

Submission to Queensland Competition Authority

**Supplementary submission to the Queensland Competition Authority
regarding the 2013 Standard User Funding Agreement DAAU**

Anglo American Metallurgical Coal Pty Ltd

12 December 2013

Contents

1	Executive summary	1
2	Previous concerns which have not been addressed	2
3	Major concerns arising from the Submissions	3
3.1	Generally	3
3.2	No reasons required for replacement of the Trustee	3
3.3	Restriction on transfers of Preference Units	4
3.4	Liability of Aurizon Network as Project Manager	4
3.5	Optimisation risk	5
3.6	Replacing Aurizon Network as Project Manager	5
3.7	Trustee's involvement in project delivery process	5
3.8	Compensation other than for 'Aurizon cause'	6
4	Specific concerns with the Project Management Agreement	6
4.1	General	6
4.2	Project Management as Agent for PMA (clause 3.2)	6
4.3	Project Manager as agent for RCA (clause 3.3)	6
4.4	Trustee's obligations (clause 3.4)	7
4.5	Project Manager may act in own interests (clause 3.6)	7
4.6	Final certificate (clause 4.7)	7
4.7	Deferred decisions (clause 6)	7
4.8	Trustee consent to Proposed Action (clauses 8.9 and 8.10)	8
4.9	Exercising the right of termination (clause 9.4)	8
4.10	Disputes under contracts (clause 11)	8
4.11	Variation to scope (clause 13.8)	8
4.12	Trustee Accelerated Proposal Notice (clause 14.2)	8
4.13	Variation resulting for Adjustment Event (clause 14.7)	9
4.14	Reporting (clause 16.2)	9
4.15	Provision of Relevant Information (clause 16.4)	9
4.16	Restrictions on the Trustee's rights (various)	9
4.17	Set-off (clause 17.10)	9
4.18	Remuneration (clause 17)	9
4.19	Project costs (clause 19.2)	10
4.20	Insurance (clause 20)	10
4.21	Project Manager's liability (clause 22)	10
4.22	Termination by the Project Manager (clause 24)	10
4.23	Replacement Project Manager (clause 26)	10
4.24	Subcontracting (clause 32.3)	10

1 Executive summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) welcomes this further opportunity to present its views to the Queensland Competition Authority (**QCA**) on Aurizon Network Pty Limited's (**Aurizon Network**) 2013 Standard User Funding Agreement DAAU (**SUFA**).

Anglo American notes the comments it submitted in its August submission to the QCA on the 2013 SUFA (**Anglo American August Submission**). Anglo American takes this opportunity to reiterate all arguments that it made in the Anglo American August Submission and notes that this current submission should be read in conjunction with Anglo American's earlier comments.

In particular, Anglo American reiterates the understanding that SUFA was designed to constrain the market power of Aurizon Network to refuse to expand the network until coal producers agree to a return higher than the regulated return, by allowing the coal industry to 'by-pass' Aurizon Network and fund expansions itself. In no way was SUFA intended to be a substitute for the mandatory expansion process (Access Conditions regime, part 7) contained in the 2010 Access Undertaking (**UT3**), and Anglo American again notes Aurizon Network's proposal to remove the Access Conditions regime from the 2013 Draft Access Undertaking (**UT4**) (evidenced by Part 8 of its UT4 submission).

SUFA is comprised of the following agreements:

- (a) Umbrella Agreement (**UA**);
- (b) Trust Deed (**TD**);
- (c) Subscription and Unit Holders Deed (**SUHD**);
- (d) Project Management Agreement (**PMA**);
- (e) Rail Corridor Agreement (**RCA**);
- (f) Extension Infrastructure Head-Lease (**EIHL**);
- (g) Extension Infrastructure Sub-Lease (**EISL**); and
- (h) Integrated Network Deed (**IND**).

Anglo American supports the submission of the Queensland Resources Council (**QRC**), particularly in respect of the following statements:

- (a) SUFA is unnecessarily complex and, as such, unlikely to operate effectively (if at all);
- (b) there is no commercial balance or reasonableness between Aurizon Network's position and that of users;
- (c) SUFA is not a real alternative to Aurizon Network Funding;
- (d) the expansion process provides Aurizon Network with too much discretion, reinforcing its monopolistic position; and
- (e) all of the QRC's suggested drafting amendments for the eight SUFA documents.

Anglo American notes that the entire purpose of regulating Aurizon Network is to protect against the exploitation of its natural monopoly position in the Queensland coal chain. Whether assets are user-funded or not, being part of a vertically-integrated business with interests in above and below rail assets and ports means that Aurizon Holdings could have complete control of the supply chain and power over its expansion or extension, even where users require expansions or extensions for the commercial viability of their projects.

Capitalised terms or otherwise unreferenced clauses which are not independently defined in this submission have the meaning attributed in either UT3 or the SUFA documents.

2 Previous concerns which have not been addressed

Due to the timing of the QCA's call for further submissions, there are a number of key issues that Anglo American raised in the Anglo American August Submission which have not been addressed.

In particular, Anglo American reiterates the following points:

- (a) **Protecting against 'economic hold-up':** Anglo American strongly reinforces its previous submission that when negotiating capacity expansions where the parties' interests are not completely aligned, relying on voluntary commercial agreements (such as is proposed by Aurizon Network in the current SUFA) only causes conflict and delay. This is exacerbated in natural monopoly situations where the infrastructure owner has an incentive to engage in tactical delays in order to force more favourable access conditions (similar to industry's experience with the Goonyella to Abbot Point Expansion (**GAPE**) and the Wiggins Island Rail Project (**WIRP**). Even though Aurizon Network has redrafted elements of its SUFA submission, Anglo American is still not assured that the amended SUFA is workable, in the sense that it is not clear that the terms sufficiently protect the interests of users, or allow users to raise the capital needed to execute a SUFA.
- (b) **Protecting against discrimination between assets:** Anglo American notes that there is still insufficient provision in any of the agreements preventing Aurizon Network from discriminating between its existing assets and the user-funded assets created by the relevant SUFA. This offers no protection for users who are forced to resort to a SUFA and invest significant funds in the creation of an expansion or extension without any assurance that their investment will not be abused by Aurizon Network in favour of its existing assets. Anglo American reinforces its view that SUFA-funded assets are supposed to operate as part of the Central Queensland Coal Network (**CQCN**) and when they become operational they should be treated as such, not ostracised from the network.
- (c) **No cap on a user's commitment:** Again, Anglo American notes that there is no true cap on the costs of an expansion, nor sufficient ability for users to control costs. Anglo American reiterates its submission that each Preference Unit Holder's maximum liability should be limited to the call amount in clause 5.9 of the SUHD. This still allows Aurizon Network to request additional funding, with the agreement of Preference Unit Holders, but does not unfairly increase a participant's liability without them accepting that further risk.
- (d) **Risk allocation generally:** Anglo American notes that in Aurizon Network's resubmission of SUFA it has not altered its approach to risk allocation and compensation for that risk. As Anglo American has previously noted, under the various agreements Aurizon Network is entitled to various fees, expenses and costs in order to compensate it for risk it has accepted, however, in all other areas of the SUFA framework Aurizon Network has adopted a zero-risk approach. As such, all risk lies with coal producers under a SUFA, even in the numerous instances where producers are unable to control or mitigate the extent of this risk. Although Aurizon Network has broadened its liability for claims of wilful default, gross negligence, fraud and trustee liability, there is still no provision protecting users from any of the risk factors which are in Aurizon Network's direct control. As Anglo American has previously noted, the QRC submission specifically outlines numerous risks which have been placed on coal producers and circumstances where coal producers are not in a situation where they are able to control or mitigate those risks. Anglo American strongly reiterates that this is an issue which must be resolved before industry and Aurizon Network can conclude a workable SUFA.
- (e) **Limitation of Aurizon Network liability:** Anglo American acknowledges that through its resubmission Aurizon Network has extended its liability to claims for wilful default, gross

negligence, fraud and trustee liability. Although this is a step forward from its previous submission, the tests of gross negligence and wilful default are particularly high and there is no protection for instances where Aurizon Network has simply imprudently incurred costs. Under the agreements, Aurizon Network is still able to seek QCA approval to roll excess cost into the RAB, and as such users will be forced to reimburse Aurizon Network for those imprudently incurred costs over an extended period of time (plus interest). This division of risk is completely unacceptable.

- (f) **Lack of repercussions for delivering insufficient capacity:** As Anglo American has previously noted, it is particularly concerned with the risk that early Preference Unit Holders' capacity will be compressed in the case where a SUFA-funded expansion results in capacity shortfall. Although the ability to prevent capacity shortfall lies solely with Aurizon Network (as Project Manager), the risk and repercussions are borne by users. This undermines the entire operation of the SUFA-process, as without being able to accurately predict the capacity created by a SUFA expansion, users will be hesitant to participate in a SUFA-process which could be to the detriment of the entire coal network, or which could simply result in significantly lower capacity for the price paid. Again, Anglo American strongly reiterates its previous submission that in circumstances where there is insufficient capacity available at the conclusion of a major project (which is likely to be strategically important to producers and operators), users bearing all liability on a project where they have no control over the outcome is totally unacceptable.

3 Major concerns arising from the Submissions

3.1 Generally

Anglo American notes that Aurizon Network has attempted to address some issues through its resubmission of the SUFA documents. While there have been minor improvements to the issues previously raised by Anglo American, there are still major flaws which prevent Aurizon Network and industry coming to a commercial agreement on these documents.

Anglo American notes that Aurizon Network has made amendments to:

- (a) the identity and corporate status of the Trustee;
- (b) the ability of Preference Unit Holders to transfer ownership of Preference Units;
- (c) Aurizon Network's project management liability;
- (d) optimisation risk attached to SUFA assets;
- (e) Preference Unit Holders' right to replace Aurizon Network as the Project Manager;
- (f) increasing the Trustee's involvement in the Project Delivery Process; and
- (g) Trustee's compensation upon termination of the EIDL other than for Aurizon Network cause.

While Anglo American acknowledges these changes, they do not fully address the issues previously raised and in some instances actually generate new issues for the approval of the SUFA-process. Anglo American wishes to discuss each of these amendments separately, and has outlined its objections and reasoning below.

3.2 No reasons required for replacement of the Trustee

Anglo American notes that Aurizon Network has rectified the question raised by the QRC in relation to the independence of the corporate Trustee. Anglo American understands that the Trustee is now to be an independent professional trustee company at all times during a SUFA transaction. Anglo American acknowledges that this a major step forward.

Anglo American submits that independence of the Trustee is essential for the purposes of the SUFA-process, as it is meant to be a fallback position for users where an equitable commercially negotiated expansion agreement cannot otherwise be reached with Aurizon Network. Without the presence of an independent Trustee, Aurizon Network (along with the Aurizon Group) has an almost wholesale control over the SUFA-process; precisely the situation that SUFA was created to protect against.

Anglo American notes, however, that Aurizon Network may now require the existing Trustee to be replaced without cause. This does not support the reasoning behind the independence of the Trustee. At a very minimum, Aurizon Network should be required to provide a statement of reasons outlining why it believes the existing Trustee should be replaced and those reasons should be required to be approved by a resolution of the ordinary Preference Unit Holders. Without this protection, the Trustee will be subject to the support and power of Aurizon Network, undermining the requirement for independence. As the Trustee exists to manage the trust operated for the purpose of Preference Unit Holders, allowing Aurizon Network to have any persuasion or control over the Trustee is inappropriate and unacceptable.

3.3 Restriction on transfers of Preference Units

Anglo American acknowledges the use of stapling Preference Units to a Preference Unit Holder's interest in the associated UA under which it will hold its access rights. This is a practical solution which has been agreed between Aurizon Network and the QRC Working Group.

Anglo American does not, however, agree that Aurizon Network should have the right to bid for a Preference Unit Holder's Preference Units, nor should it have the ability to prevent a Preference Unit Holder from transferring its Preference Units. Although Aurizon Network is required to make an offer more favourable than another third party bidding for those Preference Units, Anglo American does not see why Aurizon Network should essentially be given a free 'right of refusal' to Preference Units which could otherwise be traded at will between Preference Unit Holders and third parties. As there is no definition or clarification as to what might be 'less favourable', it is not clear whether this is focussed purely on a dollar value or whether it might also consider further elements of an agreement between a Preference Unit Holder and a third party (eg, a quid pro quo transfer where a Preference Unit Holder receives rights at a strategic location or facility in exchange for its Preference Units which might otherwise seem 'less favourable' than a dollar value offer made by Aurizon Network). Aurizon Network's interests in acquiring Preference Units should not be given a preferential status to the right to acquire Preference Units given to other Preference Unit Holders or third parties.

3.4 Liability of Aurizon Network as Project Manager

As stated above, Anglo American notes and appreciates Aurizon Network's removal of its capped liability for claims of wilful default, gross negligence, fraud and trustee liability. In saying that, Anglo American notes that these instances are narrow and may be difficult to prove.

Further, the cap still applies to numerous issues and risks which are solely within Aurizon Network's control and which Preference Unit Holders cannot impact upon (even though they are expected to bear full liability).

Anglo American submits that Aurizon Network's liability should extend much further, particularly if it wishes to maintain its preferential treatment as automatic Project Manager which immediately removes Preference Unit Holders' ability to control the risk or process by which a Project Manager is selected. Anglo American believes that if Aurizon Network is assured of the necessity that it must be the Project Manager for SUFA expansions, it should also accept the liability for its mistakes and errors as Project Manager which do not amount to the extremely onerous threshold tests for wilful default, gross negligence or fraud.

3.5 Optimisation risk

Anglo American appreciates that Aurizon Network has reduced the Trustee's liability in relation to optimisation risk for the scope and standard of the project to only encompass situations where the Trustee has expressly required the scope or standard delivered.

Anglo American also notes that there needs to be further restrictions on when Aurizon Network is allowed to optimise assets into the Regulated Asset Base (**RAB**). Primarily, this is because any over-expenditure incurred by fault of Aurizon Network, may then be rolled or optimised into the RAB where users will nevertheless be forced to pay a reasonable return on that expenditure (thus returning Aurizon Network's full value plus some) as well as any interest earned. As such, if there are not express rules on what Aurizon Network may optimise into the RAB users may nevertheless reward Aurizon Network for imprudent expenditure and subsequently deliver inappropriate incentives to Aurizon Network as Project Manager.

3.6 Replacing Aurizon Network as Project Manager

Anglo American strongly supports the QRC's suggestion to insert a clause making ongoing poor cost performance a trigger for the removal of Aurizon Network as Project Manager. This allows Preference Unit Holders some level of power and control over imprudent expenditure by Aurizon Network and (in a minor way) allows Preference Unit Holders to control some aspect of their liability.

Aurizon Network disagreed with this suggestion because:

- (a) 'Projects that overrun budget are usually late also, so the time trigger would provide a trigger for such a project' – Anglo American believes that this reason is inherently flawed: simply because projects which are in danger of running over time may incur added expenditure in order to deliver the project on schedule, or added expenditure may not be related to the time taken. As such, Preference Unit Holders are not protected by the time trigger; and
- (b) Aurizon Network stated that it is taking optimisation risk in respect of each SUFA project and bears significant financial risk, poor project delivery performance results and imprudent expenditure – Anglo American notes that Aurizon Network (as Project Manager) controls the project delivery performance, and therefore it is logical for it to bear the risk of imprudent expenditure based on its own poor project delivery performance. As such, Preference Unit Holders should be able to control some of the risk placed on them by triggering the removal of Aurizon Network as Project Manager in an instance involving ongoing poor cost performance, rather than simply relying on expanded general breach provisions.

3.7 Trustee's involvement in project delivery process

While Anglo American is satisfied that some processes have now been inserted in the SUFA documents to encourage resolution of deferred decisions, Anglo American notes some inconsistencies and new issues have arisen. In particular:

- (a) there is inconsistency between the price threshold for a 'Major Works Contract' – in the Project Management Agreement it is specified as 2% of target costs or \$20 million, and Aurizon Network's summary letter suggests that this figure is actually meant to be \$10 million;
- (b) while the Trustee has consent rights over 'material variations', this only applies to Major Works Contracts, which restricts the Trustee's involvement to contracts which individually reach over (at minimum) \$10 million, still ensuring that the Trustee bears liability for contracts under this even though the decision-making power rests with Aurizon Network;

- (c) while the Trustee now has some rights to propose an alternative tender for a Major Works Contract, in the event of a disagreement between the Project Manager (ie, Aurizon Network) and the Trustee, the process is driven to expert determination which might be costly and time-consuming, both of which are detrimental to the operation of the SUFA-process; and
- (d) although the Trustee now has some rights in relation to early termination of a Major Works Contract, it also receives added liability for Early Termination Project Management Fees, and it is uncertain whether this is only in relation to decisions made by the Trustee.

3.8 Compensation other than for 'Aurizon cause'

While Anglo American notes that Aurizon Network has taken some further liability in compensating the Trustee in situations where (in particular) the EHL is terminated for Aurizon cause, it has an extended ability to recover any 'detriment' from the Trustee. Anglo American notes that 'detriment' in the EISL has an extremely broad meaning, and as such the liability of the Trustee is similarly broad. In particular, Anglo American notes that this broad liability does not reflect the risk control held by the Trustee and stands to reward Aurizon Network in instances where 'detriment' is actually caused (either directly or indirectly) by an Aurizon Network decision or action. As such, the definition of 'detriment' should be limited to those situations where the Trustee has actual control over the risks and liability (including the costs incurred).

4 Specific concerns with the Project Management Agreement

4.1 General

Anglo American is particularly concerned with the excessive control mechanisms that Aurizon Network has implemented in the PMA. As it must act as Project Manager, many of these control mechanisms are instituted by Aurizon Network in favour of itself, placing unnecessary restrictions on the activities of the users collectively (as Trustees). These restrictions operate even in the numerous instances where users are required to provide the majority of the funding for expansion and extension works.

In particular, Anglo American is concerned that Aurizon Network has made provision for powers over and above those usually afforded to a party acting as an agent purely for the benefit of beneficiaries, in order to maintain network control. The control exhibited by Aurizon Network through SUFA is above what is usual market practice where a party is contracted to operate a project for the benefit of their skill and know how.

As stated previously, Anglo American generally agrees with the QRC's proposed amendments put forward in its marked-up PMA dated 30 August 2013. In particular, however, Anglo American has several issues arising directly from the drafting of the PMA and has specified these below.

4.2 Project Management as Agent for PMA (clause 3.2)

This clause appoints Aurizon Network as agent for all activities under the PMA. Anglo American submits that the clause is drafted too broadly and exposes the Trustee to significantly greater liability it is able to control. The Project Manager should be appointed only for the specific acts outlined in this clause. As such, the clause should be amended to reflect the specific requirements for Aurizon Network to complete as Project Manager, rather than continuing to grant Aurizon Network carte blanche authority over a SUFA project.

4.3 Project Manager as agent for RCA (clause 3.3)

This clause appoints Aurizon Network as agent for all activities under the RCA. As with the previous clause, clause 3.3 is drafted too broadly and exposes the Trustee to too much liability.

The Project Manager should be appointed only for the specific acts outlined in this clause and not

simply for the purpose of performing all of the Trustee's obligations and exercising all of its rights. This clause should be amended accordingly to reflect the specific actions that Aurizon Network is required to take to finalise a SUFA.

4.4 Trustee's obligations (clause 3.4)

While the Trustee has the right to act in relation to a SUFA, where it has appointed a Project Manager for specific purposes, the Trustee should be specifically prohibited from acting in relation to those matters. This ensures a clear division of risk and liability between the parties, rather than the inconclusive approach shown in Aurizon Network's drafting. Where a Trustee intends to act in relation to specific matters which it has otherwise agreed will be part of the Project Manager's ambit, the Trustee must provide a notice to the Project Manager outlining the responsibilities that it will also be accepting and agreeing a new level of risk-allocation between the parties.

4.5 Project Manager may act in own interests (clause 3.6)

As agent, the Project Manager must act in the best interests of the Trust (because it accepts what would otherwise be the responsibilities of the Trustee). It is not appropriate to provide for the Project Manager to act in its own interests, or the interests of a related party or contrary to the interests of the Trust under the PMA or RCA. The carve-outs allowing the Project Manager to act in its own interests are also drafted broadly, offering little protection to the Trust or the Trustee which the Project Manager (as agent) should otherwise have some level of fiduciary relationship towards. There is no precedent for an agent to act in its own interests and this should not be a contractual exception, especially where the Project Manager is part of such a significant vertically-integrated business which may have numerous opportunities to provide advantages for its related operators. The QCA should not simply allow Aurizon Network to attempt to show some level of impartiality through an independent Trustee, in order to (for all intents and purposes) reallocate that control to itself as an agent which can act in its own interests and not those of its fiduciary. This clause should be deleted.

4.6 Final certificate (clause 4.7)

The Project Manager's ability to issue a final certificate must be subject to an exercise in good faith, as befits its otherwise equitable responsibilities as an agent to the Trust. This clause should be amended accordingly.

4.7 Final certificate

(a) Within ten Business Days after the date on which the Project Manager forms the opinion, acting reasonably and in good faith, that:

...

4.7 Deferred decisions (clause 6)

The right for any party to initiate a Deferred Decision Notice is too broad. As the Trustee bears ultimate cost and responsibility for the effects of a Deferred Decision, the Project Manager (as overall agent for the Trustee) should not be entitled to take an action in relation to a Deferred Decision without the consent of the Trustee. Should that consent not be obtained (or granted), and the parties are subsequently in disagreement, either party should be entitled to refer the issue to expert determination in order to achieve a final and conclusive result. This clause should be amended to reflect these considerations.

4.8 Trustee consent to Proposed Action (clauses 8.9 and 8.10)

The Trustee's discretion to provide or withhold consent to a Proposed Action in a Major Works Contract should not be restricted as it is the Trustee that bears the ultimate risk and liability associated with any Proposed Action. Leaving this power with the Project Manager would seem absurd unless the Project Manager bore a major portion of the risk attached to the decision. This clause should be deleted.

4.9 Exercising the right of termination (clause 9.4)

As drafted, this clause allows the Project Manager ultimate discretion to terminate a Major Works Contract provided it has held a meeting with the Trustee (irrespective of the results of that meeting, or the opinion of the Trustee). While Anglo American does not disagree that the Project Manager should have a right to terminate a Major Works Contract, the Project Manager should only exercise its right to terminate upon strict instruction from the Trustee, reflecting the fact that the Trustee is ultimately liable for the repercussions of termination due to indemnifying the Project Manager for any action as agent. This clause should be amended accordingly to reflect the need for the Trustee to have an overarching power to determine whether termination is the best option.

4.10 Disputes under contracts (clause 11)

The control and conduct of disputes should allow the Trustee to direct the conduct of a dispute in relation to any Works Contract, rather than just certain Major Works Contracts. The definition of a Major Works Contract proposes too high a threshold in determining materiality and means that the Trustee will have limited involvement in controlling disputes. This clause should be amended accordingly.

4.11 Variation to scope (clause 13.8)

Aurizon Network proposes that the Project Manager may consider its own interests in determining whether to act upon the Trustee's instructions following a request for a variation to the scope of works. As the Project Manager is acting as agent of the Trust, it must act in the best interests of the Trust. It is not appropriate to allow the Project Manager to consider its own commercial interests. This clause should be amended accordingly.

13.8 Variations to the Scope of Works requested by Trustee

...

(c) For the purposes of **clause 13.8(b)**, it will be reasonable for the Project Manager to consider, amongst other matters, the impact of the proposed variation on the Project Manager's other existing or proposed customers ([where those customers will also have a fiduciary relationship arising from a SUFA agency agreement](#)). ~~and its own commercial interests.~~

[\(d\) For the absolute avoidance of doubt, it will be unreasonable for the Project Manager to have any thought to the impact of the proposed variation on the Project Manager's own commercial interests. Any decision made considering \(to any respect\) the Project Manager's own commercial interests will be invalid.](#)

4.12 Trustee Accelerated Proposal Notice (clause 14.2)

Aurizon Network proposes that the Project Manager may consider its own interests in determining whether to consider a Trustee Acceleration Proposal Notice. The Project Manager is acting as agent of the Trust and therefore must act in the best interests of the Trust. As noted previously, it is simply not appropriate to allow the Project Manager to consider its own commercial interests when making decisions which for all intents and purposes directly relate to and affect the Trust or the Trustee. This clause should be amended accordingly.

4.13 Variation resulting for Adjustment Event (clause 14.7)

The Project Manager should be required to act in good faith in determining the delay from any Weather Adjustment Event. This clause should be amended accordingly.

14.7 Variations resulting from Adjustment Events

...

(b) If an Adjustment Event is a Weather Adjustment Event:

(i) as soon as reasonably practicable after the full effects of the Weather Adjustment Event have been determined by the Project Manager, acting reasonable and in good faith, the Project Manager must...

4.14 Reporting (clause 16.2)

Aurizon Network proposes to limit the circumstances under which the Trustee can dispute relevant dates and / or project costs in the future. The monthly reporting process should merely provide information rather than affecting the Trustee's rights of dispute. Any concept resulting in the removal or hampering of the Trustee's rights is not reasonable and is not market practice. This clause should be amended accordingly.

4.15 Provision of Relevant Information (clause 16.4)

The Project Manager should be required to provide a free flow of information to the Trustee and Preference Unit Holder Engineer. It should not have such broad powers to withhold information from the Trustee. The only restriction on the provision of information should be the restriction of Price Sensitive Information to the to the Preference Unit Holder Engineer. This clause should be amended accordingly.

4.16 Restrictions on the Trustee's rights (various)

Aurizon Network proposes to place various restrictions on the Trustee's rights, for example:

- (a) disputing monetary amounts on tax invoices (clause 17.5(e));
- (b) restricting the Trustee's ability to lodge dispute notices at various stages of the project (clause 17.5(g)); and
- (c) setting a time bar on dispute notices in relation to a Claim brought by the Trustee (clause 25.10(b)).

These restrictions are excessive given the intended nature of the agency relationship created under the PMA and the Trustee's rights should not be restricted in this manner. These, and other similar clauses throughout the PMA should be amended accordingly.

4.17 Set-off (clause 17.10)

Aurizon Network has retained a right to set-off any amounts owing only in favour of the Project Manager, and no reciprocal right for the Trustee. This right should apply to both the Project Manager and the Trustee. This clause should be amended accordingly.

4.18 Remuneration (clause 17)

The remuneration rights of the Project Manager are drafted too broadly and allow the Project Manager too much discretion regarding what could be claimed as a cost. The Project Manager's rights to remuneration need to be more clearly established within the PMA; this will increase certainty for both parties and protect against any inappropriate claims from the Project Manager due to its extremely broad discretionary rights (or at least allow the Trustee a right to properly dispute such claims). This clause should be amended accordingly.

4.19 Project costs (clause 19.2)

The Trustee should not be required to pay any Project Costs where the costs are incurred as a result of inappropriate conduct by the Project Manager. Such conduct should include imprudently incurred costs and actions where the Project Manager did not turn its mind to the implications because it was otherwise indemnified by the Trustee. This clause should be amended accordingly.

4.20 Insurance (clause 20)

Provided that the Trustee is responsible for paying for insurance, the Trustee should have the right to nominate the required insurance provider. As drafted, this clause reflects the inappropriate drafting allowing the Project Manager excessive power in instances where it bears no risk or liability. This clause should be amended accordingly.

4.21 Project Manager's liability (clause 22)

The Project Manager's liability to the Trustee should extend to the Project Management Fee at all times. Further the Project Manager should not be able to exclude any liability for any negligence or fraud where the resulting costs are accepted by the Access Regulator into the RAB. Those costs (including reasonable return and interest) are payable by the Trustee at a later stage and should not be increased by the actions of the Project Manager (especially Aurizon Network), as it is only effectively generating more revenue for itself across an extended period of time. This clause should be amended accordingly.

4.22 Termination by the Project Manager (clause 24)

Aurizon Network has suggested that the Trustee shall have 10 days to remedy a breach of the Project Management Agreement. This is not sufficient time for the Trustee to remedy a breach and this time should be extended. Anglo American believes that an appropriate time (as a market standard) for rectifying a breach is no less than 20 days. This clause should be amended accordingly.

4.23 Replacement Project Manager (clause 26)

The Trustee should not be limited in its ability to replace the Project Manager where the Project Manager does not act in accordance with its obligations under the PMA (including continuing to incur imprudent costs for an extended period of time). In particular, Anglo American submits that the Trustee should be able to replace the Project Manager where there is Material Breach of the PMA. This clause should be amended accordingly.

4.24 Subcontracting (clause 32.3)

The Project Manager should not be permitted to subcontract its services under the PMA without the consent of the Trustee. This is especially important because of the nature of the agency relationship between the Trustee and the Project Manager, as well as the significant rights and control wielded by the Project Manager on behalf of the Trustee. Transferring these rights or obligations to a third party subcontractor is inappropriate. This clause should be amended accordingly.