



Submission to the Queensland Competition
Authority

Rail Connection Agreement

Anglo American Metallurgical Coal Pty Ltd

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1. Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) welcomes the opportunity to make further submissions to the Queensland Competition Authority (**QCA**) in respect of the draft decision of the QCA on the Rail Connection Agreement (**RCA**) submitted by QR Network Pty Ltd (**QR Network**). Anglo American supports all of the proposed amendments of the QCA and has set out below a response to some of the specific issues raised by the QCA in its draft decision and some additional matters that Anglo American believes that it is desirable to clarify.

2. Definition of Connecting infrastructure (Clause 6)

The version of clause 6 which has been put forward by the QCA deals with the issues identified by Anglo American in respect of the following risks:

- (a) where the Owner designs and constructs the Connecting Infrastructure, the risk that the Owner may incur considerable capital costs without any guidance as to whether QR Network is likely to consider the Connecting Infrastructure suitable for connection and operation; and
- (b) the removal of the limitation on the ability of Owners to dispute the scope of works determined by QR Network.

Anglo American submits that some minor amendments are necessary to clarify some issues. Those minor changes are to:

- (a) ensure that QR Network cannot charge the Owner any costs which arise because of the conduct of QR Network or another QR party which has caused the material change in circumstances leading to a need for the Owner to change the Design. It is an appropriate balance for the Owner to bear the costs of a material change in circumstances where it is a fault of or conduct of the Owner but that QR Network bears the costs where the material change is as a result of the conduct of QR Network;
- (b) one of the significant difficulties that coal producers face in the network is significant delays in the execution of projects. Anglo American has therefore recommended that there be a timeframe within which QR Network must inspect the Connecting Infrastructure for the purposes of determining whether it is suitable for connecting the Private Infrastructure to the Network;
- (c) Anglo American supports the proposed insertion of 6.4(b) by the QCA. Anglo American believes that the principles contained in that paragraph are essential for the proper and efficient working of the Construction Agreement. For example, the principle contained in clause 6.4(b) (iii) that the Owner shall pay to QR Network the reasonable and prudent costs of the work carried out under the Construction Agreement. However, as currently drafted Anglo American has a concern that the clause could be interpreted to mean that the Construction Agreement can contain principles which are inconsistent with those set-out in paragraph 6.4(b). This arises because of the opening words "subject to the provisions of the Construction Agreement". However, this means that the Construction Agreement does not need to contain the principles. For example, the Construction Agreement could require

the Owner to pay costs in excess of the reasonable and prudent costs. In light of the importance of the principles contained in this clause, Anglo American believes the opening words should be amended to "the Construction Agreement must include at least the following principles". This will ensure that QR Network can not exercise market power and obtain terms of the Construction Agreement which are not commercial. These protections are necessary because in the experience of Anglo American, the construction of small spur lines to mines is not currently contestable.

6. CONNECTING INFRASTRUCTURE

- (d) If, following approval of the Design by QR Network but prior to the approval of the suitability of the Connecting Infrastructure in accordance with **clause 6.3(b)**, QR Network reasonably considers there has been a material change in circumstances such that it would no longer be required to approve the Design pursuant to **clause 6.2(b)(iii)** it must, as soon as practicable of becoming aware of that change, give notice to the Owner of the nature of the material change in circumstances and details of any modifications that it requires to be made to the Design so that it is suitable for the purpose of connecting the Private Infrastructure to the Network and for the operation of the Train Services anticipated by the Owner. Where it is the conduct of QR Network or a QR Party in respect of the Network which would cause the material change in circumstances, QR Network must consult with the Owner before implementing any such change, and the Owner will not be required to pay any costs associated with that change.
- (e) Prior to the Commitment Date, QR Network will inspect the Connecting Infrastructure within 10 Business Days of a written request from the Owner. to determine whether it is suitable for the purpose of connecting the Private Infrastructure to the Network and for the operation of the Train Services contemplated to enter or exit the Network via the Connecting Infrastructure under any access agreement. The Connecting Infrastructure shall be suitable for these purposes where it:
- 6.4(b) ~~Subject to the provisions of 4.1~~ The Construction Agreement must contain at least the following terms:
- (i) QR Network must give the Owner a reasonable period within which to provide comments to QR Network on any design or construction matters, or project management issues which the Owner considers will result in non-prudent or unreasonable costs or delays being incurred;
 - (ii) any dispute arising out of or in relation to the negotiation of the Construction Agreement which relates to a matter which the QR Network Access Undertaking provides for the parties to have a right to resolve via the dispute provisions in the QR Network Access Undertaking, will be resolved in accordance with the QR Network Access Undertaking;

- (iii) the Owner shall pay (under and in accordance with the Construction Agreement) to QR Network the reasonable and prudent costs of the work carried out by or for QR Network in accordance with **clause 6.4(a)**, provided that the Owner may dispute the amount of those costs in accordance with the Construction Agreement or with **clause 6.4(b)(ii)**; and
- (iv) QR Network must give the Owner written notice of completion of the construction of the Connecting Infrastructure and an estimate of the further time required for commissioning and other activities before the Connecting Infrastructure will be available for utilisation by Train Services.

3. Interface Risk Assessment and Emergency Response Plan (Clause 11)

Anglo American supports the proposed amendments of the QCA in respect of the Interface Risk Assessment and Emergency Response Plan.

Anglo American believes that there may be some regulatory issues in QR Network having complete control over the response to an Incident on Private Infrastructure. If there is a different Rail Infrastructure Manager for the Private Infrastructure then clause 11.7 and 11.8 may not be consistent with the relevant regulatory regime and Safety Management System. Anglo American suggests that both clauses 11.7 and 11.8 commence with the phrase "subject to any legal requirement of the TRSA". This will ensure that the Rail Infrastructure Manager for the Private Infrastructure can not be placed in breach of its obligations under the Transport (Rail Safety) Act.

4. User Funding of Network Enhancements (clause 18.8)

Clause 18.8 provides that if the Connecting Infrastructure or the Network is damaged or destroyed by a Fore Majeure Event and QR Network forms the opinion that the costs of repairing such damage is not economic that QR Network may notify the Owner of its intention not to repair or replace the relevant part of the Connecting Infrastructure or the Network unless the Owner elects to pay, and does in fact pay, the cost of repairing or replacing the relevant part of the infrastructure.

Whilst it may be understandable that if the Connecting Infrastructure is no longer being used by the Owner that QR Network may refuse to repair or replace the Connecting Infrastructure the clause is too broad in its operation as it applies to the Network. There are no boundary conditions imposed upon what aspect of the Network can be the subject of a notice under clause 18.8. Whilst it is unlikely to be QR Network's intention, the clause could, in its terms, apply to a part of the Network which is more than 100km away from the Connecting Infrastructure.

UT3 makes specific provision in respect of the damage and replacement of infrastructure in the Network and therefore, in Anglo American's view this clause does not need to deal with the Network.

18.8 If the Connecting Infrastructure ~~or the Network~~ is damaged or destroyed by a Force Majeure Event and, in QR Network's reasonable opinion, the cost of repairing such damage or replacing the Connecting Infrastructure ~~or the Network~~ is not economic and the Owner is not willing to pay such rectification costs, QR Network made by written notice advised a Owner of its intention to not repair or replace the relevant part of the Connecting Infrastructure ~~or the Network~~ and there upon terminate this Agreement unless the Owner elects to pay, and does infact pay, the cost of repairing or replacing part of the

5. Security (Clause 20)

Clause 20 provides for security and that a Coal producer which has an Acceptable Credit Rating does not need to provide security. Clause 1.1 defines Acceptable Credit Rating to mean a minimum long term credit rating of not less than BBB+ from Standards & Poor's of not less than Baa2 from Moody's Investor Services.

BBB- is generally considered to be investment grade and Anglo American submits that BBB- minus is sufficient to protect the interest or QR Network. Anglo American also notes that a number of previous agreements have accepted BBB- as an Acceptable Credit Rating.

6. Liability (Clause 21)

Anglo American supports the amendments that have been made by the QCA in respect of the liability provisions. In the draft decision the QCA sought comments in respect of the appropriate cap on liability.

Anglo American is concerned about the liability provisions and, in particular, the cap on liability being only for the benefit of QR Network. In circumstances where there are mutual indemnities under clause 22 of the RCA, a one-way cap on liability is not appropriate. Therefore, Anglo American submits that the liability regimes should be as follows:

- (a) The liability cap in clause 21.3 should be for the benefit of both parties;
- (b) The cap on liability should be a fixed figure inserted at the time of execution which is based on the calculation of 150% of the fees expected to be payable under the agreement;
- (c) the Owner and QR Network should both have the ability to access any insurance claims in addition to the liability cap;
- (d) there should also be exclusions from the liability cap where the loss has been incurred because of gross negligent, wilful misconduct, property damage, personal injury and fraud.

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- (a) Despite any other provisions in this agreement, neither party will in any circumstances be liable to the other for any Consequential Loss arising from, under or in connection with this Agreement.
- (b) Neither Party will make any Claim against the other in respect of the neglect or default of that other Party under this Agreement unless notice of the Claim has been given to the other party within six months of the later of the Claim arising or becoming reasonably apparent to the relevant Party.
- (c) To the extent permitted by law and subject to clause 21(d), the liability of QR Network to the Owner ~~the liability of QR Network to the Owner~~ the liability of each Party to the other at common law, under the Australian Consumer Law or otherwise, in respect of any matters arising out of, or in any way related to, this Agreement or the subject matter thereof, will in no event exceed in aggregate the amount specified in Item 5 of **Schedule 1**.
- (d) The limitations on each Party's liability under clause 21(c) will not apply to limit a Party's liability in respect of:
- (i) any act or omission of the Party (including the Party's employees, officers, contractors, consultants and agents) which constitutes gross negligence, wilful misconduct or fraud;
 - (ii) any personal injury, death or property damage (including third party property damage) caused or contributed to by the Party; or
 - (iii) an amount which is recoverable under a policy of insurance which the Party is required to effect and maintain under this Agreement (or which would have been recoverable had the Party complied with its obligations to effect and maintain the required insurances under this Agreement).
- ~~(d)~~ (e) Nothing in this Agreement creates or constitutes any contract between QR Network and any haulage operator contracted by the Owner or otherwise responsible for the operation of the Train Services utilising the Connecting Infrastructure.

7. Insurance

Anglo American is supportive of the amendments suggested by the QCA in respect of insurance. Anglo American believes that the requirement for QR Network and the Owner to take out insurance is important in enabling both parties to obtain a remedy for losses incurred above the liability cap.

In respect of the required insurances, Anglo American suggests that there be an inclusion for professional indemnity for an amount of not less than \$20 million per occurrence in the aggregate and indexed in accordance with CPI - All Groups. Anglo American agrees that public liability insurance should be for \$20 million indexed in accordance with CPI - All Groups. A third party property damage insurance of \$20 million indexed in accordance with CPI - All Groups.