



28 February 2013

**Mr John Hall**  
Chief Executive Officer  
Queensland Competition Authority  
GPO Box 2257  
Brisbane Qld 4001

By Email: To: rail@qca.org.au

Dear Mr Hall,

## **Aurizon Network's proposed amendments to the Standard Rail Connection Agreement**

### **Executive Summary**

Vale Australia Pty Ltd (**Vale**) welcomes the opportunity to make further submissions to the Queensland Competition Authority (**QCA**) in respect of the proposed amendments to the Standard Rail Connection Agreement (**SRCA**) submitted by Aurizon Network Pty Ltd (**Aurizon**). Vale supports the proposed SRCA as outlined by the QCA in its final decision and sets out below its response to the 10 specific issues Aurizon has sought to amend.

Capitalised terms in this letter have the meaning given in the SRCA unless otherwise defined.

Vale is concerned that Aurizon is proposing new amendments to the SRCA after the QCA's final decision. The development of this agreement has followed the normal QCA process which has involved substantial consultation and opportunity for all, including Aurizon drafting the original agreement, to provide comments and suggested changes to the agreement. After this process the QCA considered all stakeholders' views, which were not unanimous, and determined what it believed was appropriate. The QCA then provided an agreement in its final decision and advised Aurizon to amend its original SRCA to reflect the detailed drafting in the QCA's final decision.

Vale accepts there are occasions when some inadvertent factual errors or minor drafting issues may need to be addressed when resubmitting, but believes the major changes being proposed by Aurizon are not to address minor drafting errors or inconsistency and are inconsistent with the QCA's detailed drafting and the QCA process generally.

Vale view is the the QCA should reject the new submission by Aurizon in its entirety and require Aurizon to submit a new SRCA consistent with the notice provided by the QCA following its final decision. Vale considers allowing this level of adjustment following a final decision and before the agreement has even been established, will only increase regulatory uncertainty of the consultation process for all stakeholders. Vale believes that

if Aurizon would like to make further amendments to the SRCA it should be completed under a separate submission and consultation process, or at an appropriate review time such as the upcoming Access Undertaking reset period.

Vale does not agree with the principle of changing the SRCA unless there is a factual error or drafting inconsistency and therefore provides the comments below based on this principle, but also proposes to provide some commentary on the issues raised for future reference.

## **1. Insurance (Schedule 3)**

Vale agrees that the insurance requirements should be reciprocal between the parties. Vale notes that Aurizon acknowledges that third party property damage is covered by public liability insurance and so separate insurance is not needed for property damage. Therefore, Vale proposes that the requirement for the Owner to have property damage insurance should be deleted as it is consistent with Aurizon's view that it will be considered under the public liability insurance. Vale would consider this change to be correcting an inconsistency and accept the requirement for third party property damage insurance to be removed from both Aurizon and the Owner's insurance obligations.

## **2. The treatment of connecting infrastructure at end of term of agreement (Clause 19)**

Aurizon has inserted further obligations on the Owner in clause 19.4 to complete the transfer of ownership and possession of the Connecting Infrastructure to the Owner. These obligations require the entering into of agreements such as safety interface, and ongoing operational and maintenance costs. Vale does not consider this to be an error or inconsistency and therefore does not believe it should be considered as part of the current SRCA development process.

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Vale finds it acceptable to require an Owner to enter into an agreement for the transfer of the connecting infrastructure due to the close proximity of the Connecting Infrastructure to the network, however, does question the need for an ongoing operating and maintenance agreement. Aurizon is not required to transfer any part of the Connecting Infrastructure which it reasonably requires for the purpose of continued operation of the network and therefore this implies that they do not need to use the transferred Connecting Infrastructure. There should be no restriction on whom or how the maintenance of this infrastructure should be managed after the transfer. Requiring an Owner to complete an agreement with Aurizon restricts the Owner's ability to tender this process if required. It is also unclear to Vale the details of the ongoing operation and maintenance required on the Connecting Infrastructure are if this is not required in the operation of the network. If an Owner wishes to reinstate the Connecting Infrastructure at a later date they should be expected to ensure the Connecting Infrastructure is reinstated to a standard fit for purpose, but this should not

need an agreement at the time of the transfer and should not be required as part of this agreement.

Vale is also concerned that the SRCA compels an Owner to enter an agreement that is currently unknown and provides no certainty of the reasonableness of the terms and conditions. The proposed Aurizon drafting provides an opportunity for Aurizon to delay or not agree with a transfer until the Owner accepts these terms and conditions which does not seem to be appropriate given the infrastructure being transferred is not required to operate the network. Vale believes a requirement that Aurizon cannot unreasonably withhold consent for the transfer should also be included as part of this drafting

### **3. Investigation of Incidents (clause 11)**

Clause 11.7 and 11.8 has been amended by Aurizon which proposes the responsibility for an investigation lies with the Rail Infrastructure Manager that operates the rail line where the incident occurs. Vale supports this approach and raised this as a concern in its previous submission dated 7 September 2012. However, as this was not included in the QCA's proposed agreement, it should not be accepted by the QCA as part of this process (but instead, considered via an alternative process as mentioned above).

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Aurizon has also inserted new drafting that requires the Owner to provide a copy of the investigation report to Aurizon. Vale believes this change is a reflection of the drafting to change the responsibility of the investigation under clause 11.7 and would accept a report could be provided to Aurizon subject to there being no requirement for the Owner to disclose any information in the report that it considered to be business sensitive, subject to legal privilege, or confidential to the Owner or the Rail Infrastructure Manager of the Private Infrastructure.

### **4. Confidentiality (Clause 25)**

Aurizon has proposed that a Rail Infrastructure Manager of the Private Infrastructure should sign a confidentiality agreement with Aurizon before they are appointed. This is further expanded under clause 25.4 and in the draft confidentiality agreement in schedule 7, which requires that confidentiality in force for 30 years after termination. Vale does not believe this is an error or inconsistency as the agreement already provides an obligation on the Owner to ensure their Rail Infrastructure Manager "must first undertake to keep the terms of this Agreement confidential." Therefore, Vale believes the drafting amendments in clause 25 and Schedule 7 should not be accepted.

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Vale accepts the requirement to execute a confidentiality agreement when it commences operation but does not understand the requirement for a 30 year enforcement post termination. This agreement is likely to

result in more information flowing from the Rail Infrastructure Manager of the Private Infrastructure to Aurizon than from Aurizon to the Rail Infrastructure Manager. Vale believes that Aurizon should be required to justify its requirements for a 30 year period it would require Aurizon to provide substantially more information on the concerns and specific areas that Aurizon is trying to address. The one paragraph in the issues paper does not provide enough information to make a decision on this proposal.

Standard practice is for the confidentiality obligations to remain during the agreement, and, if after, typically for only a short period. Vale believes the 30 year period after termination will provide significant and practical administration problems. Vale's concern is that this drafting will ultimately result in a significant barrier to entry for a new Rail Infrastructure Manager for the Private Infrastructure, which could potentially unfairly advantage Aurizon and reduce competition.

#### **5. Reciprocal rights of access to land in emergencies (Clause 27)**

The QCA's original intent of clause 27.5 appeared to be to allow a reciprocal right of access to either party's land to contain or prevent further impacts of an incident. Aurizon has now proposed to slightly modify this clause and make the access subject to the Interface Risk Management Plan and the Emergency Response Plan. Aurizon has not identified that there was a drafting error or inconsistency in the QCA's drafting but rather it proposes to change it. Vale believes these drafting changes should not be accepted as they were not provided as part of the original consultation process and do not represent a drafting error or inconsistency.

#### **6. Definition of "design"**

Aurizon has removed the words "which is to be built by or on behalf of the Owner", as they believe this creates confusion. Vale believes this change is acceptable as it does appear to address some unintended confusion around the drafting.

#### **7. Restrictions on Aurizon Network's ability to deal with connecting infrastructure (Clause 6)**

Aurizon has made changes to clause 6.5(b) which allows them to deal with the Connecting Infrastructure if at the same time it is dealing with the same party on the adjoining mainline. Aurizon has also included a new clause 6.6 which requires them to use best endeavours to procure an assignment of its obligations under this Agreement to the transferee under clause 6.5(b). Vale believes these issues are not correcting any drafting errors or inconsistency and should not be accepted.

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Vale believes clause 6.6 would create considerable risk and uncertainty for the Owner, whilst enabling Aurizon to deal freely with the Connecting Infrastructure as Aurizon is only required to use best endeavours to procure the assignment of the obligations under the agreement. Vale believes this should be

strengthened by a positive obligation on Aurizon to compel them to procure the assignment of obligations under the agreement when dealing with the Connecting Infrastructure to ensure certainty of access is maintained for the Owner.

#### **8. Provision of additional services (Clause 3)**

Aurizon have inserted a new clause 3.1(d) which provides for them to recover any other reasonable and prudent costs provided under this Agreement that is not already recovered via the access charge. Given the inclusive nature of clause 3.1(b) it is unclear to Vale what other costs Aurizon are proposing to recover here with this very broad requirement of other services. Vale therefore does not believe this is either a drafting error or inconsistency so recommend this additional drafting not be accepted.

#### **9. Time to review design provided by customer (Clause 6)**

Aurizon has inserted a new clause 6.2(b)(i) which allows them to advise the Owner they need more time to consider the Design submitted for approval. It is unclear to Vale, but it assumes the addition of clause 6.2(c) is provided to set out the process if the proposed clause 6.2(b)(i) is triggered, even though the proposed drafting refers to clause 6.2(b). Vale believes these proposed drafting changes are not either a drafting error or inconsistency and recommend the drafting is not accepted.

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Vale believes the proposed clause 6.2(c) has an incorrect reference to 6.2(b) when it should be 6.2(b)(i). If this is not the case then Vale is unclear what clause 6.2(c) proposes to do and believes that clause 6.2(b)(i) would need to be amended to ensure a new timeline is proposed at the time of requiring an extension. Vale believes it is important to maintain certainty regarding timelines on these activities to ensure an efficient and timely process.

#### **10. Provision of Train Services Plan (Clause 15)**

Aurizon has inserted a new definition for Train Services Plan and a new clause 15 and a draft Train Services Plan under schedule 4. Vale understands the desire for Aurizon to be able to receive information to allow them to plan maintenance in an efficient manner but these issues should have been raised during the consultation process. Vale also would question if this requirement really sits under the SRCA as it is likely the same information would be obtained via the various forecasting requirements under the access agreements that would need to be signed to gain access to the network. Vale believes the drafting relating to Trains Service Plans are not require to correct a drafting error or inconsistency and should not be accepted by the QCA.

For the completeness of this submission Vale provides further comments on Aurizon's proposed drafting amendments. Vale does not believe the SRCA is an appropriate

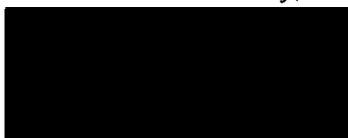
agreement for this information. During the development and construction there is likely to be discussion on the level of train activity to determine the appropriate scope for the Connecting Infrastructure and there are already processes in place to provide forecasts of usage on the network. These forecasts are currently used by Aurizon to plan the maintenance on the network so it is unclear why a more onerous obligation should be imposed on the Connecting Infrastructure.

## **Conclusion**

The development of the SRCA has been in progress for approximately 18 months and during this time there have been opportunities to provide comments and submissions on the final drafting. Vale, along with other interested stakeholders has been involved in this process that has resulted in the QCA providing a proposed agreement with detailed drafting to Aurizon as part of their final decision. Aurizon has chosen to propose further drafting to that provided in the final decision by the QCA. Vale believes modification of this agreement for minor drafting errors or inconsistencies may be required and acceptable but this process should not allow for the inclusion of new issues at this late stage. Vale believes these new issues should have been raised during the consultation process and are now inconsistent with the final agreement provided by the QCA and therefore should not be included. Vale requests the QCA to reject the proposed SRCA presented by Aurizon and require them to submit a new SRCA as per the proposed detailed drafted agreement in the QCA's final decision.

Vale would welcome the opportunity to discuss the details of this submission further with the QCA to clarify any of Vale's statements or positions. Please contact myself on (07) 3136 0911 for any further information.

Yours sincerely,



Bob Skuza  
General Manager Logistics  
Vale Australia Pty Ltd