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## Submission 1 on Queensland Rail's 2013 Draft Access Undertaking

### 1. Introduction

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Xstrata Queensland Limited (**Xstrata**) is providing this submission in respect of the Xstrata Copper and Xstrata Zinc operations which currently utilise access to the Queensland Rail (**QR**) rail network from Xstrata's Mount Isa and Ernest Henry operations to the port of Townsville.

The efficient, certain and reasonably priced provision of access to those parts of QR's network remains a critical part of ensuring that long term investments that Xstrata has made, and continues to make, in copper, zinc, magnetite and lead operations remain economic.

Accordingly Xstrata previously:

- participated in the consultation processes undertaken by QR; and
- made submissions to the Queensland Competition Authority (**QCA**) regarding consideration of Queensland Rail's, now withdrawn, 2012 draft access undertaking (the **2012 DAU**).

Xstrata appreciates QR and the QCA now engaging with Xstrata in respect of the draft access undertaking that has ultimately been submitted by QR (the **2013 DAU**).

Xstrata previously made submissions that the QCA should refuse to approve the 2012 DAU. While Xstrata acknowledges that the 2013 DAU has been improved from the 2012 DAU in some respects, many of the detrimental aspects have not been altered and the 2013 DAU should still be recognised as stripping access seekers and access holders of protections they have under QR's current access undertaking.

Recent experiences, both in terms of operation of the Mount Isa line and negotiation of access rights, have only heightened Xstrata's concerns about how access to QR's network is regulated now and in the future.

Xstrata considers the QCA should refuse to approve the 2013 DAU.

### 2. Scope of this Submission

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Xstrata notes that the QCA is hosting workshops on 5 issues (above rail operational issues, Western System pricing, the proposed standard access agreement, Mount Isa pricing and investment framework matters) and has provided an extension for submissions on those matters until 3 May 2013.

Xstrata has concerns regarding the 2013 DAU in relation to a number of those matters and will be putting in a further submission on those topics (such that this submission will need to be read in conjunction with that subsequent submission to gain a full appreciation of Xstrata's concerns in respect of the 2013 DAU). Xstrata particularly notes that as the Schedule C principles reflect the same issues as the proposed standard access agreement, it intends to raise issues regarding both items in the next submission.

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### 3. Executive Summary

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Within the scope of the issues covered by this submission Xstrata has the following substantial concerns with the 2013 DAU:

- the Mount Isa network and Xstrata's bulk minerals services are being stripped of a number of the protections that they have under the existing access undertaking;
- the negotiation framework in the 2013 DAU remains insufficiently robust to protect access seekers from abuse of QR's monopoly position, particularly in relation to:
  - protections for renewals of existing access rights;
  - limiting the access conditions which can be sought to those which are reasonably required to mitigate the risks of the provision of access; and
  - the terms imposed in respect of connections to the network; and
- there is a lack of transparency (during access negotiations, reporting, no transparent planning regime, and through inappropriate limits on the proposed information production and audit powers of the QCA);
- inadequate protections in respect of changes to the network covered by the undertaking; and
- other detrimental changes, including to the network management principles and definition of Queensland Rail Cause.

Details of these and other issues are set out in sections 4 to 7 of this submission.

### 4. Appropriate regulation of a varied network

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Much of QR's resistance to the protections which Xstrata previously proposed in submissions to the 2012 DAU appears to be based on two premises:

- that QR competes with non-rail transport and is therefore not in a position to abuse monopoly power (such that only very 'light handed' regulation is required); and
- that QR's network services a substantial variety of train services (some of which would not be commercially viable without government support) and that the level of prescription therefore needs to be much less than would occur in a largely single commodity network.

In respect of the Mount Isa line, Xstrata fundamentally disagrees with QR's statements in its submission (and the preamble to the 2013 DAU) that non-rail transport is competitive. For the type of bulk minerals train services primarily operated for Xstrata, there is no other mode of transport that can effectively be cost competitive with rail transport, placing QR in an effectively monopolistic position (at least in respect of Xstrata's services).

On the other hand, clearly it is true that QR's network has varied traffic (some of which other transport modes might be competitive for and some of which might require government support). However, that does not mean that it is appropriate for all access seekers and access holders to receive 'lowest common denominator' treatment.

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Where there are a few parts of the QR network or particular train services which have substantially different characteristics (i.e. Western system coal traffics and bulk mineral services on the Mt Isa line being the most evident examples), Xstrata considers it is clearly appropriate to treat them differently.

Consequently, where the QCA has any concerns about positions Xstrata is proposing applying to QR's network generally, Xstrata would request the QCA consider adopting them for a particular customer type or particular sections of the network.

## **5. Regime must be as robust as it would be for private ownership**

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Some comfort that QR may not engage in monopolistic behaviour could arguably be taken from QR's position as a government owned business. However, it is clear from recent announcements of the State that privatisation of State assets is being considered. As a profitable part of QR's network, privatisation of the Mount Isa line is possible (and the 2013 DAU would not impose any restrictions on a change in ownership). Accordingly, the 2013 DAU should not be approved in a less robust manner on the assumption of continuing government ownership.

## **6. Negotiation framework**

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### **6.1 Information to be provided during negotiations**

Xstrata is concerned that QR provides insufficient information to access seekers (for non-reference services) in access negotiations in terms of costs and pricing. That has been Xstrata's experience in current (and to a lesser degree previous) access negotiations.

Xstrata is particularly frustrated with the complete lack of transparency provided in access negotiations regarding:

- the rate of return being sought; and
- the costs involved in providing the access services.

Rectifying this asymmetry of information is an important part of making a negotiate-arbitrate model effective (as otherwise it may often not be evident to an access seeker whether the terms they are being offered are unreasonable and warrant commencing an arbitration process). Xstrata objects to such non-disclosure being justified on the basis that pricing is 'market based' rather than 'cost based' (as noted in section 5.2 of QR's submission) – when (as noted above) on the Mount Isa line QR is effectively the only supplier such that it is the entity setting the 'market price'.

Xstrata notes that section 101 of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) imposes certain disclosure obligations on QR (as the provider of a declared service) and that the disclosures required pursuant to clause 2.6.2(a)(v) of 2013 DAU fall well short of those requirements. As the disclosure requirements in s 101 of the QCA Act are subject to any approved access undertaking, Xstrata considers it is critical that it is put beyond doubt that clause 2.6.2 does not restrict the pricing and cost information that QR is required to disclose to access seekers.

Xstrata submits the 2013 DAU should not be approved without clause 2.6.2, being amended to either:

- expressly reflect the requirements of s 101 of the QCA Act (at least in respect of disclosure of information about pricing, costs and the value of the relevant assets); or
- make it clear that the disclosure requirements in clause 2.6.2 are in addition to those pursuant to s 101 of the QCA Act.

## 6.2 Connection Agreements

New mine or port developments will often require a connection agreement to connect private infrastructure to the existing network in order to make use of the access rights sought.

Xstrata considers that clause 2.6.2(b) (which merely envisages negotiation of connection occurring in parallel with negotiation of access) is not sufficiently robust to prevent the connection agreement being an impediment to gaining access on reasonable terms. This concern is what led to the inclusion of robust provisions regarding connection in Aurizon Network's access undertaking which applies to the central Queensland coal region rail network (the **Aurizon Undertaking**).

Xstrata is particularly concerned about:

- QR seeking to use connection agreements as a way of gaining additional access revenue (which is likely to be subject to less regulatory scrutiny than access charges); and
- QR requiring that connecting infrastructure and private infrastructure be of a standard in excess of that part of the QR network to which it is proposed to be connected.

Clause 8.3 of the Aurizon Undertaking and the QCA's recently released final decision on the Standard Rail Connection Agreement to apply under the Aurizon Undertaking provide good precedents for the sorts of protections that are necessary for both access seekers and the network owner.

Xstrata considers that it would also be appropriate to include in the 2013 DAU a right for the QCA to require development of a Standard Rail Connection Agreement for the purposes of connection to QR's network if it considered it appropriate for that to occur (such that if the principles provided ultimately prove not to be sufficiently robust the QCA would not need to wait under the next access undertaking before providing more protections for access seekers/holders seeking connection).

Xstrata submits the 2013 DAU should not be approved without the following:

- incorporating a clear right to connect private infrastructure to the network if certain minimum preconditions are met (similar to those provided for in the Aurizon Undertaking and Standard Rail Connection Agreement);
- obligations on QR to facilitate connection in a timely manner where those minimum preconditions for connection are met;

- obligations on QR to provide appropriate interface arrangements with any different rail infrastructure manager on the private infrastructure where those minimum preconditions for connection are met;
- controls on the costs that can be recovered / the price that can be charged by Queensland Rail in respect of connection to the network (equivalent to those in the Aurizon Undertaking Standard Rail Connection Agreement);
- a clear right to bring disputes about connection agreements to the QCA for arbitration; and
- a right for the QCA to seek to require development of a Standard Rail Connection Agreement during the term of QR's access undertaking.

### 6.3 Renewal rights

The protections for continuation of existing access rights provided in clause 2.7.3 of the 2013 DAU are only available where there is an applicable reference tariff for the relevant train services. Consequently, no such protections are available other than to a few coal customers on the Western System.

Other major users of the network have made substantial investments in facilities which are dependent on long term access (beyond the typical 10 year term of an access agreement). In Xstrata's case this includes investments in mines, refineries, smelters and port facilities.

Upon negotiation for renewal of access agreements is when an entity having made such upstream or downstream investment is most exposed to the monopoly power of the network owner (as the investment is a sunk cost and non-renewal is generally not a realistic option). Consequently, it is appropriate to provide users who have made major investments of this type (and are high volume, high value customers of QR) protections in seeking to extend their access rights.

The current position on renewal does not appropriately reflect:

- Xstrata's past contributions to the Mount Isa line; or
- the significance of Xstrata's utilisation of the line (in terms of providing a large volume of business to QR and the resulting economies of scale which benefit other users of the line) and the critical nature of ongoing secure access for Xstrata's business.

In addition the renewal rights that are provided for in clause 2.7.3 of the 2013 DAU remain flawed as:

- to obtain a renewal, an existing access holder can be required to apply (with only 20 Business Days notice) for new access at any time during the term of their access agreement. For example, on the first day of a 10 year access agreement, an Access Holder can be required to make a decision about whether to apply for access rights for up to another 10 years beyond its existing term (clause 2.7.3(d)); and
- it does not provide a right of renewal on the existing terms of the access holder's access agreement and expressly rejects QR being required to agree to entry into

such an agreement (clause 2.7.3(e)), making it possible that a failure to reach agreement on an extension prior to the time periods noted in clause 2.7.3 and the resulting potential inability to extend access rights, can arise from QR requesting onerous terms for an extension rather than the access holder failing to promptly seek an extended term (i.e. it incentivises QR to seek a bidding war between an existing access holder and a new applicant – such that the renewal rights provides very limited actual benefits over the 'most favourable' to QR test proposed as the nom under clause 2.7.2(a)-(b)).

Xstrata acknowledges that there should be some period prior to expiry of the term of an Access Agreement before which the Access Holder needs to apply for a renewal if they want to exercise renewal rights so that QR has an opportunity to contract the capacity to a third party to the extent the renewal right is not going to be exercised by the existing Access Holder. That period should be set having regard to the likely timing for contracting the capacity to an alternative access seeker (or constructing an expansion in the event of the existing Access Holder seeking to exercise its renewal rights). Xstrata considers an appropriate period is 2 years prior to expiry of an existing Access Agreement (being the time frame the QCA has previously considered appropriate for the same reasons in a similar context in the Aurizon Undertaking – see clause 7.4(d) Aurizon Undertaking).

Provided the period is set reasonably it seems unlikely that new access seekers would apply for access prior to that time in any case.

If improved renewal rights are not provided for existing access holders who have invested substantial capital in long term investments dependent on long term access, it will have a chilling impact on future investment of that nature (which seems contrary to the public interest and promotion of competition in upstream and downstream markets).

Xstrata submits the 2013 DAU should not be approved without the renewal regime being amended to reflect the following:

- renewal rights being available to (at a minimum) other bulk minerals producers (or their nominated haulage operators) in addition to reference tariff services (both a **Renewal Service**);
- up until 2 years prior to expiry of an Access Agreement for a Renewal Service QR should not be able to contract capacity which would only become available if the Renewal Service was not renewed; and
- an Access Holder should have a right (if they applied prior to the date 2 years prior to expiry of the existing Access Agreement) to renew for a further term on the terms of the existing Access Agreement other than price – with price to be determined by any applicable reference tariff, or agreement or, in the absence of a tariff and failing agreement, by QCA arbitration.

(It would of course remain open to QR and a renewal Access Holder to negotiate different terms, but existing Access Holders should have an enforceable right to a particular set of terms).

#### 6.4 Access Conditions

There are no restrictions in the 2013 DAU on the circumstances in which QR can request access conditions or the extent of access conditions which it can require.

Xstrata requests that the QCA require QR to incorporate similar protections to those that exist in the Aurizon Undertaking (or at least QR's existing undertaking), particularly the general principle in clause 6.5.2 of the Aurizon Undertaking that access conditions can only be imposed to the extent reasonably required in order to mitigate exposure to the financial risks associated with providing access to the access seeker's proposed train service(s). Any access conditions which do not meet criteria of that nature are an exercise of monopoly power that any approved undertaking should be designed to prevent.

Without such a protection, it would be open to QR to undermine the terms of access the undertaking appears to provide, by requiring access conditions such as:

- additional fees which bear no relationship to the costs or risks involved in provision of access and that raise the total cost of access above the limits on access charges provided in Part 3 of the 2013 DAU; or
- agreements not to raise access disputes with the QCA.

In theory the appropriateness of access conditions could be left to be resolved by the QCA arbitrating access disputes, but a guiding principle regarding the types of access conditions which would be appropriate would be useful in both preventing such disputes and in guiding the outcome of any such arbitration before the QCA.

Finally, Xstrata notes the user funding and rebate provisions which overlap to a degree with access conditions, but notes it is possible for access conditions to be imposed in a manner that would not be covered by those clauses (i.e. where upfront payments are required without being recognised as a contribution to a particular extension).

Xstrata submits that the 2013 DAU should not be approved without being amended to include the restrictions on access conditions in at least QR's existing access undertaking (if not the comprehensive regime in the Aurizon Undertaking), including at least:

- a prohibition on seeking access conditions that are not reasonably required in order to mitigate QR's exposure to the financial risks associated with providing access for the access seeker's proposed train services (including the clear circumstances in which such access conditions are not reasonable); and
- a rebate regime where subsequent access holders gain the benefit of infrastructure enhancements underwritten by an access condition imposed on a previous access holder.

#### 6.5 Payment of negotiating costs

Xstrata considers that it is not reasonable for Queensland Rail to always have a right to recover its costs of negotiations with an Access Seeker whenever it gives a Negotiation Cessation Notice (which 2.6.3(c) of the 2013 DAU currently provides). This right should be restricted to where the access application is frivolous or the Access Seeker has no genuine intention of obtaining the Access Rights requested. The costs of unsuccessful negotiations

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in other circumstances is part of the ordinary course of business of a multi-user railway which Queensland Rail should consider in setting prices (and the QCA should take into account in approving any reference tariffs). Access Seekers already bear their own costs of negotiation and consequently are economically incentivised not to make unnecessary access applications.

Xstrata submits that the 2013 DAU should not be approved without clause 2.6.3(c) of the 2013 DAU being amended such that an access seeker is only required to pay QR's costs of negotiations where a negotiation cessation notice is given on the basis of the access application being frivolous or the access seeker having no genuine intention of obtaining the Access Rights requested.

## **7. Other detrimental issues**

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### **7.1 Line diagrams**

Xstrata is concerned that clause 1.2.3 of the 2013 DAU creates the potential for QR to unilaterally remove parts of its rail from the 'Network' which would be the subject of the undertaking. There are no protections which prevent QR from removing parts of the rail network which are currently in use and no dispute regime for inappropriate changes. Xstrata would encourage the QCA to consider the equivalent clause in the Aurizon Undertaking (3.8.1) which provides both such protections.

Xstrata submits the 2013 DAU should not be approved without clause 1.2.3 being amended to include:

- a restriction on removing rail transport infrastructure from the rail diagrams which is utilised for contracted access rights; and;
- a right for access seekers/holders to dispute whether rail transport infrastructure should have been removed from the rail diagrams.

### **7.2 Reporting and system master planning**

Xstrata notes its support for the proposed separate reporting for the Mt Isa Reporting Area. However, those reports should extend to cover greater information about:

- operational constraints and major sources of cancellations in that part of the network;
- the plans to resolve those operational constraints and causes of cancellations; and
- the progress being made on those rectification plans compared to proposed timing.

Such information would be more likely to highlight the underlying causes of any issues being experienced (and thereby guide more effective responses from QR and other stakeholders) compared to the proposed content for reports (which really reflect the symptoms not the cause).

In addition, Xstrata has long had concerns about the condition of the Mount Isa network and inadequate maintenance (with a complete lack of transparency regarding what maintenance activities are actually being conducted and whether they are appropriate to



ensuring that the network can meet the contracted train services). Xstrata suggests that it would be appropriate for an independent condition based assessment of the rail infrastructure to be undertaken (at least of the profitable and high volume parts of the network) similar in nature to the obligations imposed in clause 5 Schedule A Aurizon Undertaking, with rail infrastructure found to be in an inappropriate condition for the relevant contracted train services being required to be rectified by QR.

A more robust and transparent system master planning regime would also provide more warning to access holder of capacity and operational constraints, possible options to rectify performance of the line and cost and lead time estimates. This sort of planning should already be occurring internally within QR in any case, such that making this more transparent to access holders should not be a major burden.

Xstrata submits the 2013 DAU should not be approved without being amended so that:

- the quarterly reports cover more information about current operational constraints and major sources of cancellations, the plans to resolve those constraints and sources of cancellations, and the progress being made on those rectification plans compared to proposed timing;
- there is an independent condition based assessment of the rail infrastructure undertaken (at least of the profitable and high volume parts of the network) with rail infrastructure found to be in an inappropriate condition for the relevant contracted train services being required to be rectified; and
- there is a system master planning regime for each reporting area.

### 7.3 Queensland Rail Cause

Xstrata is concerned with widening of the definition of Queensland Rail Cause arising from the addition of 'or any other person'. That exclusion means that where the non-provision of access is 'in any way' (i.e. irrespective of how minor the contribution) attributable to 'any other person' access holders will have to pay take or pay components of access charges. This effectively imposes nearly the entire risk of non-provision of access upon access holders, and removes important economic incentives for QR to ensure access is being provided as contracted.

Xstrata submits the 2013 DAU should not be approved without the reference to 'or any person' in the definition of Queensland Rail Cause being deleted.

### 7.4 Amendment to Network Management Principles

The 2013 DAU contains modifications to the Network Management Principles (Schedule B) which provide for a number of variations which are clearly detrimental to access holders. For example:

- the master train plan would be able to be varied without consultation to accommodate operational constraints (whereas previously if the variation would have resulted in a scheduled train service not being met it required consultation with the relevant access holder and to the extent the modification was not within

the scope of the access holder's train service entitlement, agreement with that access holder); and

- the daily train plan would be able to be varied from the master train plan in ways that would result in an access holder's scheduled train services not being met subject only to consultation (whereas previously, if the modification was not within the scope of the access holder's train service entitlement, agreement with that access holder was required).

Xstrata appreciates those changes will provide greater flexibility to QR, but considers it inappropriate for QR to have such wide discretion to not provide contracted access rights due to operational constraints (when QR is refusing to accept anything like a higher maintenance standard or more transparency over its maintenance activities).

Xstrata submits the 2013 DAU should not be approved without the following changes to the Network Management Principles being reversed:

- inclusion of 1.1(g)(ii) and deletion of 1.1(h)(i)(C); and
- amendments to 1.2(f)(ii).

## 7.5 QCA Information requests and audit regime

It is critical to the effectiveness of a regulatory regime that the regulator has sufficient mandatory information production powers and audit powers to both assess compliance with the requirements of the undertaking and to determine how to exercise the powers the regulator has under the undertaking.

In that regard, clause 5.3.2(a) of the 2013 DAU is defective as the purpose for which the QCA can obtain documents is limited to information that 'the QCA reasonably requires for the purpose of complying with this Undertaking'. Clause 9.5 of the Aurizon Undertaking is a useful precedent the QCA should consider.

Xstrata submits the 2013 DAU should not be approved without clause 5.3.2(a) being amended as follows:

Subject to clause 5.3.2(b), the QCA may, by written notice, request Queensland Rail to provide information or a document that the QCA reasonably requires for the purpose of:

- (i) performing its obligations or functions in accordance ~~complying~~ with this Undertaking, the QCA Act, or an Access Agreement; or
- (ii) determining whether it should exercise powers in this Undertaking or the QCA Act, such as requiring the conduct of an audit or seeking to enforce a provision of this Undertaking.

Similarly the new audit regime in clause 5.3.3 solely relates to inaccuracies in the quarterly or annual reports. Clause 9.8 of the Aurizon Undertaking is a useful precedent the QCA should consider.

Xstrata submits the 2013 DAU should not be approved without clause 5.3.3(a) either being supplemented or replaced with an audit rights regarding whether any specific conduct or decisions of QR comply with the undertaking (similar to clause 9.8 of the Aurizon Undertaking).

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## 7.6 Lack of capacity management provisions

Xstrata is concerned that critical issues such as resumption, relinquishment and transfer of access rights have been removed from the undertaking and placed in the SAA (particular in the context of Schedule C providing very limited protections in relation to these issues).

Xstrata submits the 2013 DAU should not be approved without resumption, relinquishment and transfer of access rights being included as matters regulated under the access undertaking (as minimum protections which access holders and QR can negotiate different arrangements for in access agreements if they consider appropriate).

## 8. Contacting Xstrata

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If you have any queries in relation to this submission or Xstrata can provide any further assistance in relation to the process of considering the 2013 DAU please do not hesitate to contact Mark Roberts on [REDACTED] or Merv Sharkey on [REDACTED]