a party to unilaterally refer a dispute to the QCA. In essence, the QCA will be unable to monitor, investigate or intervene with any non-compliances, whereas under UT3 the QCA has the power police these important protections. As coal producers and Aurizon Network have rarely been

able to resolve difficulties or disputes by mutual agreement, Anglo American has no confidence that this approach will protect users in respect of these important matters;

- (e) **Determining the Weighted Average Cost of Capital (WACC):** Anglo American submits that the WACC suggested by Aurizon Network is far too high in light of the very low risks faced by Aurizon Network under UT4. Anglo American supports the submissions of the QRC and its experts in respect of the WACC parameter, with the exception of beta. Anglo American submits that an equity beta in the range of 0.2-0.3 is more appropriate for Aurizon Network in light of the very significant risk mitigants in both UT3, and the additional risk mitigants proposed under UT4;
- (f) **Mandatory expansions:** UT4 should contain the same mandatory expansions as were provided for in UT3. All of these forms of mandatory expansions involve low risks to Aurizon Network, as they could not be used to require Aurizon Network to undertake significant expansions or allow expansion to connect new basins. Importantly, they provide protections to producers for critical access-related issues. However, Anglo American also believes that the QCA should:
  - (i) retain the ability for Aurizon Network to seek Access Conditions when it faces higher risks; and
  - (ii) strength the Access Conditions regime by requiring Aurizon Network to obtain the approval of the QCA for any Access Conditions, irrespective of whether there are users who have 'agreed' to those Access Conditions;
- (g) **Expansion pricing principles:** Anglo American agrees with the submissions of the QRC in respect of expansion pricing principles, except that it believes that there should be no socialisation of costs (at any stage) where the works are a geographical extension of the railway or expansion works required solely to allow for the connection of a new coal basin;
- (h) **Voting system on new capital expenditure:** Anglo American agrees with the submissions of the QRC in respect of the voting system on new capital expenditure, except that it believes that an abstention vote with reasons should count as a 'no' vote as opposed to being deemed as 'yes' vote;
- (i) **Network Management Principles (NMP):** Anglo American believes that a significant amount of work needs to be undertaken in respect of the operation of the NMP and clarification in respect of the inter-operation of the NMP, the Network Development Plan, the System Operating Assumptions, the individual System Rules and the individual Access Agreements to ensure a transparent, consistent and co-ordinated approach to delivery of access;
- (j) **Central coordination:** Anglo American believes that central coordination is key to ensuring that scheduling occurs so that, firstly, the greatest number of contractual entitlements are delivered and that, secondly, the overall throughput of the various systems is maximised. However, this role should not be undertaken by Aurizon Network as Aurizon Network is vertically integrated and therefore conflicted. Such a role is best performed by a completely independent party able to manage and co-ordinate in an objective manner in the interests of all stakeholders including service providers; and
- (k) **Split cost of capital:** Anglo American supports the split cost of capital concept raised by the QCA in its pricing papers. The concept has a strong theoretical basis and could rectify some of the significant concerns that coal producers, including Anglo American, have previously had that Aurizon Network has too high a WACC on the CQCN and has not

undertaken investments in a timely manner. Clearly, the investment signals in UT3 are not working to signal when timely investment should be undertaken.

Where a term is capitalised but not defined in this document, it refers to the definition in UT4.

## 2 Overall approach to UT4

Anglo American believes that the 'principles-based' approach taken by Aurizon Network is unacceptable. UT4 has significantly reduced many of the regulatory protections for users that are currently contained in UT3. This is even more concerning now that Aurizon as an entity has been privatised.

A more principles-based approach to regulation may be appropriate where a natural monopoly provider of infrastructure is not vertically integrated. Aurizon Network however, is vertically integrated and is proposing to extend its vertical integration under UT4 into interests in port terminals (the terminal at Abbot Point) and rail infrastructure other than the CQCN (for example, the Galilee Basin railway).

It may also be appropriate where a natural monopoly provider of infrastructure has clearly demonstrated that it is able to conduct negotiations of commercial arrangements based upon a reasonable commercial approach to risk allocation and fair to both itself and the users of the infrastructure. Anglo American believes that the conduct of Aurizon Network in almost all of its commercial negotiations places the interests of itself and its shareholders as the only relevant interests. This is inconsistent with the regulatory regime which takes into account both the interests of the users as well as the legitimate business interest of the natural monopoly provider. In the view of Anglo American, the phrase "legitimate business interests" does not mean that Aurizon Network should be able:

- (a) obtain monopoly rent on any service provided relating to access to, and use of, the network; or
- (b) to strike agreements which contain the risk allocation which is generally adopted by Aurizon Network, which is, that Aurizon Network will take no risk and the users will take all the risk. Examples of this are full tax and other complete indemnities which are often required by Aurizon Network. The purpose of a regulatory regime is to replicate, as far as possible, a competitive market. There is no competitive market in the world where the supplier/s in that market are able to obtain near zero risk in all major contracts.

In light of the behaviour of Aurizon Network under UT3 it is necessary that UT4 is prescriptive in its requirements and maintains the UT3 requirements as a minimum. In any circumstances where there has been any matter left open or unresolved, such as a deferred outcome, under any of the previous undertakings Aurizon Network has exploited the gap to its benefit. Examples include:

- (a) in respect of the Goonyella to Abbot Point Expansion (**GAPE**) the negotiations and ultimate GAPE Deed were unacceptable because it is generally understood that this resulted in Aurizon Network obtaining a rate of return substantially in excess of the regulated WACC and include unacceptable access conditions such as users being prohibited from raising disputes or making submissions to the QCA in certain circumstances. Anglo American's view of this negotiation was that Aurizon Network engaged in strategic investment hold-up behaviour to obtain unreasonable conditions as the length of delays placed pressure on the coal producers, particularly those who had invested heavily in the relevant mine projects, to concede to such unreasonable requirements;
- (b) in respect of the Wiggins Island Rail Project (**WIRP**) Anglo American believed that the agreements were unacceptable but was hampered in making full submissions to the

QCA, in circumstances where it was entitled to under UT3 as a potentially 'affected party', as Aurizon Network had claimed confidentiality over the agreements;

- (c) at the beginning of WIRP there was also a period where Aurizon Network and the users were negotiating terms of access but Aurizon Network denied that the discussions were "negotiations" as this would have obliged Aurizon Network to provide details of the Access Conditions and the additional risks being taken by Aurizon Network under UT3;
- (d) the negotiations on the Standard User Funding Agreement (**SUFA**) involved almost 3 years of negotiations and still did not result in any agreement, in part because Aurizon Network would not accept general risk allocation principles that the party who is best able to mitigate the risk should carry the risk; and
- (e) the negotiations on ancillary agreements such as TFLs and Rail Relocation Deeds also involve inappropriate risk allocations and onerous conditions.

In light of these, as well as many other examples, and the extent of Aurizon Network's vertical integration; Anglo American believes that UT4 must be prescriptive in nature in order to protect the users, as any other approach will be open to strategic gaming by Aurizon Network.

### **3 Scope of UT4 and application to ancillary services**

The approach of Aurizon Network in seeking to limit the scope of UT4 to 'Core Access-related functions' is unacceptable. The definition of 'Core Access-related Functions' is limited to:

- (a) negotiating Access Agreements and Train Operations Agreements;
- (b) procuring maintenance and renewal of Rail Infrastructure;
- (c) assessing, allocating and managing Capacity; and
- (d) scheduling and Train Control Services.

The QRC submits that UT4 should include a definition of 'Associated (or Ancillary) Services' to extend UT4 to those associated services where the only practical service provider is Aurizon Network. Anglo American agrees with this approach.

The QRC suggests that the definition of "Associated Services" should include:

- (a) RIM and train control for spurlines;
- (b) level and other crossings;
- (c) land leases (leasing corridor land and land owned or leased by Aurizon Network); and
- (d) design, scope and standard reviews (for example, where Aurizon Network requires infrastructure to comply with minimum standards).

Anglo American believes that in circumstances where there is a natural monopoly provider then all aspects of its functions which are necessary to enable coal producers to obtain access to the network to transport their coal must be the subject of a transparent and workable access regime. Of course, any ancillary services which are contestable should not be subject to the access regime, but in assessing whether an ancillary service is contestable it must be truly contestable rather than weakly so, or at the margins.

An example of where Aurizon Network provides ancillary services which are unregulated is Rail Relocation (and related construction) Deeds. These deeds can become necessary in a range of circumstances, however, the relocation of rail and related infrastructure is not contestable at all. Similarly, TFLs (which deal with loadout interface requirements and other matters such as dust veneering) are necessary and non-contestable where producers do not own the spur and loop being subject to Aurizon Network's requirements.

In the past, for example, Anglo American has had significant difficulty in negotiating reasonable terms and conditions in Rail Relocation and related constructions deeds, in addition to TFLs where Aurizon Network took an essentially 'no risk take-it-or-leave-it' approach.

Anglo American believes that ancillary or associated services must include those listed by the QRC in its submission and also, rail and related infrastructure relocation and TFLs.

#### **4 Ringfencing and confidentiality**

Anglo American agrees with the submissions of the QRC and its proposed mark-up of Part 3 of UT4.

It is absolutely essential that the ring-fencing requirements are strengthened in UT4. In Anglo American's view the requirements in UT3 have not been sufficient and there have been occasions where it believes that the ringfencing requirements may have been breached, however but establishing that this is the case is almost impossible.

Anglo American also supports the retention of the Confidentiality Agreement between Aurizon Network and an Access Seeker, a pro-forma of which appeared in Schedule B1 of UT3 in the terms suggested by the QRC. Anglo American believes that the QRC draft should also include liquidated damages provisions in the same terms as clauses 4 and 5 of the Confidentiality Agreement at Schedule B1 of UT3 (including clause 4.2 which specifically provided that any dispute in respect of the clause may be referred to the QCA).

#### **5 Issues moved from the Access Undertaking to the Access Agreement**

Aurizon Network's UT4 removes a significant number of important regulatory elements from the Access Undertaking and place them in the Access Agreements, which is concerning due to the resultant lack of regulatory oversight.

The following provisions have been removed from UT4 and placed in the Access Agreements:

- (a) **Resumption:** currently clause 7.3.5 of UT3, not included in UT4 but dealt with in clauses 8 and 15 of Aurizon Network's UT4 Access Agreement;
- (b) **Reduction of access rights:** currently clause 11.3(c)(v)(C)(2) of UT3, not included in UT4 but dealt with in clause 9.3 of Aurizon Network's UT4 Access Agreement;
- (c) **Relinquishment:** currently clause 7.3.6(d) of UT3, not included in UT4 but dealt with in clause 12.4 of Aurizon Network's UT4 Access Agreement;
- (d) **Transfers:** currently clause 7.3.6(d) of UT3, not included in UT4 but dealt with in clause 13.5 of Aurizon Network's UT4 Access Agreement;
- (e) **Reduction factor:** currently clause 7.3.6(n) of UT3, not included in UT4 but dealt with in clause 14 of Aurizon Network's UT4 Access Agreement;
- (f) **Compliance:** various references throughout UT3, not included in UT4 but dealt with in clause 17 of Aurizon Network's UT4 Access Agreement forming;
- (g) **Train operations:** currently clause 5 of schedule E of UT3, not included in UT4 but dealt with in clause 19 of Aurizon Network's UT4 Access Agreement;
- (h) **Rollingstock interface standards:** various references throughout UT3, not included in UT4 but dealt with in clause 20 of Aurizon Network's UT4 Access Agreement;
- (i) **Management of network:** clause 6 of schedule E of UT3, not included in UT4 but dealt with in clause 24 of Aurizon Network's UT4 Access Agreement; and

- (j) **Interface and environmental risk management:** currently considered under Part 8 of UT3, not included in UT4 but dealt with in clause 28 of Aurizon Network's UT4 Access Agreement.

Aurizon Network has suggested that this process has been undertaken in order to attempt to streamline the Access Undertaking by removing complex and cumbersome aspects of the regulation.<sup>1</sup> In particular, Aurizon Network notes that this is because of its drive to incorporate the commercial interests of its shareholders and removes some of the aspects linked directly to public ownership and old objectives of the Aurizon Group.

Anglo American does not support this approach, as many important aspects of regulation which are necessary to ensure access on appropriate terms have been removed from the Undertaking itself. This means that any issue now only contained in the Access Agreement is open to be the subject of commercial negotiations. While Anglo American ordinarily prefers commercially negotiated outcomes, based on previous negotiations with Aurizon Network it is not confident that such important issues should be left to the Access Agreements. In the absence of an alternative transparent regulated process, Aurizon Network is able to exercise its monopolistic power unchecked, as has been the case in the example previously cited. Conversely, there is no good reason why such aspects should not remain the subject of regulation providing a 'backstop' should commercial discussions not be fruitful.

In particular, Anglo American is deeply concerned that the dispute resolution clauses in the Access Agreements do not allow a party to unilaterally refer a dispute to the QCA. Therefore, unless Aurizon Network agrees to allow a matter to be referred to the QCA; the approach adopted by Aurizon Network under UT4 will essentially remove the ability of coal producers to raise non-compliance with the QCA. The QCA will be unable to monitor, investigate or intervene in any non-compliance with the Access Agreement. Conversely, whereas under UT3 the QCA has jurisdiction to deal with, by way of example, a non-compliance in respect of the transfer of Access Rights. As industry and Aurizon Network have rarely been able to resolve difficulties by satisfactory mutual agreement, Anglo American has no confidence that the approach to dispute resolution in the Access Agreements is appropriate on such critical issues as outlined below.

In the QRC Submissions, the QRC comments that 'Aurizon Network seeks to significantly reduce the constraints on its monopoly power which existed under the previous access undertaking.'<sup>2</sup> Further, the QRC notes that Aurizon Network's UT4 submission attempts to place it 'free of effective regulatory oversight.' Anglo American strongly supports these sentiments. The CQCN was regulated because of its vital position as part of the Queensland coal supply chain and the fact that it is a clear natural monopoly existing as one element of that supply chain (noting its parent has related interests in other elements) . As the Aurizon Group continues to expand its interests through other vertically integrated elements of the supply chain, more aspects of the Aurizon Network business should be incorporated in, and subject to, the scope of the Access Undertaking, rather than the other way around.

Anglo American requests the QCA to ensure that these fundamental elements of natural monopoly regulation are reinserted into UT4 in order to ensure transparency and certainty for industry, as well as the essential element of QCA oversight.

## **6 Part 6: Determining the WACC**

Anglo American submits that the WACC suggested by Aurizon Network is far too high in light of the very low risks faced by Aurizon Network under UT4.

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<sup>1</sup> Aurizon Network, *UT4 Submission: Volume 2* (2013) 25.

<sup>2</sup> Queensland Resources Council, *Submission: Aurizon Network's draft 2013 Undertaking ('UT4')* (October 2013).

Anglo American supports the view of the QCA in its Statement of Regulatory Principles 2013 that the form of regulation and the ancillary mechanisms of risk reduction are relevant to the WACC parameters, in particular, the beta.<sup>3</sup> Anglo American also supports the submissions of the QRC and its experts in respect of the WACC parameter, with the exception of beta.

In Anglo American's view, the beta under UT3 did not reflect the fact that the 'revenue cap' form of regulation with an 'overs and unders account' protected Aurizon Network from volume risk. In addition to the principal form of regulation, there were a number of 'ancillary mechanisms' (both within UT3 and independently applied by Aurizon Network) which further reduced the total risk under UT3 (both diversifiable and non-diversifiable) to Aurizon Network. In summary, these ancillary mechanisms were as follows:

- (a) UT3 is 100% take or pay for a number of the elements of the tariff (AT2, 3 and 4);<sup>4</sup>
- (b) UT3 includes a process for customer pre-approval for the scope of capex and procurement strategy, which reduces the risk of capex / costs not being included in the RAB;<sup>5</sup>
- (c) UT3 provides for the payment of relinquishment fees where access rights are to be relinquished or transferred;<sup>6</sup>
- (d) UT3 includes a cost 'pass-through' adjustment where electric and connection costs vary by more than 2.5%;<sup>7</sup>
- (e) UT3 includes annual adjustments for a Maintenance Cost Index (which provides better alignment to Aurizon Network's actual costs) and an annual process which provides for a reconciliation between forecast and actual Maintenance Cost Index, and forecast and actual CPI;<sup>8</sup>
- (f) UT3 includes an annual process for resetting volume forecasts, to reduce the size of revenue cap unders/overs and therefore reduce cashflow timing differences;<sup>9</sup>
- (g) UT3 allows accelerated depreciation of rolling 20 year asset lives for new capex;
- (h) UT3 allows a Review Event where Aurizon Network prudently and efficiently incurs maintenance costs which exceed allowances by more than 2.5% (further, over the years the definition of 'Review Event' has been expanded to include any material change in circumstances that could lead to a variation in Reference Tariffs);<sup>10</sup>
- (i) UT3 allows a Review Event where Aurizon Network incurs costs in excess of \$1m as a result of certain Force Majeure events (for example Review Events were claimed in regard to the 2011 and 2013 Queensland floods);<sup>11</sup>
- (j) Aurizon Network reduces its risk profile by seeking and obtaining 'Access Conditions' to reduce risk and/or increase returns for significant investments. This means that the risk

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<sup>3</sup> Queensland Competition Authority, *Statement of Regulatory Pricing Principles* (August 2013) 17, 33-34.

<sup>4</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part B, clause 2.2.

<sup>5</sup> Aurizon Network's 2010 Access Undertaking, Schedule A.

<sup>6</sup> Aurizon Network's 2010 Access Undertaking, clause 7.3.6.

<sup>7</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part A, clause 2.2.

<sup>8</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part A, clause 2.2; see also schedule 1.

<sup>9</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part B, clause 3.

<sup>10</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part A, clause 2.2; see also schedule 1.

<sup>11</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part A, clause 2.2; see also Queensland Competition Authority *QR Network's Review Event Submission – Central Queensland Flooding* (October 2012); schedule 1.

profile which the regulated cost of capital must compensate for is the risk profile of the existing RAB, minor capital expenditure and operating activities (ie, the relevant risk profile for this assessment need not consider the risk of significant investments);

- (k) Aurizon Network is able to lodge draft amending access undertakings (**DAAUs**) and seek adjustments when risks are realised, or when the likelihood of realisation is perceived to increase. Examples include the DAAU for maintenance cost adjustments during UT2 and the Electric Traction DAAU during UT3. Customers do not have a similar right to seek adjustments using DAAUs;<sup>12</sup>
- (l) Aurizon Network is able to achieve additional risk transfer through the use of agreements with customers for which standard (regulator-approved) agreements do not exist. These include (as examples) agreements for:
  - (i) the funding of studies such as feasibility studies;
  - (ii) TFLs;
  - (iii) relocation deeds;
  - (iv) level crossings;
  - (v) RIM and train control services on customer specific spurs; and
  - (vi) funding of customer specific spurs;
- (m) Aurizon Network is able to reduce the risk of 'regulatory lag' by:
  - (i) undertaking endogenous review events under UT3;
  - (ii) taking advantage of cost pass-throughs for costs varying by more than 2.5%;
  - (iii) lodging DAAUs in respect of cost adjustments in circumstances where UT3 would not allow cost pass throughs, for example, the AT5 DAAU (Anglo American notes that customers do not have similar rights to seek adjustments using DAAUs);
  - (iv) the timing of lodging Access Undertakings (for example, Aurizon Network has delayed the lodgement of UT4 and proposes to continue the current WACC parameters for the next year and then smooth any adjustment to the benefit of customers over the next regulatory period. This is the ultimate example of Aurizon Network benefiting from manipulating the timing of a review); and
  - (v) significantly deferring the outcomes of required actions under UT3, avoiding obligations that it was required to consider over the last three years of UT3 regulation, for example SUFA, System Rules and the System Operating Assumptions and the Alternate Access Agreements; and
- (n) even though the monthly TOP was waived during the force majeure event of the Australia Day 2013 flooding, TOP obligations are still compromised because after the re-commencement of services there were speed restrictions which affected the ability for services to be provided leading to producers paying TOP in any case.

Under UT4 the risks are even further reduced as follows:

- (a) removing the end of period condition assessment;
- (b) reducing the circumstances in which the RAB can be optimised by the QCA;
- (c) removing the requirement that Access Conditions must reasonably reflect the financial risks involved in providing access;

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<sup>12</sup> See schedule 1.

- (d) providing for effectively unfettered pricing in relation to investment in Expansions;
- (e) effectively removing the (already weak) obligation to invest in Expansions to rectify Capacity shortfalls;
- (f) changing the customer-voting process (including being able to seek customer approval for prudence of standard) which makes it easier to require inclusion of investments in the RAB;
- (g) requiring the QCA to accept costs/variations as prudent where incurred in accordance with an approved procurement strategy in a wider range of circumstances;
- (h) reversing outcomes of Aurizon Network having certain risks under the existing regulatory framework in respect of ballast fouling, Gladstone destination TOP issues,<sup>13</sup> TOP disputes and audit costs;
- (i) reducing the depreciation period for UT1 and UT2 components of the RAB;
- (j) providing rights to increase the RAB by 'equity raising costs';
- (k) bringing 75% of the AT1 element of Reference Tariffs within the revenue cap;
- (l) changing the EC element of Reference Tariffs to a direct cost pass through;
- (m) socialisation of underrecovery of electric traction costs in the Blackwater system;
- (n) including in revenue cap adjustments:
  - (i) environmental compliance charges for non-compliance with the coal dust management plan;
  - (ii) differences in actual vs forecast audit costs; and
  - (iii) differences in maintenance costs based on changes in system forecasts;
- (o) introducing a greater number of Review Events; and
- (p) narrowing the definition of 'Network Cause' (such that Aurizon Network can recover TOP revenue in a wider range of circumstances when it fails to provide access).

Anglo American submits that all of the above should be rejected by the QCA. However, if the QCA does not reject any of the above elements then the further reduction in risk in what was already a very low risk business should be reflected in the beta.

Accordingly, Anglo American submits that an equity beta in the range of 0.2-0.3 is appropriate for Aurizon Network rather than the figure of 0.9 adopted in Aurizon Network's submissions on UT4.

In its submissions on UT3, supported by expert evidence at the time, Anglo American submitted that the Aurizon Network beta should be generated from weighting 25% at zero beta (reflecting the lack of risk and guaranteed revenue) and 75% at an average benchmark beta of similar firms. This placed the UT3 beta at approximately 2.70. In light of the fact that Aurizon Network has accepted even less risk under UT4 it is arguable that the weighting should be 50/50. That is, 50% weighted at zero beta (reflecting the decreased risk accepted by Aurizon Network) and 50% at an average benchmark beta of the firms set out by Aurizon Network's expert, SFG Consulting, in Annex B to Aurizon Network's supplementary materials.

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<sup>13</sup> In particular see Aurizon Network's submission on the 2013 Draft Access Undertaking, volume 3, section 5.5. It appears that there has been a differentiation in Access Agreements describing port services for a specific terminal or just for 'the Gladstone area'. Where the agreement was to the 'Gladstone area' this had the effect of not utilising the producer's Train Service Entitlements. As such, Aurizon Network has waived take or pay on those paths, but is attempting to recoup that retrospective loss by socialising the cost of the lost paths into UT4 tariffs.

Even if Anglo American were to apply the 25%/75% weightings the equity beta is substantially lower than the 0.9 proposed by Aurizon Network and is closer to 0.30.<sup>14</sup>

## 7 Part 8: Expansions

### 7.1 Mandatory Expansions

The QRC submission has proposed that UT4 does not include any mandatory Expansions but that Aurizon Network is prohibited from investing in the network except at the regulated return. Whilst this is better than Aurizon Network's submission, which completely removes any form of mandatory Expansion, it is insufficient to protect the interests of users.

The QRC submission recommends, at page 65, that UT4 should be drafted to explicitly prohibit Aurizon Network from investing in the network other than based on regulatory returns and conditions. After this, it discusses coming to a meaningful compromise between Aurizon Network's current extreme position and the mandatory Expansion provisions of UT3.

Whilst Anglo American believes that a commercially negotiated outcome is ideally a better solution than a regulatory outcome, it does not currently believe that this is possible with Aurizon Network given the nature and structure of its parent company's business and aspirations. As such, SUFA (or any other form of commercially negotiated Expansion) is not a valid substitute for the current mandatory Expansion mechanism.<sup>15</sup>

Anglo American proposes that Aurizon Network still be required to undertake Expansions in those circumstances outlined in UT3 (in particular clause 7.5.4), being Expansions that:

- (a) consist of replacement capital expenditure;
- (b) are needed to provide Access Holders, whose Access Rights are conditional on the completion of an Expansion, with additional Access Rights where the Expansion did not result in sufficient Capacity to satisfy all Access Holders with conditional rights;
- (c) are needed to reduce a deficit between Capacity and Committed Capacity caused by a change in System Operating Assumptions; or
- (d) are required to create sufficient Available Capacity to provide Access Rights sought by an Access Seeker unless the Expansion is:
  - (i) a Customer Specific Branch Line; or
  - (ii) greater than \$300 million (adjusted for inflation),except to the extent that such an Expansion is a user-funded Expansion.

Further, Anglo American believes that the QCA has, and should use, the power to require mandatory Expansions at the regulated WACC (or an uplifted WACC where additional risks are involved in any particular Expansion) in circumstances where the users pay for the Expansion through Access Charges. In its Draft Report on the Review of the National Access Regime the Productivity Commission found that it was entirely appropriate to empower a regulator to require mandatory investment. In particular, the Productivity Commission noted that without a power to direct capacity expansions, the regulator (in that case, the ACCC) would have no ability to enforce its efficiency objective, which is the central obligation of any competition regulator. Part 5,

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<sup>14</sup> This approach was adopted by Anglo American's expert, Economic Insights, in relation to UT3. Although the benchmarks have obviously changed since UT3 (as evidenced by the data presented by SFG Consulting in relation to UT4), Anglo American continues to support the theoretical approach adopted in its UT3 submissions and has arrived at this conclusion using the redefined data supplied by Aurizon Network: see Anglo American, *Submission to the Queensland Competition Authority: QR's Rail Access Undertaking (UT3)* (12 February 2010).

<sup>15</sup> See Anglo American, *Submission on the 2013 Standard User Funding Agreement DAAU* (August 2013) 1.

section 69E of the QCA Act contains the specific efficiency objective for the QCA in relation to determining access to services and is effectively a mirror of Part IIIA section 44AA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), which the Productivity Commission was referring to in its Draft Decision on the Review of the National Access Regime.

The mandatory Expansions contained in UT3 are all low risk. In particular, any Expansion to allow for the connection of a new basin or any significant Expansion will not fall within any of the items.

They are all matters which are within the control (or are significantly impacted by decisions made by Aurizon Network), such that:

- (a) it is appropriate that Aurizon Network undertakes asset replacement at the WACC as the level of risk has not changed;
- (b) in circumstances where there is an Expansion underpinned by TOP agreements and the Expansion does not deliver the capacity required then it is appropriate that Aurizon Network undertakes any works required to deliver the Capacity which has been contracted because Aurizon Network has control of whether the works deliver the expected Capacity;
- (c) where there is a deficit between Capacity and Committed Capacity this has ordinarily arisen where Aurizon Network has over-contracted part of the network and it is entirely appropriate that Aurizon Network undertakes the works required at the regulated WACC; and
- (d) Expansions to create Capacity costing less than \$300 million are generally minor Expansions with the same risk as the general network and would usually not be appropriate for a SUFA-style funding arrangement.

As mentioned above, Aurizon Network would be entitled to a WACC uplift (through the Access Conditions regime) if it could establish that the mandatory Expansion involved additional risks.

Anglo American believes that Part 8 of UT4 should incorporate the mandatory expansions which were contained in UT3.

## **7.2 Expansion pricing principles**

Anglo American generally agrees with the submissions of the QRC in respect of the pricing of expansion and agrees with the QCA that if average costs are decreasing substantially with capacity, adding the expansion costs to the cost base of the established capacity will provide an efficient and fair outcome.<sup>16</sup>

Anglo American considers, however, that to provide certainty and transparency the process to be followed when socialising the cost of an expansion should be enshrined in the regulatory framework (here UT4), rather than being left to be dealt with at the time of an expansion.

Anglo American also agrees with the QCA that if average costs are increasing substantially with capacity, a separate access price should normally be calculated and charged to those whose demand for capacity underwrites the new tranche of capacity calculated to reflect the average cost of that new capacity. That position arguably should be able to be altered in some circumstances, as it might be possible that one expensive expansion could unlock the potential for a series of cheaper incremental expansions. Anglo American considers that position should only be able to be altered by approval of the QCA or an overwhelming majority vote of existing customers for the relevant system, subject to prudence.

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<sup>16</sup> Queensland Competition Authority, *Discussion Paper: Regulatory Objectives and the Design and Implementation of Pricing Principles* (April 2013).

Anglo American believes that there is obviously a position in between where there would be smaller (not substantial) increases in reference tariffs which should be socialised. For minor increases, within the bounds of what an access seeker would have expected to occur in a negotiated contract prior to incurring sunk costs on a mine development, Anglo American accepts that it is reasonable they should be socialised. Again those positions should be enshrined in the relevant regulatory framework, rather than being left to be dealt with at the time of an expansion.

Anglo American notes, therefore, that the critical task for the QCA is to determine the appropriate threshold above which the cost of an expansion is deemed to be so substantial that they should not be socialised. Anglo American considers it would be reasonable to adopt an approach of socialising expansion costs unless:

- (a) the works are a geographical extension of the railway such that there is no real benefit to existing users;
- (b) the expansion works are required to allow for the connection of a new coal basin to an existing system (as such connections are, by their nature, only going to occur on the basis of a very substantial volume of coal, and therefore a very substantial step-change in the costs of access, eg, Surat Basin Rail or the Galillee Basin); or
- (c) the expansion would, if the costs were socialised, have the effect of increasing an existing customer's anticipated aggregate Access Charges by a material amount.

### **7.3 Voting system on new capital expenditure**

Anglo American believes that the current voting system for new capital expenditure is deficient in a number of respects including:

- (a) Aurizon Network does not provide sufficient information to allow users to adequately assess the need and prudence of any proposed capital expenditure – this was seen particularly in respect the vote on the electrification of the Blackwater System which Aurizon Network then sought to 'socialise' across the Goonyella users as well; and
- (b) an abstention of a vote is deemed to be a 'yes' vote – particularly in circumstances where there is insufficient information a user may be reluctant to actually vote no (or alternatively may not feel like they cannot adequately articulate why they wish to vote no).

Anglo American supports the voting process outlined in the QRC submission (page 70-71), however, further submits that an abstention with reasons (eg, lack of adequate information to make an informed decision binding that user) should count as a 'no' vote.

### **7.4 Access Conditions Regime**

Anglo American has always strongly supported the existence and operation of the Access Conditions regime under UT3.

The Access Conditions regime was specifically designed to protect Aurizon Network where there was a mandatory expansion and Aurizon Network could establish that the expansion would involve higher risks which required compensation.

However, Anglo American is of the view that the Access Conditions regime in UT3 has not necessarily proved to be effective. In particular, Anglo American believes that the process in WIRP could not be considered to be a successful use of the Access Conditions regime for the reasons that:

- (a) significant terms in the WIRP Deed were kept confidential hampering the ability of users who were not in Stage 1 from making adequate submissions;

- (b) Anglo American was excluded from the negotiation process, even though it had made an application to participate in Stage 2; and
- (c) Anglo American remains of the view that if Stage 2 were to proceed users in Stage 2 may have been disadvantaged by the precedent set in Stage 1.

Having said that, Anglo American does not see this as a reason to discard the process altogether. Rather, UT4 provides an opportunity for the QCA to strengthen the Access Conditions regime.

In its supporting submission to UT4, Aurizon Network likened itself to other commercially-focused entities looking for the best return and potential to promote shareholder value, therefore investing only when the risk / return of a project is attractive (Aurizon Network submissions at page 138). While this reflects the corporate nature of Aurizon Network, it does not reflect the fact that it is also a regulated entity. Anglo American understands that Aurizon Network is obliged to give proper consideration to its shareholders, however, at the time of investment all shareholders were well aware that Aurizon Network was subject to regulation and the ramifications of that regulation. The Access Conditions regime does not force Aurizon Network to make poor commercial decisions, merely to expand its contracted capacity on parts of the CQCN at an appropriate return.

The QRC describes Aurizon Network's stance in UT4 as seeking 'a regulatory model in which it can "negotiate" access conditions for expansions with access seekers, free of effective regulatory oversight' (QRC Covering Letter page 1). Anglo American agrees with this description of Aurizon Network's submission of UT4, and urges the QCA to protect the Undertaking from this erosion.

While Anglo American agrees with the QRC's views in respect of the removal of regulatory oversight, Anglo American does not believe that the QRC's submission that Aurizon Network should only be restricted from obtaining an above-regulated WACC until a valid suite of user-funded expansion documents can be agreed is sufficient. Anglo American believes that the most likely outcome of that approach is that Aurizon Network will refuse to invest in the CQCN during the course of UT4. It will employ its capital in other areas such as a port at Abbott Point or its interest in the GVK Railway.

Anglo American has already clearly outlined its views on Aurizon Network's proposal to remove the Access Conditions regime. In its submissions on the 2013 Standard User Funding Agreement Draft Amending Access Undertaking, Anglo American stated that:

[T]he QCA should not allow Aurizon Network to remove (or even dilute) the Access Conditions regime that is present in UT3 (currently Part 7 of UT3)... Anglo American notes that Aurizon Network proposes to remove the Access Conditions regime from [UT4] (evidenced by Part 8 of its 2013 Draft Access Undertaking submission) and Anglo American is concerned that Aurizon Network will argue that the Access Conditions regime is not necessary because of the SUFA.

Anglo American also notes that Aurizon Network proposes in its draft UT4 submission that even if users are willing to fund an expansion under SUFA, Aurizon Network still has significant discretion regarding whether to approve the SUFA and how it will progress (see clause 8.2.1(a) and (b) of UT4). In particular, clause 8.2.1(b)(ii) of UT4 clearly introduces an economic discretion for Aurizon Network – this is entirely inappropriate. Where the alternative to a SUFA expansion is around 15% return on the capital, which is significantly above the regulated rate of return (as Aurizon Network sought with the Goonyella to Abbot Point Expansion (**GAPE**) and the Wiggins Island Rail Project (**WIRP**)), it will *always* be in Aurizon Network's legitimate business interests to refuse a SUFA. Further, there are no objective circumstances or tests outlined to determine when an expansion will be economically feasible (and no explanation as to why Aurizon Network should determine whether the project is economically feasible when the entire capital outlay is being provided by users). This gives Aurizon Network clear discretion over what should be objective factors leading to the approval of a SUFA and undermines the premise of the entire project. Combined with the removal of all

mandatory funding obligations (other than replacement capital), this discretion creates further cause for concern for users willing to invest in extensive expansions to the network.

Aurizon Network also proposes in its draft UT4 submission to have the ability to determine the order in which expansions proceed (if at all). User-funded or not, being part of a vertically integrated business with interests in above and below rail assets and ports means Aurizon Holdings would have complete control of the supply chain (including how and when it is expanded), creating clear conflicts contrary to interests of rail access users and seekers, and potentially in breach of ringfencing obligations.

With a completely untested SUFA, if users lose the protection afforded by the Access Conditions regime there will be no ability to force Aurizon Network to complete an expansion on a user's behalf at reasonable expense. Rather, as has already happened to users in negotiations over the GAPE and WIRP, users will be subject to 'economic hold-up' at the hands of Aurizon Network.<sup>17</sup>

The Access Conditions regime should be strengthened to deal with the issues which arose in respect of WIRP. The QCA should be empowered to assess and approve the Access Conditions even where the Access Conditions have been agreed between Aurizon Network and the users. The reason for this is that, as WIRP showed such an agreement can be extracted through use of market power, even in circumstances where the Access Conditions are not appropriate (for example, by contractually providing for monopoly rent).

As such, Anglo American submits that the positions taken by Aurizon Network (to completely remove the Access Conditions regime) and the QRC (only to retain a requirement for Aurizon Network not to achieve above the regulated rate of return) should not be accepted by the QCA. Rather the QCA should:

- (a) retain the mandatory expansion provisions of UT3;
- (b) retain the ability of Aurizon Network to seek Access Conditions when it faces higher risks; and
- (c) strengthen the Access Conditions regime by requiring Aurizon Network to obtain the approval of the QCA for any Access Conditions.

## **8 Part 7.6 and Schedule H: Network Management Principles**

### **8.1 Hierarchy of operational protocols (NDP, SOA, NMP, System Rules and Access Agreement)**

In order to consider whether the Network Management Principles are appropriate, it is necessary to consider the various layers of operational protocol and how they interact with each other.

There are five layers of operational protocols under UT4, which are:

- (a) Network Development Plan;
- (b) System Operating Assumptions;
- (c) Network Management Principles;
- (d) Individual System Rules; and
- (e) Individual Access Agreements.

The Network Development Plan is a generally prospective document outlining the broader goals for development of the CQCN to ensure that Aurizon Network has a long term plan focused on the development and capacity maximisation of the network. The Network Development Plan is informed by the other documents which outline an End User's railings, however, it does not

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<sup>17</sup> Anglo American, *Submission on the 2013 Standard User Funding Agreement DAAU* (August 2013) 1-2.

directly impact on existing railings. Rather, the Network Development Plan outlines a framework for expansion and investment in the network over the short to medium term and, as such, impacts the System Operating Assumptions over a period of months to years.

The System Operating Assumptions are defined in Part 12 of UT4 to be Aurizon Network's specific 'assumptions on the operation of each element of the coal supply chain and the interfaces between those elements including in relation to the supply chain operating mode, seasonal variations and live run losses'. This is a more specific analysis of the operation of the network than the Network Development Plan, but does not necessarily directly inform the practical operation of train services and railings.

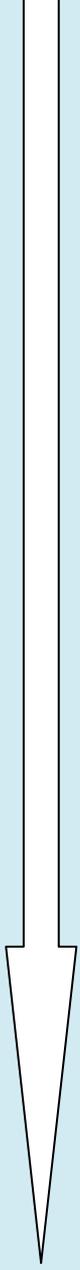
Although there is no direct reference to schedule H in clause 7.6 of UT4, the definition of Network Management Principles in Part 12 specifically states that they are the 'principles set out in schedule H and all System Rules existing from time to time'.

System Rules are defined in Part 12 of UT4 (specifically see page 157), the System Rules are to 'plan, schedule and control the operation of Train Services... in greater detail than under schedule H'. The Network Management Principles, therefore, cover the same concepts but at a higher level and with less specific operational detail. In particular, the Network Management Principles guide the development of all System Rules on the CQCN, whereas the System Rules themselves can vary operational details system-by-system.

As such, Anglo American understands that the hierarchy of the operational protocols (from most specific to most general) is:

- (a) each user's (either Access Holder or End User) individual Access Agreement outlining the specific railings and contractual provisions binding Aurizon Network and that Access Holder / End User;
- (b) the specific System Rules applying to the system that the Access Holder / End User is using to transport product from the specific mine that the Access Agreement relates to, eg, the Capricornia System Rules (will) apply to Anglo American's railings from Dawson to Gladstone on the Moura System;
- (c) the Network Management Principles as outlined in schedule H and clause 7.6 of UT4, which apply broadly to all railings (regardless of the specific system) and inform the general provisions underlying the System Rules;
- (d) the System Operating Assumptions determining the interactions and interfaces between various elements of the supply chain, and used to determine inefficiencies in the operation of the network from mine to port (although it should be noted that these operating assumptions are solely developed by Aurizon Network); and
- (e) the Network Development Plan, which includes various options and constructive plans for the short- and medium-term development of the CQCN, informed by all existing layers to determine the most appropriate extension, use, capital investment in, or interaction between Coal Systems in order to maximise network Capacity.

This can be shown in the following diagram.

<b>Network Development Plan</b>	<ul style="list-style-type: none"> <li>Existing and potential Capacity Expansions for each Coal System of: <ul style="list-style-type: none"> <li>Theoretical paths</li> <li>Usable paths</li> <li>Contractible TSE paths</li> </ul> </li> </ul>	
<b>System Operating Assumptions</b>	<ul style="list-style-type: none"> <li>Assumptions reducing theoretical paths down to usable paths and contractible TSE paths, including definitions or assumptions underpinning: <ul style="list-style-type: none"> <li>Port operating mode path requirements</li> <li>Network availability</li> <li>Planned and unplanned loss</li> <li>TSE</li> </ul> </li> </ul>	
<b>Network Management Principles</b>	<ul style="list-style-type: none"> <li>High level principles used to develop and inform the System Rules for each Coal System</li> <li>Where System Rules are not in place, the Network Management Principles are used to inform the planning, scheduling and management of trains</li> </ul>	
<b>System Rules</b>	<ul style="list-style-type: none"> <li>Allows the practical drawdown of usable and contracted paths for the Day of Operation for a Coal System</li> <li>Documents the detailed processes agreed for each Coal System to plan, schedule and manage the operation of trains, in order to realise contracted TSE, based upon the capacity available as detailed in the NDP and the assumptions detailed in the System Operating Assumptions</li> <li>Specific processes detailed are: <ul style="list-style-type: none"> <li>MTP</li> <li>ITP</li> <li>DTP</li> <li>Contested path decisions</li> <li>Train control decisions</li> <li>Traffic management decisions</li> </ul> </li> </ul>	
<b>Access Holder Agreement</b>	<ul style="list-style-type: none"> <li>Contracted TSE paths, based upon the capacity assumptions as per the System Operating Assumptions and drawdown conditions as per the System Rules</li> </ul>	
<b>Operational outcome</b>	<ul style="list-style-type: none"> <li><i>Actual TSE and Ad hoc paths used</i></li> <li><i>Tonnes hauled</i></li> </ul>	

## 8.2 NMP should be part of UT4

The intent of the NMP and associated components (in particular, the TSE, MTP, ITP, DTP, Train Control, System Rules, Contested Path Decisions and Traffic Management Decisions) is to maximise the contractual entitlements (for contracted and Ad Hoc Train Services) in an equitable and transparent manner.

Section 7.6.1(a) of UT4 states that an Access Agreement will include obligations for the Access Holder and Aurizon Network to comply with the Network Management Principles. Anglo American believes that this approach is inappropriate. UT4 should itself impose an obligation on Aurizon Network to comply with the NMP. This is important as the QCA should have oversight in respect of ensuring Aurizon Network is complying with the NMP. In this regard Anglo American specifically supports the submission of the QRC in respect of its proposed amendment to clause 7.6.1 of UT4.

Anglo American also believes that there should be an explicit right for the QCA to audit Aurizon Network's compliance with the NMP.

### **8.3 Train Service Entitlement**

Schedule H does not sufficiently set out Aurizon Network's approach to the allocation and consumption of TSEs. Although the System Rules do, in part, address the allocation and consumption of TSEs, general principles around allocation and consumption should be set out in the Access Undertaking itself, with the System Rules providing more detail in respect of how the general principles apply to a specific system.

In the view of Anglo American, some of the general principles which should be recognised in the Access Undertaking (in Schedule H) are:

- (a) as a first priority, TSEs are to be calculated, allocated and managed by Aurizon Network to ensure that the contracted monthly TSEs of all users are achievable in practice;
- (b) the calculation of TSEs must take into account the expected availability and capability of the network for planned and unplanned maintenance, outages, variability and speed restrictions; and
- (c) TSE allocation and consumption, including Aurizon Network non-performance, are to be reported transparently to users and end users.

### **8.4 Monthly Train Plan**

Schedule H sets out that the purpose of the MTP is to demonstrate how Aurizon Network plans to deliver TSEs, having regard to Planned Possessions, Existing Capacity and other relevant characteristics of each respective system. It then provides for various methods of amending the MTP with (and sometimes without) the consultation of relevant stakeholders.

Anglo American believes that the UT3, and proposed UT4, approach to the MTP does not provide sufficient information to relevant stakeholders in respect of the calculation and allocation of TSEs, nor do relevant stakeholders have sufficient information in the MTP to determine how Aurizon Network will deliver all contracted TSEs. Anglo American believes that clause 3.1 of Schedule H needs to identify the purpose of the MTP more specifically and include the fact that the MTP should have information in respect of:

- (a) the maximum number of round trip paths available for each loading and unloading location;
- (b) contracted TSE train paths on a round trip basis;
- (c) train paths available for make-up of expected loss; and
- (d) train paths that are not practically able to be utilised or to be sterilised (due to resourcing, variability or track utilisation issues).

Schedule H should incorporate general principles in respect of the content of the MTP, including:

- (a) the MTP must take into account the System Operating Assumptions and planned network availability and capability for the period;
- (b) each of the paths shown in the MTP must be practically achievable on at least an origin-destination basis taking into consideration required headways between successive trains arriving at unloading or loading facilities;
- (c) the maximum number of usable round trip paths is not to exceed the practical utilisation ceiling of any track sections; and

- (d) key assumptions forming the MTP are to be documented in the System Operating Assumptions.

Schedule H does set the method of amending the MTP. In general, Anglo American agrees that Aurizon Network should be able to unilaterally vary the MTP where that amendment has no effect on any other Access Holder's ability to obtain sufficient TSE under its agreements. In this regard, Anglo American believes that clause 3.3(b)(iii) does not go far enough as it allows amendment to the MTP for new TSEs to occur unilaterally where the new or varied TSE 'does not result in any other Access Holder's scheduled Train Service not being met'. Clause 6.3 should be amended to ensure that unilateral changes cannot be made where there is any possibility that changes to the MTP materially disadvantage another Access Holder.

Schedule H should also require that any changes to the MTP template must be undertaken in consultation with users and End Users, with any Access Holder having the right to refer any dispute regarding changes to the MTP to the QCA for a determination.

## **8.5 Intermediate Train Plan**

Schedule H provides very little information on the scope and operation of the ITP, other than recognition that somehow it is an intermediate scheduling step between the MTP and the DTP.

Scheduling on the CQCN is a complex matter and all aspects of scheduling cannot be fixed in UT4. However, there are some general principles which are sufficiently important that they should be recognised in UT4 itself and the QCA should have oversight in respect of compliance with those general principles.

## **8.6 Daily Train Plan**

Schedule H sets out that the purpose of a DTP is to indicate all scheduled Train Services and Planned Possessions for a particular day and provides some general principles around when a DTP may depart from the ITP and also variations to a DTP after it is scheduled.

Schedule H should recognise the following general principles:

- (a) the DTP is a locked down 48 hour plan of scheduled train services, taking into account final agreed orders for train services, planned availability of the network, planned maintenance of terminals / loading facilities and TSE allocations for the scheduling period; and
- (b) the DTP is to be updated each day to reflect changes required.

## **8.7 Contested Path Decisions**

Clause 8 of Schedule H sets out the contested train path decision making process. This is an important protection for users. Anglo American supports the general principles contained in clause 8.1 that the contested decision making process should have the objective of ensuring that, firstly, Aurizon Network meets its contractual obligations to Access Holders and, secondly, that Aurizon Network does not unfairly differentiate between Access Holders.

Anglo American believes that Schedule H should also include an objective of maximising the capacity and throughput of each coal system. However, it acknowledges that there may be some tension between these 3 objectives.

Anglo American believes that there are two options for addressing the priority of the objectives to avoid this tension. That is that Schedule H should either:

- (a) include a third objective in UT4 schedule H clause 8.1 to maximise the throughput of the system, however, this should be second in priority to the requirement that Aurizon Network meet its contractual obligations with Access Holders (as such, priority would be

to contractual obligations first, system throughput second, and unfair discrimination between users third); or

- (b) remove UT4 schedule H clause 8.1 because without clarification of priority and some focus on system throughput the entire clause is flawed and will create conflicting obligations on Aurizon Network.

Anglo American also believes that there should be transparent reporting in respect of the consumption of TSEs. The TSE Reconciliation Report should detail the cause for non-performance, with the aggregated and individual information readily available to all Access Holders and End Users.

## **8.8 Train path consumption is left to be defined in the System Rules**

Anglo American disagrees with the QRC submission that train path consumption should be determined under the System Rules. Currently the proposed System Rules are unacceptable for users as they contain matters which can significantly impacts upon the rights of the users, whereas, the original intention of the System Rules was that they would be limited to operational requirements.

As Anglo American has submitted previously (specifically in relation to Aurizon Network's submission of the Capricornia System Rules and the Northern Bowen Basin System Rules), there is no method for producers or operators to challenge the decisions of Aurizon Network in relation to the System Rules. This is a major concerns as, under the current drafting, Aurizon Network also has the power to conclude amendments to the System Rules without the approval of producers, operators or the QCA. Such amendments could be extremely damaging to producers' interests if they apply to regulatory situations, for example determining the situations when a user has consumed its train paths. If Aurizon Network was able to amend the System Rules as they stand, it has power to change the definition of train path consumption and yet there will be no avenue for review within the System Rules or the Access Undertaking. As such, these considerations (including powers to review, amend and control the consumption of train paths) should be covered in the Access Undertaking for the overall protection of producers.

Otherwise, Anglo American supports the submissions made by the QRC.

## **8.9 Train Control and Traffic Management Decisions**

Clause 7.3 of Schedule H contains some general principles in respect of Train Control.

In light of the approval of the End User Access Agreement and Train Operations Agreement some of these general principles are no longer suitable. For example, where a coal producer is an Access Holder under an End User Access Agreement then the following general principles are not appropriate:

- (a) the Access Holder will ensure operational safety is maintained through compliance with the Safeworking Procedures, the Safety Standards, Rollingstock Interface Standards, applicable IRMPs etc (clause 7.3(a)(i) of Schedule H); and
- (b) Access Holders will ensure that Above Rail issues, including Train crewing, locomotive and wagon availability are appropriately managed (clause 7.3(a)(ii) of Schedule H).

However, clause 7.3 should contain the following general principles:

- (a) train control and traffic management processes must consider the System Rules and TSEs, with the objective of an equitable and transparent outcome;
- (b) the Traffic Management Rules are to reinforce that decisions involving reordering the sequence of a train's arrival at an unloader must be referred to the unloading terminal for determination of priority; and

(c) the exercise of Train Controller discretion must be transparent.

### **8.10 Pooling of train paths**

Anglo American believes that the NMP should enshrine the concept that Access Holders and End Users may pool train paths.

Anglo American supports Aurizon Network's suggestion to create mine capping principles for the pooling of train paths. Further, Anglo American supports Aurizon Network's submission to maintain operator pooling and system pooling for the remainder of unused train paths which cannot be reclaimed through mine capping.

Operator pooling as suggested by Aurizon Network would allow train operators to determine how train path pools are outlined and which users will be in each pool. Anglo American does not support the proposal by Aurizon Network to permit operators to create numerous train pools, and to subsequently determine the membership of those pools. By allowing operators to determine the characteristics and membership of each pool, Aurizon Network is delegating an aspect of its otherwise regulated power to those operators (and, therefore, shifting that important responsibility outside the oversight of the QCA and industry). Train operators would then have the ability to charge fees for membership to train pools, exploit producers for over or under railing and discriminate between users without any ramifications under the regulation.

As such, Anglo American believes that Aurizon Network's submission to allow operators to pool and determine the construction of those pools undermines the purpose of regulation in the first place and should not be allowed by the QCA. Access Holders and End Users should be allowed to elect to join an operator pool and each operator should only have one pool.

### **8.11 Drafting of Schedule H**

We have attached Anglo American's redraft of Schedule H incorporating some of the key principles outlined above.

## **9 Coal Chain Co-ordination**

Anglo American believes that centralised coal chain coordination is key to ensure that scheduling occurs so that, firstly, the greatest number of contractual entitlements are delivered and that, secondly, the overall throughput of the various systems (including related assets) is able to be maximised.

However, this role should not be undertaken by Aurizon Network as Aurizon Network is part of a vertically integrated business and as such the role is best performed by a completely independent party, a system which has been successfully employed in other regulated coal chain environments. Anglo American recognises that this objective may not be able to be achieved by the QCA under UT4 but believes that the QCA should consider the issue and raise it with Government as to the necessary reforms to enable such an objective to be achieved.

## **10 The Split Cost of Capital Concept**

### **10.1 Risk on the Regulated Asset Base**

Anglo American fully supports the statement by the QCA that the WACC on the Regulated Asset Base (**RAB**) should be connected to the regulated entity's guaranteed return. As the guarantee of return increases, the WACC on the RAB should consistently approach the cost of debt.<sup>18</sup>

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<sup>18</sup> Queensland Competition Authority, *Discussion Paper: Split Cost of Capital* (2013) vii.

In Aurizon Network's case, the guarantee of the return on the RAB on the CQCN under UT3 is almost certain. This can be seen from the following factors:

- (a) UT3 is 100% take or pay for a number of the elements of the tariff (AT<sub>2, 3</sub> and 4);<sup>19</sup>
- (b) UT3 provides for the payment of relinquishment fees where access rights are to be relinquished or transferred;<sup>20</sup>
- (c) UT3 includes a revenue cap and an annual process for resetting volume forecasts, to reduce the size of revenue cap unders/overs and therefore reduce cashflow timing differences;<sup>21</sup>
- (d) UT3 allows accelerated depreciation of rolling 20 year asset lives for some capex;
- (e) Aurizon Network is able to lodge draft amending access undertakings (**DAAUs**) and seek adjustments when risks are realised, or when the likelihood of realisation is perceived to increase. Examples of this include the DAAU for maintenance cost adjustments during UT2 and the Electric Traction DAAU during UT3. Customers do not have a similar right to seek adjustments using DAAUs;<sup>22</sup> and
- (f) Aurizon Network is able to achieve additional risk transfer through the use of agreements with customers for which standard (regulator-approved) agreements do not exist. These include (as examples) agreements for:
  - (i) the funding of studies such as feasibility studies;
  - (ii) transfer facility licences;
  - (iii) relocation deeds;
  - (iv) level crossings;
  - (v) RIM and train control services on customer specific spurs; and
  - (vi) funding of customer specific spurs.

Under UT4 these protections remain and, in fact, there are further protections, including reducing the circumstances in which the RAB can be optimised by the QCA.

The only risk that a regulated entity faces on its RAB is generally a regulatory one. This might include changes to how the regulator operates or how the regulator determines Reference Tariffs for the RAB. The risk might also include the regulator's approval of opex, maintenance or force majeure reimbursement. In Aurizon Network's situation, Anglo American submits that this regulatory risk is particularly low.

In the above circumstances, Anglo American agrees that the RAB should earn at or just above the cost of debt.

## 10.2 WACC on expansion capital

Anglo American submits that it is incorrect to attribute the phrases 'high/higher WACC' and 'low/lower WACC' to the multiple WACCs created by a split cost of capital system. What should actually be created are 'separate WACCs' which reflect the risk borne by the regulated entity on that particular infrastructure asset. In the case of Aurizon Network, that could mean different systems, different networks or the existing CQCN as opposed to expansion works.

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<sup>19</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part B, clause 2.2.

<sup>20</sup> Aurizon Network's 2010 Access Undertaking, clause 7.3.6.

<sup>21</sup> Aurizon Network's 2010 Access Undertaking, Schedule F, Part B, clause 3.

<sup>22</sup> See schedule 1.

While Anglo American understands that the WACC attributed to new or expansion infrastructure under the split cost of capital concept will generally be higher than that applied to existing infrastructure, Anglo American also believes that this is not a 'rule' which applies to each expansion. There are some expansions where risks are low and some where the risks are higher. Even if the expansion WACC is an average WACC, this fundamental principle needs to be kept in mind.

The WACC on expansion capital does not apply to reward the regulated entity for making the investment, but rather to compensate and insure the regulated entity for the increased risk that it adopts because of its increased capital in that new or expansion infrastructure. As such, the WACC applied to the new or expansion infrastructure directly correlates to the risk adopted by the regulated entity and does not simply apply because there has been an investment.

For example, if Aurizon Network were to invest in a passing loop on the existing CQCN, if we apply the split cost of capital concept this should not necessarily attract a 'higher' WACC. Aurizon Network is strongly protected by the existing customer base on the CQCN; when making the investment it has 100% Take or Pay contracts, opex and maintenance modifiers and virtual insurance by users. As such, the increased risk accepted by Aurizon Network through this type of expansion work is little to none, and should not necessarily attract a WACC any higher than already exists on the CQCN, even if the QCA is to apply the split cost of capital concept and determine an alternate WACC.

Further, if Aurizon Network were to complete a major augmentation of the network (for example, a system similar to GAPE even this might not attract a significantly 'higher' WACC in light of protections contained in UT4, including:

- (a) the revenue cap form of regulation;
- (b) 100% Take or Pay contracts with users;
- (c) accelerated depreciation (although Anglo American disagrees with the approach adopted by Aurizon Network); and
- (d) the process for customer pre-approval for the scope of capex and procurement strategy, which reduces the risk of capex / costs not being included in the RAB.

As such, Anglo American submits that the appropriate concept to define the split cost of capital is various WACCs for independent systems which all accurately reflect the risk adopted by the regulated entity in relation to each regulated asset. Whilst this is likely to be higher than the WACC on the RAB, it may not be significantly higher.

### 10.3 Risks in respect of opex

In the Split Cost Paper, the QCA also considers the various situations that a regulated firm could be in and the risk associated with those activities. One cost that is considered is the opex and maintenance costs associated with maintaining serviceable infrastructure: in the Split Cost Paper the QCA considers that operation of infrastructure creates a moderate level of equity risk.<sup>23</sup>

Anglo American disagrees with this analysis for all regulated entities, in particular with reference to the opex and maintenance costs accepted by Aurizon Network. Through the AT<sub>1</sub> charge, Aurizon Network recovers its exact cost of maintenance every year, determined *ex post* rather than *ex ante* so that reimbursement precisely reflects disbursement. Although it might be argued that this charge represents a certain element of risk, as long as Aurizon Network's outgoings are prudently incurred its maintenance charges cannot be rejected.

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<sup>23</sup> Queensland Competition Authority, *Discussion Paper: Split Cost of Capital* (2013) 4, in particular see Table 2.1.

Similarly, UT4 a contains number of cost pass through provisions in respect of opex costs.

#### **10.4 Criticisms of the split cost of capital concept**

The split cost of capital concept has received some criticism. Anglo American notes that DBCT Management expressed concerns that the split cost of capital proposal:

'may not fully recognise investor expectations and may be based on a number of flawed assumptions regarding risks attached to the RAB'.<sup>24</sup>

The concerns regarding the risk associated with the RAB are addressed above at paragraph 2.

Anglo American assumes that Aurizon Network would express the same concerns regarding not recognising investor expectations, specifically since the float of Aurizon Network (as QR Network in 2010). Anglo American also understands that similar concerns were also raised by critics of Professor Dieter Helm's papers in the United Kingdom.<sup>25</sup>

In response to this concern, Anglo American submits that regulatory risk is or was fully anticipated by investors, and properly outlined by Aurizon Network during its float. Changes to the model of regulation, in this instance applying the split cost of capital concept, are part of the operation of a regulated entity and stunting or restricting regulatory growth and development does not achieve the purpose of regulating an entity. Anglo American submits that regulation should evolve to meet the needs of the industry and the regulated entity itself, and should not be avoided merely because it affects the return to investors.

In Aurizon Network's case, investors were fully informed of the regulatory risks associated with investing in Aurizon Network from the time of the float. In particular, investors were fully informed that regulation of the assets could change with time and negotiation between the parties. The QR National share prospectus included the following discussion of regulatory risk:

'QR National's network is subject to extensive regulation that significantly affects it business, and there is a risk of regulatory outcomes that are adverse to QR National'.<sup>26</sup>

Investors made informed decisions to invest in Aurizon Network knowing that regulatory risk existed and changes to the regulatory approach over time could be expected. Anglo American does not believe that this is an adequate excuse to avoid any kind of regulatory change or adaptive pricing techniques applied by the QCA. Furthermore, Anglo American does not believe this is an adequate reason to reject the split cost of capital concept.

At this point in time, there is no evidence to suggest that applying a split cost of capital mechanism to Aurizon Network's regulated assets will decrease its overall average level of profits. On the contrary, prudently-made and operated expansions should attract an ultimate WACC which rewards Aurizon Network for participating in the growth of the industry, at the same time as it is compensated for extra risk accepted and positive involvement in developing the coal network.

#### **10.5 Timing for the alternate WACC**

A very difficult issue is whether the alternate WACC applies only during construction and then the RAB WACC applies after the asset has rolled into the RAB.

Whilst theoretically Anglo American agrees with the findings of the QCA on the timing for applying an alternate WACC on expansion assets, it is concerned that this may not be sufficient to provide an incentive for Aurizon Network to undertake investments in a timely manner.

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<sup>24</sup> Dalrymple Bay Coal Terminal Management, *Submission to the QCA Split Cost of Capital Discussion Paper* (31 July 2013)

<sup>25</sup> Queensland Competition Authority, *Discussion Paper: Split Cost of Capital Concept* (2013) 20.

<sup>26</sup> Queensland Rail National, *Share Prospectus* (2010) 21.

This might mean that the QCA applies the alternate WACC for a period of 2 to 3 years after completion of the expansion project in order to adequately compensate Aurizon Network for any greater risks taken.

An alternative which might apply where Aurizon Network has undertaken an expansion which is not fully underpinned by 100% Take-Or-Pay contracts, then the alternative WACC could also operate with a percentage-based limit of capacity; for example, Aurizon Network would receive the alternate WACC for 2 years or until it reached 90% capacity run rate, whichever came first.

## **10.6 Issues which might undermine split cost of capital**

Anglo American understands that, for the rail industry in particular, this is a time of regulatory change.

Of particular concern to Anglo American, in its UT4 submissions Aurizon Network has removed the access conditions regime so that users can no longer force Aurizon Network to invest in expansions or new infrastructure. If the QCA approves the split cost of capital concept to apply to Aurizon Network's regulated assets and yet there is no access conditions regime, the QCA has achieved no development in the regulation of Aurizon Network. While the QCA might determine an alternate WACC which rewards Aurizon Network if it invests, this does not necessarily change Aurizon Network's behaviour to expansions and it may continue to refuse to invest, even at the alternate WACC. This would perpetuate the incentive for 'economic hold-up' and not provide the incentive that is required for the revenue cap to operate effectively.

Anglo American fears that if the QCA approves the removal of the forced investment regime in UT4, it will only provide a reinforcement for Aurizon Network's aggressive pricing approach to expansions. Rather than creating a cap on the Reference Tariffs that can be charged on expansions, the QCA-determined alternate WACC will provide a fallback position which Aurizon Network knows that it can receive if it invests under regulation. This does not mean that Aurizon Network will not refuse to invest under regulation and rather force commercial negotiations which result in imprudent and economically unfeasible outcomes for users with WACCs well above the ceiling set by the QCA as the alternate WACC (similar to the commercially negotiated outcomes achieved in GAPE and WIRP).

While Anglo American fully supports the split cost of capital concept, without a forced investment structure in the Access Undertaking applying to the regulated entity, the split cost of capital concept is almost completely and utterly useless. As such, the split cost of capital concept cannot be considered separately from the form of regulation or the principles applying under that form of regulation and these form essential elements as to the appropriateness and effectiveness of the split cost of capital concept.

## **11 Incidental matters**

In addition to the issues raised by the QRC in its submission and proposed drafting amendments, Anglo American notes the following ancillary matters:

- (a) one of the key components of SUFA is that the SUFA agreements end when the SUFA-funded assets no longer have any value in the RAB. To facilitate transparency, Anglo American believes that 10.1.6 of UT4 should specifically require Aurizon Network to specify the value of each SUFA-funded asset in the RAB. This would reflect the amendments suggested by QRC to Schedule E;
- (b) in respect of the list of matters upon which the Auditor may be requested to audit under clause 10.8 of UT4, Anglo would like to add 'discrimination between projects on the basis of obtaining an advantage for an Aurizon Associate including any related body corporate

involved in providing services at a port or in respect of a railway which does not form part of the CQCN;

- (c) In respect of the dispute resolution process, Anglo American agrees with the QRC that it needs substantial amendment. In particular, the QCA should ensure that **all** matters relating to the Undertaking can be referred to the QCA by one party. It is critical that the QCA has oversight on all regulatory issues under the Undertaking.

**12 Schedule 1: Anglo American drafting of UT4 Schedule H –  
Network Management Principles**

Please see attached.

# Schedule H

## Network Management Principles

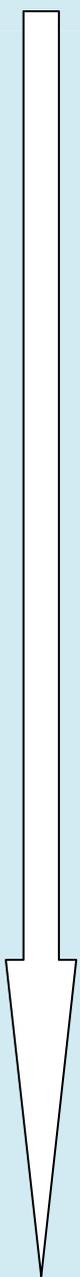
### 1 Interpretation

In this **schedule H**, a reference to an Access Holder means:

- (a) in respect of **clause 8.3** the Access Holder or a Train Operator where the Access Holder has no Customer; and
- (b) in respect of all other clauses, the Access Holder.

### 2 Objective and Context of the Network Management Principles

The objective of the Network Management Principles (**NMP**) is to maximise the contractual entitlements (contracted Train Service Entitlement and Ad Hoc Train Service Entitlement) of End Users of the system in an equitable and transparent manner with regard to train scheduling and day of operations management. The NMP should be considered in context with other documents and processes as follows:

<b>Network Development Plan</b>	<ul style="list-style-type: none"> <li>Existing and potential Capacity Expansions for each Coal System of: <ul style="list-style-type: none"> <li>Theoretical paths</li> <li>Usable paths</li> <li>Contractible TSE paths</li> </ul> </li> </ul>	
<b>System Operating Assumptions</b>	<ul style="list-style-type: none"> <li>Assumptions reducing theoretical paths down to usable paths and contractible TSE paths, including definitions or assumptions underpinning: <ul style="list-style-type: none"> <li>Port operating mode path requirements</li> <li>Network availability</li> <li>Planned and unplanned loss</li> <li>TSE</li> </ul> </li> </ul>	
<b>Network Management Principles</b>	<ul style="list-style-type: none"> <li>High level principles used to develop and inform the System Rules for each Coal System</li> <li>Where System Rules are not in place, the Network Management Principles are used to inform the planning, scheduling and management of trains</li> </ul>	
<b>System Rules</b>	<ul style="list-style-type: none"> <li>Allows the practical drawdown of usable and contracted paths for the Day of Operation for a Coal System</li> <li>Documents the detailed processes agreed for each Coal System to plan, schedule and manage the operation of trains, in order to realise contracted TSE, based upon the capacity available as detailed in the NDP and the assumptions detailed in the System Operating Assumptions</li> <li>Specific processes detailed are: <ul style="list-style-type: none"> <li>MTP</li> <li>ITP</li> <li>DTP</li> <li>Contested path decisions</li> <li>Train control decisions</li> <li>Traffic management decisions</li> </ul> </li> </ul>	
<b>Access Holder Agreement</b>	<ul style="list-style-type: none"> <li>Contracted TSE paths, based upon the capacity assumptions as per the System Operating Assumptions and drawdown conditions as per the System Rules</li> </ul>	
<b>Operational outcome</b>	<ul style="list-style-type: none"> <li><i>Actual TSE and Ad hoc paths used</i></li> <li><i>Tonnes hauled</i></li> </ul>	

### 3 Purpose

The purpose of the NMP is to provide high level, guiding principles for:

- development of System Rules for each Coal System;
- TSE interpretation; and
- Operational processes - Master Train Plan (MTP), an Intermediate Train Plan (ITP), where necessary, and a Daily Train Plan (DTP), Train Control Decisions, Contested Path Decisions and Traffic Management Decisions.

## 4 Development of System Rules

- (a) System Rules must be developed and in use for each Coal System, prior to the date of commencement of this Undertaking.
- (b) System Rules are to be updated, at least annually and upon changes to Coal System traffic as follows:
  - (i) Where an increase of more than 30 percent of Coal System GTK is to occur;
  - (ii) Where a rail spur or Expansion from a new coal basin is to connect to the existing Coal System;
  - (iii) Where a new Unloading Terminal is to be commissioned; and
  - (iv) Where a change to the System Operating Assumptions occurs.
- (c) The System Rules are to provide detailed and agreed processes for the planning, scheduling and control of the operation of Train Services;
- (d) The System Rules are to be agreed with all stakeholders (i.e. Access Holders, End Users and managers of Unloading Facilities and adjoining rail infrastructure); and
- (e) Each set of System Rules is to incorporate processes detailing the MTP, ITP, DTP, Train Control, Contested Path and Traffic Management Decisions specific to that particular Coal System, as agreed with the relevant stakeholders and as approved by the QCA.

## 5 Train Service Entitlement Principles

Train Service Entitlements:

- (a) for the same types of traffics, will be defined using consistent terminology;<sup>1</sup>
- (b) will be expressed in terms that can be interpreted for the development of a MTP, ITP, DTP;
- (c) Train Service Entitlements are to be calculated, allocated and managed to ensure that the contracted monthly Train Service Entitlement of all users are achievable in practice;
- (d) Train Service Entitlement must take into account the expected availability and capability of the network for planned and unplanned maintenance, outages, variability and network conditions (e.g. speed restrictions and transit time allowances); and
- (e) Train Service Entitlement allocation and consumption, including non-performance, is to be reported transparently to Train Operators and End Users.

## 6 Master Train Plan principles

### 6.1 Purpose and form of the MTP

- (a) The purpose of the MTP is to demonstrate how Aurizon Network plans to deliver Train Service Entitlements in each Coal System, having regard to Planned Possessions, Existing Capacity, the System Operating Assumptions and other relevant characteristics of each Coal System.

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<sup>1</sup> For example, Timetabled Traffics may be defined in terms of a path between certain locations, on particular days, and at particular times. Cyclic Traffic may be defined in terms of a number of train paths per specified period of time.

- (b) The MTP will be in a form that is readily convertible to a DTP and indicates the capability of Aurizon Network to deliver Train Service Entitlements in each Coal System given other activities on the relevant Rail Infrastructure, including planned Rail Infrastructure unavailability and expected loss of the Coal System.
- (c) The MTP will separately identify where applicable:
  - (i) for Cyclic Traffics, the practically usable round trip System Paths allocated to Cyclic Traffics, where such Train Paths reflect the:
    - (A) Train Service Entitlements, but may not necessarily reflect the particular Train Paths that those Train Services will operate on; and
    - (B) System Paths greater than Train Service Entitlements available for Train Service Entitlement scheduling flexibility, countering Coal System expected loss or for the operation of Ad Hoc Train Services.
  - (ii) for Timetabled Traffics, the particular Train Paths allocated in accordance with the Train Service Entitlements; and
  - (iii) time allocated for Planned Possessions.
- (a) each of the Train Paths shown in the MTP must be practically achievable on an origin-destination and round trip basis, taking into consideration required headways between successive trains arriving at unloading or loading facilities; and
- (b) the maximum number of usable round trip paths is not to exceed the practical utilisation ceiling of any track sections forming part of the origin-destination.

## 6.2 Updating the MTP

- (a) Aurizon Network will update the MTP when Aurizon Network considers it necessary to do so in accordance with **clause 6.3** and, in any event, no less than once each Year.
- (b) Aurizon Network will notify relevant Access Holders and Infrastructure Service Providers of any modifications to the MTP at least 30 days prior to the commencement of the modification and make available to the relevant Access Holders and Infrastructure Service Providers an updated MTP once it has been finalised.

## 6.3 Modifying the MTP

- (a) The MTP may be modified by Aurizon Network in accordance with any of **clauses 6.3(b), (c) and (d)**. For clarity, so long as a modification can be made in accordance with one of **clauses 6.3(b), (c) or (d)**, it is not necessary for each of those clauses to be complied with in respect of that modification.
- (b) Aurizon Network may make modifications to the MTP on a case-by-case basis without the need for consultation where:
  - (i) an Access Holder notifies Aurizon Network that it wishes to make a long-term Train Service Time Change, provided:
    - (A) that change:
      - (1) is within the scope of its Train Service Entitlement; and
      - (2) does not result in any other Access Holder's scheduled Train Service/s not being met, or a Planned Possession not being met; and
    - (B) the Access Holder has given Aurizon Network reasonable prior notice of that change having regard to the necessary process to be complied with,

and factors to be considered, by Aurizon Network including Aurizon Network's obligations under **clause 6.2(b)**;

- (ii) a Planned Possession is cancelled;
  - (iii) a new or additional Train Service Entitlement has been created, through the signing of an Access Agreement, or the negotiation of a variation to an Access Agreement, provided that the new or varied Train Service Entitlement does not result in any other Access Holder's scheduled Train Service/s not being met, or a Planned Possession not being met; or
  - (iv) an Access Holder's Access Agreement allows Aurizon Network to alter the Access Holder's Train Service Entitlement – for example, by resuming Access Rights through a capacity resumption process.
- (c) Aurizon Network may make modifications to the MTP, on a case-by-case basis after consulting with any Access Holders whose Train Service/s or Train Service Entitlements are affected by the proposed modification to the MTP, and/or with Infrastructure Service Providers if the proposed modification affects a Planned Possession, where:
- (i) Aurizon Network notifies all affected Access Holders that it wishes to make a long-term Train Service Time Change, provided that change:
    - (A) is within the scope of the relevant Access Holders' Train Service Entitlement/s; and
    - (B) is intended to accommodate:
      - (1) the creation of a new or varied Train Service Entitlement, through the signing of an Access Agreement, or the negotiation of a variation to an Access Agreement, where that new or varied Train Service Entitlement cannot otherwise be reasonably accommodated on the MTP;
      - (2) the creation of new Planned Possessions or the modification of existing Planned Possessions; or
      - (3) any other Operational Constraint affecting the MTP; and
    - (C) where it results in any existing Access Holder's Train Service Entitlement not being met, is only made with the agreement of that existing Access Holder (such agreement not to be unreasonably withheld); or
  - (ii) Aurizon Network notifies all affected Access Holders, within the time period specified in each affected Access Holder's Access Agreement, of a long-term Train Service Time Change for the purpose of carrying out Major Periodic Maintenance provided that, where that change is not within the scope of an Access Holder's Train Service Entitlement, Aurizon Network has used reasonable endeavours to mitigate the impact on that Access Holder. Any limitations (if any) on Aurizon Network's ability to exercise this right will be specified in individual Access Agreements.
- (d) Aurizon Network may make modifications to the MTP where Aurizon Network and all affected Access Holders, agree. Aurizon Network will invite all Access Holders whose Train Service Entitlements are affected by the proposed modification to the MTP to consider the modification in an appropriate forum (which may include a face to face meeting, a telephone conference or any other forum that provides the affected Access

Holders with a reasonable opportunity to participate). Each affected Access Holder will be provided with a copy of the proposed changes seven days prior to the scheduled consideration of the modification in the forum.

- (e) Aurizon Network will consult with any Infrastructure Service Providers who Aurizon Network considers may be affected by any modification to the MTP that is proposed to be agreed under **clause 6.3(d)** or **6.3(d)**.
- (f) Notwithstanding any other provisions of this Schedule, the Undertaking or an Access Agreement, any affected Access Holder may refer a change or amendment to the MTP under the **Part 11** dispute resolution provisions to the QCA for a determination.
- (g) Notwithstanding any aspect of this Clause 6.3, Aurizon Network cannot make unilateral amendments to the MTP where there is any possibility that those amendments will materially disadvantage another Access Holder.

## 7 Intermediate Train Plan principles

- (a) An ITP is an intermediate scheduling step in progressing from the MTP to the DTP. The ITP represents either a firm or indicative train schedule for a period (dependent upon the applicable Coal System and System Rules), based upon Planned Possessions, the Train Paths and the System Paths detailed in the MTP, Train Service Entitlements and firm or indicative Train Orders.
- (b) The ITP is to be aligned to the Coal System it is developed for, and is to be based upon the planning process and System Rules for each Coal System.
- (c) Aurizon Network will plan Cyclic Traffics in the ITP in accordance with the relevant System Rules. If the process of planning Cyclic Traffics in the ITP involves the allocation of a Contested Train Path between Access Holders for Cyclic Traffic, Aurizon Network:
  - (i) may require a meeting of all affected Access Holders; and
  - (ii) will use the decision making process in **clause 11** to allocate the Contested Train Path.
- (d) Aurizon Network will notify relevant Access Holders and Infrastructure Service Providers of the ITP once it is finalised:
  - (i) in the manner and timeframe specified within the relevant System Rules; or
  - (ii) if there are no relevant System Rules, before 1600 hours on the day immediately prior to the period for which an ITP is to be prepared (fixed ITP period).

## 8 Daily Train Plan principles

### 8.1 Purpose and form of a DTP

A DTP details all agreed Train Orders as scheduled Train Services and Planned Possessions which are considered as final, for a particular day, in a form that displays the planned time/distance (location) relationship of all activities on that part of the Rail Infrastructure to which the DTP relates. The DTP is a final train plan for a scheduling period of 48 hours and represents the final ITP for that period.

## 8.2 Scheduling and notification of a DTP

- (a) Aurizon Network will schedule a DTP at least one Business Day prior to the day to which the DTP relates (**Day of Operation**), and provide all relevant Access Holders and Infrastructure Service Providers with a copy of the DTP within the same timeframe.
- (b) Where System Rules apply, a DTP will be scheduled in accordance with the timeframes as specified in the System Rules.
- (c) A DTP will vary from an ITP in accordance with the relevant System Rules.
- (d) Variations to the DTP, either prior to or during the Day of Operation, can occur in accordance with the relevant System Rules, or alternately, as agreed between the parties.

## 8.3 Application of a DTP to performance targets

The DTP will represent the expected train operation performance target over its period and will be used as base information for performance monitoring, including for the purposes of the annual operational data report under **clause** Error! Reference source not found. of this Undertaking (for example, in applying the Allotted Time Threshold).

# 9 Effect of cancellations on other Access Agreement obligations

The cancellation of a Train Service or Train Services in accordance with the Network Management Principles does not necessarily excuse either Aurizon Network or an Access Holder from other Access Agreement obligations relating to the conduct in question.

# 10 Train Control Decision Principles

## 10.1 Objective of Train Control

A fundamental objective of Train Control is to facilitate the safe running of Train Services, and the commencement and completion of Planned Possessions, Emergency Possessions and Urgent Possessions, as scheduled in the DTP.

## 10.2 Effect of deviations from DTP on Day of Operation

The ability of Aurizon Network or an Access Holder to deviate from the DTP on the Day of Operation, as specified below, does not necessarily excuse either Aurizon Network or the Access Holder from any other Access Agreement obligations relating that deviation.

## 10.3 General principles

- (a) The following general principles apply to Access Holders, Train Controllers and Aurizon Network (as applicable):
  - (i) the Access Holders and Train Controllers will ensure that operational safety is maintained through compliance with the Safeworking Procedures, the Safety Standards, Rollingstock Interface Standards (subject to any Approved Derogation) and applicable IRMPs and, where applicable, EIRMRs;
  - (ii) Access Holders will ensure that Above Rail issues, including Train crewing, locomotive and wagon availability and loading and unloading requirements, are appropriately managed to ensure that such issues do not prevent the DTP from being met;
  - (iii) Aurizon Network will manage the Rail Infrastructure based on agreed entry/exit times as specified in the DTP with the objective of managing Trains according

to their schedule for on time exit, not contributing to late running and, if a Train is running late, making up time and holding the gain where reasonably possible;

- (iv) train control and traffic management processes must consider the System Rules and Train Service Entitlements of Access Holders, with the objective of an equitable outcome maximising the network ability to meet contractual entitlements;
  - (v) decisions involving reordering the sequence of a train's arrival at an unloader must be referred to the unloading terminal for determination of priority; and
  - (vi) at all times, the exercise of Train Controller discretion must be transparent and equitable.
- (b) The handling of Out-Of-Course Running is dependent on the particular circumstances of a rail corridor, including the traffic type using the corridor. The management of Out-Of-Course Running will be conducted so as not to unfairly disadvantage one Access Holder over another, and as a result, the identity of an Access Holder will not of itself be a legitimate basis for Train Controllers to alter a scheduled Train Service.

#### **10.4 Application of traffic management decision making matrix**

- (a) The traffic management decision making matrix in **clause 12** will be provided to assist Train Controllers in the resolution of disputes in accordance with the general Train Control Principles under **clause 10.3**.
- (b) Subject to **clause 10.4(c)**, where the operation of a Train Service differs from the DTP, Train Controllers will apply the traffic management decision making matrix in **clause 12** for the purposes of Train Control.
- (c) Aurizon Network may depart from the traffic management decision making matrix in **clause 12** in the period following a Network Incident, or a Force Majeure Event which materially affects Aurizon Network's ability to achieve the DTP, for the purpose of:
  - (i) maximising the throughput of Trains in line with Access Agreement entitlements on the Rail Infrastructure; and
  - (ii) restoring normal operations on the Rail Infrastructure,provided that Aurizon Network complies with this **clause 10** and uses reasonable endeavours to return to normal Train Control procedures for resolving conflicts that arise from Out-Of-Course Running as soon as reasonably practical after the occurrence of the Network Incident or Force Majeure Event (as applicable).

#### **10.5 Provision of information to Access Holders**

Aurizon Network will provide Access Holders with:

- (a) real time Train Control information that indicates actual running of that Access Holder's Train Services against the relevant DTP;
- (b) subject to reasonable terms and conditions, access to Train Control diagrams that indicate actual running of that Access Holder's Train Services against the relevant DTP; and
- (c) information about the type of Train Services (for example, non-coal freight, passenger or coal Train Services) operated by other Access Holders on the same network to assist Access Holders to determine whether the Train Controller is applying the principles in this **schedule H** in a consistent manner between Access Holders.

# 11 Contested Train Path Decision Principles

## 11.1 Purpose

The purpose of this **clause 11** is to outline the principles that Aurizon Network will have regard to when allocating a Contested Train Path to an Access Holder for the purpose of developing the ITP (under **clause 7**) with the objective of ensuring:

- (a) Aurizon Network meets its contractual obligations with Access Holders; and
- (b) Access Holders are not unfairly differentiated between in respect of the use of their Train Service Entitlement.

## 11.2 TSE Reconciliation Report

- (a) For the purpose of the planning and scheduling of Train Orders , after the end of each Relevant Period, Aurizon Network will provide a report (**TSE Reconciliation Report**) to each Access Holder which identifies as at the end of that Relevant Period, in respect of that Access Holder's Train Service Entitlement under which Train Services were entitled to operate during that Relevant Period:

- (i) the extent to which the Train Service Entitlement:
  - (A) was used in the Relevant Period;
  - (B) has been used in the relevant Access Provision Period to date; and
  - (C) has been used in the relevant Year to date,for each origin to destination pair of the Train Service Entitlement; and
- (ii) the remaining balance of the Train Service Entitlement for:
  - (A) the relevant Access Provision Period; and
  - (B) the relevant Year,for each origin to destination pair of the Train Service Entitlement.

- (b) For the purpose of **clause 11.2(a)(i)**, the extent to which a Train Service Entitlement was or has been used in respect of a particular origin to destination pair will be calculated as the greater of:

- (i) the number of the Train Services operated in accordance with the Train Service Entitlement for that origin to destination pair for the relevant period; and
- (ii) the number of Train Paths scheduled for Train Services in accordance with Train Service Entitlement for that origin to destination pair for the relevant period.

- (c) The principles used to determine the number of Train Paths scheduled or operated for the purpose of clause 11.2(b) include the following:

- (i) The point at which a schedule for Train Services is considered final will be:
  - (A) as specified in the System Rules; or
  - (B) if the System Rules do not specify that point or there are no applicable System Rules, Train Paths are taken to be scheduled when the DTP is finalised.
- (ii) The number of Train Paths scheduled will be reduced by the number of scheduled Train Paths not provided due to Aurizon Network Cause in the period to which the schedule applies as per **clause 11.2(c)(i)**.

- (iii) If:
  - (A) an Access Holder submits Train Orders for less than its Train Service Entitlement for a particular origin to destination pair as set out in the MTP for a Relevant Period ("First Entitlement"); and
  - (B) that Access Holder also submits Train Orders for a different Train Service Entitlement for a particular origin to destination pair for a Relevant Period in excess of its Train Service Entitlement for that origin destination pair as set out in the MTP ("Additional Path based on Pooled Entitlement"),

and the path is allocated to the Additional Path based on Pooled Entitlement, that path will be deemed to be scheduled and operated against the First Entitlement.

- (iv) Where the scheduled time of the Train Path is varied in accordance with **clause 8**, that variation is not taken to involve the scheduling of more than one Train Path unless, for clarity, that variation is a cancellation of the Train Path in which case (subject to **clause 11.2(c)(ii)**) the Train Service Entitlement is taken to be operated in respect of that cancelled Train Path.
  - (v) To the extent an Access Agreement requires Aurizon Network to provide to an Access Holder a reasonable alternative Train Path or to determine whether infrastructure has not been made available due to Aurizon Network Cause, a Train Path will be deemed to be a reasonable alternative Train Path where it is within the same period to which the schedule applies and it is practical for the Access Holder to use it.
- (d) The remaining balance of a Train Service Entitlement, as amended from time to time, for a particular origin to destination pair for an Access Provision Period under clause 11.2(a)(ii)(A) is calculated as:
- (i) the number of Train Paths for that origin to destination pair for that Access Provision Period that Aurizon Network is obliged to make available during that Access Provision Period in accordance with the Train Service Entitlement (including as amended from time to time) as set out in the MTP; less
  - (ii) the Train Service Entitlement for a particular origin to destination pair used in the Access Provision Period to date (determined in accordance with **clause 11.2(a)(i)(B)**).
- (e) The remaining balance of a Train Service Entitlement, as amended from time to time, for a particular origin to destination pair for the relevant Year under **clause 11.2(a)(ii)(B)** is calculated as:
- (i) the number of Train Paths for that origin to destination pair for that Year that Aurizon Network is obliged to make available during that Year in accordance with the Train Service Entitlement (including as amended from time to time) as set out in the MTP; less
  - (ii) the Train Service Entitlement for a particular origin to destination pair used in the Year to date (determined in accordance with **clause 11.2(a)(i)(C)**).

### **11.3 Contested Train Path principles**

- (a) Aurizon Network will determine which Access Holder is allocated a Train Path that is a Contested Train Path, using the following principles in order of precedence:

- (i) The Access Holder whose request for the Contested Train Path is within the scope of its individual Train Service Entitlement for an origin to destination pair as set out in the MTP.
- (ii) Where the relevant Access Holders agree amongst themselves who should be allocated the Contested Train Path, the Contested Train Path will be allocated as agreed by the Access Holders.
- (iii) The Access Holder whose request for the Contested Train Path is within the scope of its relevant Train Service Entitlement adjusted for Aurizon Network Cause as follows:
  - (A) the Train Paths finally scheduled, in accordance with **clause 11.2(c)(i)**, for which Train Services did not operate due to Aurizon Network Cause Year to date; less
  - (B) the greater of:
    - (1) zero; and
    - (2) the relevant Train Service Entitlement used for Year to date less Train Service Entitlement set out in the MTP Year to date.
- (iv) The Access Holder whose request for the Contested Train Path is within the scope of its Train Service Entitlements for the relevant Coal System as set out in the MTP, for that Access Holder's pool of mainline paths, subject to the availability of Existing Capacity where the mainline paths are those Train Paths which include Rail Infrastructure:
  - (A) between Coppabella and Jilalan;
  - (B) between Burngrove and Parana;
  - (C) between Collinsville and Pring; or
  - (D) between Byelle junction and Boundary Hill junction.
- (v) The Access Holder whose request for the Contested Train Path will have the least capacity impact on the relevant Coal System. For example, for competing requests in excess of the MTP allocation for the Train Service Entitlement due to a change of origin. The request where the new origin is on the same branch line, would take precedent over the request where the new origin is on a different branch line.
- (vi) Aurizon Network may allocate the Train Path to an Access Holder where, based on the MTP, Aurizon Network will not meet the Train Service Entitlement for that Access Holder in a future Access Provision Period due to a Planned Possession.
- (vii) The Access Holder who is most behind for the relevant Access Provision Period, by calculating as a percentage the Train Service Entitlement for the relevant origin to destination pair used in the Access Provision Period to date as per **clause 11.2(a)(i)(B)** plus the remaining balance of the Train Service Entitlement for that origin to destination pair for the Access Provision Period as set out in the MTP compared against the Train Service Entitlement for that origin to destination pair for that Access Provision Period as set out in the MTP at the commencement of the Access Provision Period or as amended from time to time.

- (viii) The Access Holder who is most behind for the relevant Year, by calculating as a percentage the Train Service Entitlement for the relevant origin to destination pair used in the Year to date as per **clause 11.2(a)(i)(C)** plus the remaining balance of the Train Service Entitlement for that origin to destination pair for the Year as set out in the MTP compared against the Train Service Entitlement for that origin to destination pair for that Year as set out in the MTP at the commencement of the Year or as amended from time to time.
- (ix) Where the application of above principles does not result in a determination by Aurizon Network as to which requested Train Service is to be scheduled, Aurizon Network will unilaterally determine which Train Service is scheduled, and will keep a record of that decision and the reasoning behind that decision. Aurizon Network will seek to ensure that, over time, no Access Holder is favoured over another and, where possible, if one Access Holder is favoured this time, taking into account the Train Service Entitlement held by an Access Holder, next time they are not favoured. In other words, if one Access Holder has an entitlement to 10 Train Services per week, and another Access Holder has an entitlement to 20 Train Services per week, then it could not be said that favouritism was shown to the second Access Holder if they received priority over the first Access Holder on two out of three consecutive occasions.
- (b) Aurizon Network will advise each party of the Contested Train Path decision and the principle that determined the result.

## 12 Traffic Management Decision Principles

For the purposes of the traffic management decision making matrix below the meaning of **On Time**, **Ahead** and **Late** are determined by the scheduling of Train Paths in the DTP. For example, if a Train is travelling in accordance with the DTP path allocated to it, it is running **On Time**.

		Train A – Current Status			
		Train A	Train Running “On Time”	Train Running “Ahead”	Train Running “Late”
Train B	Objective	On Time Exit	On Time Exit	On Time Exit	<ol style="list-style-type: none"> <li>1. Lose no more time</li> <li>2. Make up time</li> <li>3. Hold the gain</li> </ol>
Train B – Current Status	Train Running “On Time”	On Time Exit	Scheduled Cross	A or B Rule 2	B Rule 3
	Train Running “Ahead”	On Time Exit	A or B Rule 2	A or B Rule 2	B Rule 3
	Train Running “Late”	<ol style="list-style-type: none"> <li>1. Lose no more time</li> <li>2. Make up time</li> <li>3. Hold the gain</li> </ol>	A Rule 1	A Rule 1	A or B Rule 4

**Rule 1:** Train B may be given priority on condition Train A will still meet its “On Time” objective, or as permitted by rules 5, 6, 7 and 8.

**Rule 2:** Both Trains must meet their “On Time” objective.

**Rule 3:** Train A may be given priority on condition Train B will still meet its “On Time” objective, or as permitted by rules 5, 6, 7 and 8.

- Rule 4:** Priority may be given to the Train where performance indicates it will lose least or no more time and even make up time and hold the gain, or as permitted by rules 5, 6, 7 and 8.
- Rule 5:** Passenger and livestock Trains may be given priority over other Trains if the Train Controller reasonably believes that this is consistent with the objectives of the Trains in question, as specified in the Train Service Entitlement/s for those Trains and/or the requirements of a Passenger Priority Obligation.
- Rule 6:** Where a Train is running “Late” due to a Below Rail Delay, it may be given preference over other Trains if the Train Controller reasonably believes that this is consistent with the critical objectives of the Trains in question, and that it will result in less aggregated consequential delays to other Trains than otherwise would be the case.
- Rule 7:** Where a Train Controller has to decide which of two Trains to give priority to, and both of those Trains are operated by the same Access Holder, the Train Controller may ask the Access Holder how it would prefer the Trains to be directed and, provided that taking the Access Holder’s preferred course of action does not adversely affect the Train Services of any other Access Holder, the Train Controller will follow the Access Holder’s request.
- Rule 8:** Where a Train Controller has to decide which of two Trains to give priority to, and those Trains are operated by different Access Holders, one may be given preference over the other if the Train Controller reasonably believes that this is consistent with meeting the coal supply objective(s) detailed in the System Rules.