



Submission to the Queensland Competition Authority

Alternate Access Agreement

Anglo American Metallurgical Coal Pty Ltd

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1. Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) welcomes the opportunity to make submissions to the Queensland Competition Authority (**QCA**) in respect of the Alternate Access Agreement submitted by QR Network Pty Ltd (**QR Network**). Those Alternate access agreements comprise of the:

- (a) End User Access Agreement (**EUAA**); and
- (b) Train Operations Agreement (**TOA**).

Anglo American submits that the QCA should reject both the EUAA and the TOA.

In summary, Anglo American makes the following submissions:

- (a) Anglo American supports the amendments to the EUAA and the TOA which have been proposed by the Queensland Resource Council (**QRC**);
- (b) There is insufficient clarity in the definition and concept of “Access Holder”, which is obviously a critical concept in terms of the Alternate Access Agreement;
- (c) A detailed review of each of the EUAA, the TOA and UT3 should be undertaken to ensure that every reference to “Access Holder”, “Access Seeker”, “End User” and “Customer” applies to the correct entity in circumstances where a coal producer has utilised the Alternate Access Agreement. Table 1 below sets out a number of examples where the definitions may not work appropriately;
- (d) Clause 5 contains an ability to unilaterally vary the Train Service Description which is inappropriate and amounts to a capacity resumption without the protections of the capacity resumption provisions and the clause should be removed in its entirety;
- (e) Clause 6 imposes obligations on End Users in respect of obstructions which involve liability for matters beyond the control of the End Users. This is an inappropriate allocation of risk and the relevant provisions should be removed from EUAA;
- (f) Clause 12.5 contains a force majeure provision which allows QR Network to force users to pay for the re-instatement of damaged rail infrastructure, without the protections of either the user funding regime or the requirement of the QCA to approve an increase in Reference Tariffs for a Review Event (which includes a force majeure). These provisions should be removed. Anglo American believes that there should be a positive obligation on QR Network to reinstate damaged rail infrastructure.

Words and phrases which are capitalised but not defined in this submission are a reference to the definition of that word or phrase as used in the EUAA and/or the TOA, unless the context otherwise requires.

2. Definition of Access Holder

The EUAA and TOA refer to the relevant coal producer as the "End User" and the relevant above-rail operator as to the "Operator" throughout the agreements.

Clause 1.1 of the EUAA defines "Access Holder" as having the meaning given in QR Network's Access Undertaking 2010 (**UT3**). UT3 defines "Access Holder" as "a person who holds Access Rights".

The key objective of the development of the Alternate Access Agreement was to allow coal producers to contract directly with QR Network for rights of access without bearing liability and obligations for above rail operational issues. This objective was designed to allow coal producers to have control over their individual access rights. It is critical to this objective that the coal producers are the "Access Holder" for the purposes of UT3. This has not been achieved under the current drafts of the EUAA and the TOA.

Clause 2.5 of the EUAA specifically provides that where there is any doubt as to whether a reference to the "Access Holder" under UT3 is a reference to the End User or the Operator then the following principles apply:

- (a) only 1, not both, of the End User and the Operator is the "Access Holder";
- (b) whether the End User or the Operator is the "Access Holder" will be determined based on which of those party's rights or obligations under the EUAA or the TOA are the most consistent with the relevant rights or obligations under UT3; and
- (c) if the above is not determinative, then the Operator is the Access Holder.

In light of the importance of the issue, there should be more clarity around the identity of the Access Holder. Clause 2.5 can not change the scope and meaning of UT3.

By way of contrast, the ARTC model (which QR Network says in its Explanatory Notes is similar to the model designed by QR Network) does not have any ambiguity in whether the coal producers are "Access Holders". If there are amendments which need to be made to UT3 to clarify whether a specific right or obligation should fall on the End User or the Operator then this should be done in preference to the approach adopted in clause 2.5 which leaves a degree of uncertainty.

A detailed review of the EUAA, the TOA and UT3 should be undertaken to ensure that every reference to “Access Holder”, “Access Seeker”, “End User” and “Customer” applies to the correct entity in circumstances where a coal producer has utilised the Alternate Access Agreement. The following table sets out some examples where the definitions may not precisely work in the context of a dual system of holding access rights. The table is not exhaustive.

Table 1: Definitional Issues

Clause	Issue
Clause 2.4(c)	This clause refers to “Access Holders” being responsible for the provision of Above Rail Services. Under the Alternate Access Agreement it is the Operator (as opposed to the coal producer who is the Access Holder) who is responsible for the provision of Above Rail Services.
Clause 6.1.2(a) to 6.1.2(c)	Clause 6.1.2(a) provides that QR Network will not differentiate Access Charges between Access Seekers. Access Charges are defined as the price paid by an Access Holder for Access under an Access Agreement. Under the Alternate Access Agreement, only part of the Access Charge appears in the Access Agreement (the take or pay provisions) and the remainder appear in the TOA. Therefore, the price paid by the Access Holder (the coal producer) under the Access Agreement does not reflect the full Access Charge.
Clause 6.1.2(d) – Rate reviews	Clause 6.1.2(d) provides that QR Network will give Access Seekers the opportunity to incorporate rate review provisions in Access Agreements. For the same reasons, this may not pick up those aspects of the Access Charge paid by the Operator under the TOA.
Clause 6.2.4 – Maximum Allowable Revenue	The Maximum Allowable Revenue is determined as the maximum amount of expected revenue including the Access revenue earned from Access Charges. For the same reasons, this may not pick up those aspects of the Access

	Charge paid by the Operator under the TOA.
Clause 6.4.2(i)(iii) – Establishment of Reference Tariffs	In respect of the establishment of Reference Tariffs for new Reference Train Services QR Network is obliged to advise Access Holders and Access Seekers, in respect of the Train Services to which the Reference Tariff applies, that the Reference Tariff has been approved. In circumstances where the Access Holder is the coal producer it may be preferable that QR Network advises Access Holders, Access Seekers and nominated Operators that the Reference Tariff has been approved.
Clause 6.5.4 – Access Conditions	This clause refers to “Customers” throughout but not in all places where it might be necessary. For example, clause 6.5.4(c)(i) to (iii) refers to “Access Seekers and Customers” but the opening words of clause 6.5.4(c) only refers to Access Seekers. Clause 6.5.4(f)(ii) refers to QR Network establishing that the Access Condition is not reasonably mitigated by an Access Agreement which permits QR Network to charge Access Charges. Access Charges is defined by reference to the Access Agreement with the Access Holder but part of the Access Charge is in the TOA.
Clause 8.1.1 – Interface Responsibilities	Clause 8.1.1(b) provides that QR Network and the Access Seeker or Access Holder will participate in the Interface Risk Management Process. This is an above rail issue and the obligation should be on the Operator to participate in this process.
Clause 8.1.3 – Interface Risk Management Plan	Similarly, clause 8.1.3 imposes an obligation on the Access Seeker or Access Holder to jointly develop with QR Network the IRMP. This is an above rail issue and the obligation should be on the Operator.
Clause 8.1.4 – Operating Plan	Clause 8.1.4 imposes an obligation on the Access Seeker or Access Holder to submit a draft Operating Plan to QR

	Network. This is an above rail issue and the obligation should be on the Operator.
8.1.6 – Rollingstock Authorisation	Clause 8.1.6 imposes an obligation on the Access Seeker or Access Holder to demonstrate that the Rollingstock has been designed, constructed or modified to comply with QR Network standards. This is an above rail issue and the obligation should be on the Operator.
8.2 – Environmental Risk Management Process	Clause 8.2 imposes various obligations on the Access Seeker or Access Holder in respect of the Environmental Risk Management Process. This is an above rail issue and the obligation should be on the Operator.
Clause 10 – Dispute Resolution Process	The clause should allow for the Operator to be a party and involved in disputes.

Anglo American is strongly of the view that this detailed analysis should be undertaken.

However, as an infinitely inferior solution, at the very least, clause 2.5 should acknowledge that where an alternate Access Agreement is entered into the End User is the Access Holder for the purposes of any matter relating to the:

- (a) lodgement and negotiation of Access Applications;
- (b) establishment or management of a queue;
- (c) capacity resumptions; and
- (d) capacity relinquishment or transfers.

This last alternative could be achieved by making the following amendments to clause 2.5 of the EUAA:

Clause 2.5 of the EUAA – Interaction of rights

2.5 Interaction of rights

The Parties acknowledge and agree:

- (a) that to the extent that the Operator's rights under the Train Operations Agreement or QR Network's Access Undertaking in relation to the Access

Rights allocated to the Operator are inconsistent with the End User's rights in relation to those Access Rights under this Agreement or QR Network's Access Undertaking, the End User's rights and the exercise of those rights prevail to the extent of the inconsistency; and

- (b) that if there is any doubt as to whether a reference to the "Access Holder" under QR Network's Access Undertaking is a reference to the End User or the Operator, then the following principles will apply:
 - (i) only one, not both, of the End User and the Operator is the "Access Holder";
 - (ii) where an Access Agreement is entered into, the End User is the Access Holder for the purposes of any matter relating to the:
 - (A) lodgement and negotiation of Access Applications;
 - (B) establishment or management of a queue;
 - (C) capacity resumptions; and
 - (D) capacity relinquishments or transfers;
 - (iii) subject to clause 2.5(b)(ii), whether the End User or the Operator is the "Access Holder" will be determined based on which of those party's rights or obligations under this Agreement or the relevant Train Operations Agreement (as applicable) are the most consistent with the relevant rights or obligations under QR Network's Access Undertaking; and
 - (iv) if the application of Clause 2.5(b)(ii) and (iii) is not determinative of whether the End User or the Operator is the "Access Holder", then the Operator is the "Access Holder".

However, in Anglo American's view the alternative solution cannot deal with the uncertainty of meaning of the definitions.

3. Appointment of Operator

Clause 2.3 of the EUAA sets out the process in relation to the nomination by an End User of an Operator. Specifically, clause 2.3 provides for the following:

- (a) the End User may nominate an Operator, provided it is not in material breach of any of its obligations under the EUAA; and
- (b) QR Network is not obliged to accept, or act on, any nomination of an Operator by the End User if that Operator is in material breach of any of its obligations under an existing TOA and unless QR Network is satisfied that the Operator is financially sound and capable of performing the obligations of an Operator.

It is critical to the operation of UT3 that End Users are completely free to choose the above rail haulage provider of their choice. The fundamental purpose of UT3 is to allow for competition between above rail service providers. Therefore, any contractual restrictions in the EUAA and the TOA which may limit the right of End Users to choose, or use, their preferred above rail service provider, is fundamentally inconsistent with the regulatory regime.

Both clause 2.3(b) and 2.3(c) allow for QR Network to fail to act upon a nomination of an above rail service provider if QR Network is of the view that either the End User or the Operator is in material breach of an existing agreement with QR Network. There may be circumstances where QR Network believes that an End User or an Operator is in material breach of an existing agreement such as disputes by the End User and/or the Operator. In these circumstances QR Network should not be able to refuse to act upon the nomination. There may be other circumstances, for example where QR Network is not reasonably satisfied that an Operator is capable of performing the obligations of an Operator safely, that may justify QR Network in refusing to act on a nomination.

Therefore, Anglo American suggests that clauses 2.3(b) and (c) be amended as follows:

- (a) Both subsections should provide that where an End User or an Operator, as relevant, disputes the question of whether they are in breach of any current agreement with QR Network then QR Network must accept the nomination, and act on the nomination, pending the resolution of the dispute. Such an amendment would not require QR Network to accept, and act on, a nomination where QR Network is satisfied that the nominated Operator cannot perform the obligations of the TOA; and
- (b) Clause 2.3(c) should provide that where QR Network can refuse to act on the nomination because the Operator is not financially sound or not capable of performing the obligations of the TOA, that they must do so only in circumstances where they are "acting reasonably".

4. Performance Levels

Clause 5 provides that if an Operator does not comply in any material respect with the Train Service Description under a TOA and has failed to demonstrate to the reasonable satisfaction of QR Network that the Operator will consistently comply with the Train Service Description under a TOA then QR Network is entitled to:

- (a) vary the Train Service Description to a level it reasonably expects to be achievable for the remainder of the Term; or

- (b) vary the EUAA to reflect the impact of the change in the Train Service Description.

This provision allows QR Network to unilaterally vary the Train Service Description. An ability to unilaterally vary the Train Service Description is completely unacceptable. Such a variation may significantly alter the rights and obligations of the coal producer and must only be done with the agreement of the End User. The ability to unilaterally vary the Train Service Description is inconsistent with the key objective of the development of the alternate Access Agreements (that coal producers will obtain control over their access rights) and is not necessary to protect any legitimate interest of QR Network.

Of particular concern is the fact that the clause may operate as an alternative form of capacity resumption, without the protections contained in clause 7.3.5 of UT3. This may occur because the Train Service Description is set out in Part 1 of Schedule 1 of the TOA and includes, importantly, the Train Service Levels set out in section 1.3.

The Train Service Levels are set out in Part 1 of Schedule 1 of the EUAA and the TOA as follows:

Train Service Levels

Service Levels	No. of Train Services
Nominated Weekly Train Services ¹	
Nominated Monthly Train Services (31 days) ¹	
Nominated Monthly Train Services (30 days) ¹	
Nominated Monthly Train Services (29 days) ¹	
Nominated Monthly Train Services (28 days) ¹	
Nominated Annual Train Services ¹	

NB: A Train Service is a One Way Train Service.

Therefore, clause 5 would allow QR Network to unilaterally reduce the number of train services. In essence, this is a capacity resumption mechanism without the protections of contained in clause 7.3.5 of UT3.

Whilst there is a similar clause in the current QR Network Access Agreement Coal, Anglo American is of the view that it should not be included in the EUAA or the TOA, as a power of unilateral variation is inappropriate and it is inconsistent with the fundamental objective of the Alternate Access Agreement, which is to allow coal producers more ability to control their own access rights. Other access arrangements, such as the ARTC model, do not contain an equivalent provision and there is no justification for the clause. Under the ARTC

model, the most similar provision provides that if a 3 month comparison of the Scheduled Train Paths shows that there is a material difference, the parties will negotiate in good faith to amend the Scheduled Train Path.

There is no legitimate interest of QR Network which requires clause 5 to be included in the EUAA or the TOA. In the majority of cases QR Network has 100% take or pay contracts and any under-utilisation of Train Services does not impact upon QR Network. To the extent that the under-utilisation of Train Services triggers an ability for QR Network to resume capacity under clause 7.3.5 of UT3, then that is the appropriate method of dealing with the under-utilisation.

The clause should be removed in its entirety.

5. Management of Infrastructure

Clause 6 of the EUAA provides that the End User must:

- (a) notify QR Network of any damage to or disrepair or failure in operation or function of any part of the network of which the End User becomes aware (clause 6(a));
- (b) not cause any obstruction or permit to continue any obstruction caused by the End User (clause 6(b)(i)); and
- (c) notify QR Network as soon as practicable after the End User's Staff discover or become aware of any obstruction (clause 6(b)(ii)).

The consequences for a breach of this clause are serious and clause 14.1(b) of the EUAA specifically provides that any material breach of clause 6 which is not rectified within 30 days can result in termination of the EUAA (and, as a consequence, the TOA).

5.1 Inappropriate allocation of risk

Anglo American agrees with QR Network that one of the guiding principles to be applied in determining the appropriate scope of the EUAA and the TOA is that the agreements should allocate functions and responsibilities to the most appropriate party (see page 6 of the Explanatory Notes).

Clause 6 deals with above rail operational issues which are within the control of the Operator and not the End User. Therefore, clause 6 is most appropriately dealt with within the TOA and not the EUAA.

This is particularly so in light of the fact that the consequences for breach are serious. Even if QR Network issues a rectification notice to an End User as envisaged by clause 14.1(b) the End User may not be in a position to rectify the obstruction if the obstruction is caused (either in whole or part) by the Operator.

There is no equivalent in the ARTC model.

As clauses 6 and clause 14.1(b) relate to above rail operational issues they should be removed from the EUAA.

5.2 Liability for matters within the Operator's knowledge

Clause 6(b)(ii) of the EUAA states that the End User must notify QR Network as soon as practicable after the End User's Staff discover or become aware of any obstruction. The phrase "End User's Staff" is defined to mean "employees, contractors, volunteers and agents of the End User". This would include any Operator nominated by the End User (as the Operator would be a contractor of the End User).

An End User cannot be subject to obligation to notify QR Network of a matter within the knowledge of the Operator and to suffer the potential consequence of termination of the EUAA if the End User breaches clause 6(b)(ii) for a failure to notify when the Operator has not informed the End User of the obstruction. This matter is best dealt within under the TOA and not the EUAA.

5.3 Anglo American proposed approach

As stated above, Anglo American believes that as clauses 6 and clause 14.1(b) relate to above rail operational issues they should be removed from the EUAA in their entirety.

At the very least the clauses should be amended to ensure that the EUAA cannot be terminated for a breach that is not caused by the End User. Specifically, clause 14.1(b) should be limited to a breach of clause 14.1(b)(i) (where an obstruction has been caused by the End User) and should only apply when the obstruction is caused solely by the End User. If an obstruction is caused (in whole or part) by the Operator then this issue must be dealt with in the TOA.

This could be achieved by making the following amendments to clause 14.1(b) of the EUAA:

Clause 14.1(b) of the EUAA – Termination by QR Network

14.1 Termination by QR Network

Without limiting any rights of termination contained elsewhere in this Agreement or otherwise existing at Law, QR Network may, by notice in writing to the End User, immediately terminate this Agreement upon the occurrence of any one or more of the following events or circumstances:

...

- (b) the End User fails to comply in any material respect with its obligations under Clause 6(b)(i), where the obstruction is caused solely by the Access Holder, and such default continues for, or the End User has failed to take reasonable action to prevent recurrence of the default within, thirty (30) days after notice from QR Network to the End User of the default;

6. Force Majeure

Clause 12.5 provides for the termination of the EUAA for loss or damage to the network where:

- (a) the network has been damaged or destroyed by a Force Majeure Event;
- (b) in QR Network's reasonable opinion the cost of repairing such damage or replacing that part of the network is not economic on the basis of the current and future utilisation; and
- (c) QR Network has notified the users of the estimated cost of effecting the necessary repairs or replacement and QR Network's intention not to repair or replace the relevant part of the network and the End User does not bear the entirety of the costs of the repair or replacement.

Anglo American believes that this clause is fundamentally flawed and that there should, in fact, be an obligation on QR Network to re-instate any damaged rail infrastructure.

As drafted by QR Network, this clause is in effect a forced user funding model in respect of repairs and replacement capital expenditure. It is inconsistent with the Investment Framework, which requires that QR Network fund any capital replacement. It may be argued that QR Network already has the ability to require the users to pay for damaged network as Schedule F allows QR Network to seek to vary the Reference Tariff if a Review Event occurs and a Review Event is defined to include a Force Majeure Event where the costs are greater than \$1 million. In circumstances where QR Network has self-insurance

(paid for by the users) the \$1 million threshold is too low. In any event, this mechanism has the protection that the QCA must approve the increase in the Reference Tariff (including whether the costs are prudent etc).

The test of whether a repair or replacement is “economic” is extremely subjective and QR Network is likely to take a significantly different view to coal producers as to what repairs and replacements are economic in its opinion.

For the purposes of illustration, Anglo American has considered the operation of the clause in the scenario of rail infrastructure which has been washed away by a flood. It is understood that the QCA does not remove from the RAB the value of any washed away infrastructure, but allows it to remain in the RAB and a return is continued to be earned by QR Network on that infrastructure. In this situation, this clause could give rise to the situation where:

- (a) there has been a wash-away of rail infrastructure as a result of a flood;
- (b) QR Network takes the subjective view that its replacement is uneconomic;
- (c) the coal producers continue to pay for the washed-away infrastructure through the Reference Tariffs which will include a return on the value of the washed-away infrastructure; and
- (d) the coal producers are forced to pay for the replacement infrastructure under clause 12.5 of the EUAA to ensure continuity of services, in circumstances where they do not have the protections of either the User Funding regime or the requirement that the QCA must approve the increase in the Reference Tariffs.

QR Network has insurance which covers damaged infrastructure and should not be allowed to avoid its obligations under Access Agreements because it refuses to replace infrastructure which is still being used.

7. Other Commercial Issues

Anglo American agrees with the submissions put forward to the QRC in respect of the range of commercial issues which arise in the EUAA and TOA. The following table sets out those issues with which Anglo American strongly agrees and, where relevant, adds further comments.

Clause	Issue	Anglo American Comments
2.3(b), (c) and (d)	Appointment of Operator	This provision should be amended to ensure that QR Network cannot unreasonably delay responding to the nomination of an Operator and executing the TOA. Anglo American also believes it is not necessary to have a minimum appointment of 3 months for an Operator nor that appointments should comprise of whole months.
2.3(e), (f),(g) and (h)	Withdrawal or Variation to Appointment of Operator	<p>The EUAA should be amended to require QR Network to vary the TOA with the Operator to reflect any variation or withdrawal of the Operator's appointment by the End User.</p> <p>The EUAA should also be amended so that where the calculation of Adjustment Charges requires reimbursement by QR Network to the Operator, QR Network is obliged to pay such Access Charges to the End User where applicable.</p>
2.4	Renewal of Term	The EUAA should be amended to ensure the End User has rights in respect of the Nominated Network at the expiry of the term of the EUAA.
3	Payment	The definition of "QR Network Cause" should be amended to include a breach of the TOA by QR Network.
3.4, 3.5 and 3.6	Security provided by End User	<p>The EUAA should be amended to reduce the amount of security to 12 weeks of Access Charges, rather than 24 weeks.</p> <p>The EUAA should contain a provision requiring QR Network to not unreasonably withhold or delay its approval to the security provided by the Operator.</p>
4.1 and 4.5	Reduction of Access Rights	A separate obligation which requires QR to vary the TOA with the Operator to reflect any resumption of Access Rights should be included in the EUAA.
4.4	Forecasts	The forecasting obligations should be amended so that they are no more burdensome than those contained in the Access Agreement Coal and do not require both the Operator and the End User to provide the same forecast.
7	Insurance	The requirement of the End User to hold public liability insurance and carrier liability insurance should be removed from the EUAA.
8	Indemnities and Liabilities	The requirement of the End User to indemnify the Operator or QR Network for claims that result from conduct outside of the End User's control should be removed from the EUAA.
3.7 and 9	Limitation of Liability	<p>The limitation of liability provisions should be amended to provide for consequential loss as per the Access Agreement Coal and should provide for the same exclusion for limitation on liability for damages/loss of freight as the TOA.</p> <p>This provision should be amended to clarify that the limitation on liability where a QR Network Train Control Direction is issued will only apply where QR Network has complied with the relevant clause of the TOA.</p> <p>Clause 9.5(d) should be amended to clarify that the exclusion of</p>

		liability where an audit is conducted under the TOA only applies where QR Network has complied with clause 13 of the TOA.
10	Material Change	The EUAA should be amended to ensure it only applies to a change in the financial position of QR Network under the TOA, to the extent that change is relevant to the End User's Access Rights.
12	Force Majeure	The EUAA should be amended to ensure the End User is consulted and/or required to give consent to termination of the TOA for a Force Majeure Event.
13	Suspension	<p>The EUAA should be amended to require that any notice of suspension served on the Operator is simultaneously served on the End User and should also provide the End User with a right to "step-in" to remedy the default of the Operator where possible.</p> <p>This EUAA should be amended to require that the suspension of an End User is to be lifted if the End User has remedied its default and should also be amended to make QR Network liable to the End User for wrongful suspension.</p>
14	Termination	<p>The EUAA should contain a provision for a cure period in respect of each default or an extension to any existing cure period.</p> <p>QR Network's right to terminate if the End User is "in default of the due performance of any other obligation" should be amended to "any other <i>material</i> obligation".</p>
15	Assignment	This provision should be amended to specify the form of evidence required to be provided by the End User.
16	Relationship with TOA	<p>The EUAA should be amended to clarify that the End User is only required to comply with the dispute resolution provisions of the TOA where the matter is relevant to the End User or where the End User has been joined as a party.</p> <p>This provision should be amended to provide protection against Access Rights of the End User being modified without the End User's consent.</p>

Anglo American appreciates the opportunity to put a submission to the QCA.