
Supplementary Submission on Queensland Rail's Draft Access Undertaking

1. Introduction

Xstrata Queensland Limited (**Xstrata**) is providing this further submission on Queensland Rail's draft access undertaking (**AU1**) in respect of the Xstrata Copper and Xstrata Zinc operations which currently utilise access to the rail network from its Mt Isa and Ernest Henry operations to the port of Townsville.

This submission should be read together with Xstrata's initial submission provided to the Queensland Competition Authority (**QCA**) in July 2012.

Xstrata would continue to welcome any opportunity to discuss with Queensland Rail and/or the QCA the issues raised in Xstrata's initial submission and this submission and the detailed drafting amendments that would be required to AU1 and the proposed standard access agreement (**SAA**) to address those issues.

2. Executive Summary

Xstrata continues to consider that the draft access undertaking should not be approved by the QCA in its current form.

This submission focuses on issues raised by the other submissions made to the Queensland Competition Authority. In particular, Xstrata considers Queensland Rail's position in respect of provision of access for haulage of dangerous goods and the indemnities which must be given by access holders as a condition of obtaining such access rights is inappropriate.

Without repeating (or in any way limiting) its initial submission or this submission, Xstrata also continues to have serious concerns regarding the:

- lack of renewal rights for non-reference tariff train services and the inadequacy of the renewal rights which have been provided in relation to reference tariff train services;
- lack of protections regarding the access conditions that can be sought;
- inadequate expansion framework (which gives absolute discretion to Queensland Rail to prevent expansions and thereby creates the potential for exercise of monopoly power by withholding required consents and approval);
- inadequate user funding regime (which in its current form does not provide sufficient certainty of the terms on which funding can be provided to materially mitigate the risks of monopoly power created by the inadequate expansion framework);
- lack of standard access agreements for end users to hold access rights directly (preferably with a separate agreement under which a haulage operator can

contract operational rights and obligations separately, with the right to use such operational rights being dependent on nomination by the end user access holder);

- lack of a standard access agreement for access rights regarding bulk minerals haulage on the Mt Isa to Townsville line (and the inadequacy of the Schedule C principles which apply in the absence of such a standard access agreement);
- inappropriate position regarding liabilities and indemnities under the SAA and Schedule C principles; and
- inappropriate treatment of access for, and the liability and indemnity positions proposed in respect of, train services carrying dangerous goods.

3. Importance and differences of Mt Isa to Townsville line

As noted in a number of the submissions provided to the QCA in respect of AU1, different parts of the Queensland Rail network are utilised by different traffics and warrant different regulatory treatment.

While many issues raised in submissions are of general application, what constitutes an appropriate regulatory framework for access for intermodal or general freight on the north coast line, coal services on the West Moreton system or other types of freight on the remainder of the network, should not automatically be accepted as appropriate in applying to access to the Mt Isa to Townsville bulk minerals services.

Xstrata understands that the Mt Isa to Townsville line is excluded from the State government subsidies to Queensland Rail.

The Mt Isa to Townsville line is also critically important to Queensland's economy, as previously recognised by Queensland Rail in its following comments:

The Mount Isa Line is of particular national interest as it runs along some of the world's largest deposits of copper, lead, zinc, silver and phosphate rock. The region surrounding the Mount Isa Line produces 75% of Queensland's non-coal mineral output. As a result of strong international demand for commodities, exploration in the North West Minerals Province has increased significantly in recent years.

Last year we helped our customers rail 5.8 million tonnes on the Mount Isa Corridor. This supported mineral production of \$6.67 billion in the region. We are now working on plans to help our customers rail more than 40 million tonnes each year.

Significant new mineral deposits coupled with the discovery of coal in the Northern Galilee Basin indicates that the Mount Isa Line is on the cusp of exponential growth opportunities. We are committed to facilitating the transport of the forecast tonnage anticipated to be railed on the Mount Isa Line to suit the needs of our customers

(Source:

<http://www.queenslandrail.com.au/NetworkServices/DownloadsandRailSystemMaps/Freight/Pages/MountIsaMasterPlan.aspx>)

Consequently, even if the QCA is minded to accept a light handed regulatory regime to minimise the regulatory burden on Queensland Rail in respect of subsidised or less heavily used parts of the network, Xstrata considers that it would not be appropriate to do so in respect of the Mt Isa to Townsville line.

Examples of where Xstrata considers there is very strong justification for different treatment of access rights for the Mt Isa to Townsville line from the position Queensland Rail proposes more generally are:

- the treatment of access for train services transporting dangerous goods, which has no real application to train services in respect of coal, grain, cattle, general freight or passengers, but is a substantial component of the existing rail traffic on the Mt Isa-Townsville line (noting that, as discussed further in section 6 of this submission, 'dangerous goods' includes a wide variety of goods, including zinc and copper concentrates that are far less dangerous than goods like explosives which would also be categorised as dangerous goods);
- the high volume of demand for access rights relating to bulk minerals haulage on the line, justifying a separate non-coal bulk minerals related standard access agreement;
- the high capital cost and long term nature of the mining and industrial facilities to which many of the access rights on the Mt Isa-Townsville line relate justifying strong renewal rights to provide certainty of long term rail access in respect of existing investments and certain rights to procure expansions to provide certainty of future rail access in connection with new greenfield or expansion developments of mining and industrial facilities;
- the mixed nature of the traffic and the varying ability of the various goods being hauled using the Mt Isa-Townsville line to support profit margins for the below rail access provider justifying greater transparency regarding the cost of providing access (and making a single reference tariff for the line inappropriate); and
- the limited surplus capacity that currently exists on the Mt Isa-Townsville line, anticipated growth in demand for access rights, and the existing disproportionately large number of outages and operational constraints on the line, justifying a robust expansion framework and greater rigour regarding system planning, capacity analysis, maintenance obligations and impositions of operational outages and constraints.

4. Industry support for positions Xstrata raised

Without repeating its initial submission, Xstrata notes that many of the points raised in Xstrata's initial submission have received significant industry support as noted below:

Issue	Stakeholders supporting
Need for wider and more certain renewal rights	New Hope, Peabody Energy, QR National, Queensland Resources Council (QRC), Xstrata
Need for limitations on the access conditions which can be sought	Association of Mining and Exploration Companies (AMEC), QRC, Xstrata
Need for an 'end user' standard	AMEC, New Hope, Peabody Energy, QRC, Xstrata

access agreement	
Need for a standard access agreement for bulk minerals freight	QRC, Xstrata
Need for a more certain expansion framework	AMEC, Asciano, New Hope, Peabody Energy, QR National, QRC, Xstrata
Need for a more certain user funding framework	AMEC, New Hope, Peabody Energy, QRC, Xstrata
Higher standard of maintenance obligations	Peabody Energy, QR National, QRC, Xstrata
Greater limits on Queensland Rail's right to resume capacity	New Hope, Peabody Energy, QRC, Xstrata
More balanced liability and indemnity positions	Asciano, QR National, QRC, Xstrata
Need for provision of Queensland Rail cost information	Asciano, QR National, Xstrata
Unreasonable to require payment of negotiation costs by access seekers for all unsuccessful negotiations	Asciano, QR National, QRC, Xstrata
Greater right to carry dangerous goods	Asciano, QR National, Xstrata

The fact that this support is relatively consistent across resources companies (big and small), resources industry bodies and the two haulage operators that currently operate on the Queensland Rail network (leaving aside those issues which only impact on a narrow range of stakeholders), confirms concern regarding these issues is widespread.

In relation to support for an end user access agreement, Xstrata notes that the number of submissions supporting such a concept seems inconsistent with Queensland Rail's assertion that there is a 'lack of sufficient demand for an end user access agreement' (Queensland Rail's response to the QCA Issues Paper on Queensland Rail's 2012 Draft Access Undertaking 2012, page 16).

Given that the submissions received from non-Xstrata stakeholders (other than the two haulage operators) are reasonably high level, Xstrata anticipates that further industry support will be forthcoming in respect of some of these issues now that other stakeholders have access to some of the more detailed initial stakeholder submissions.

5. Xstrata's support for some issues raised in other submissions

5.1 End user rights where haulage operator holds access rights

Xstrata's initial submission proposed that it should be possible for end users to directly hold access rights. With the QCA having now made a draft decision on 29 July in respect of the end user access agreement and train operations agreement which it would be minded to approve in relation to the central Queensland coal network, Xstrata considers it does not impose a substantial regulatory burden on Queensland Rail to require it to develop arrangements of a similar nature.

However, existing access rights in respect of Queensland Rail's network are typically held by haulage operators, and Xstrata acknowledges that some end users may have a preference for continuing that position (i.e. end users holding access rights should be an alternative that is available not the only choice).

Where the access holder is a haulage operator, Xstrata supports submissions raised by other stakeholders that:

- access agreements (and access applications) by such a haulage operator should note the identity of the end user;
- the renewal right should apply to the end user or its nominated haulage operator (as attaching the renewal right to the haulage operator that holds the access rights simply entrenches incumbency of existing haulage operators and reduces competition in the above rail haulage market);
- transfers of the access rights (including changing origins/destinations) cannot proceed without the consent of the relevant end user;
- the relevant end user should have a right during the term of such an access agreement to transfer access rights to itself or a nominated haulage operator (to enable the end user to protect itself against the consequences of operator default and promote competition in the above rail haulage market); and
- the relevant end user or its nominee haulage operator should have a first right to enter into a new access agreement within a reasonable period of time in circumstances where a haulage operator's access agreement is terminated by Queensland Rail or the haulage operator due to the other party's default (as a last resort protection for the end user against loss of access rights due to the operator's conduct).

5.2 System master planning, transparency

For major lines (particularly including those such as the Mt Isa to Townsville line which have historically performed poorly in terms of outages and non-provision of scheduled services) Xstrata supports the concept of the AU1 including obligations on Queensland Rail to:

- provide greater transparency regarding the state of the rail infrastructure, including by:

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- reporting operational information for the line to users of that line such as the information described in clause 5.1.2 of AU1 and capacity impacts and causes of planned and unplanned outages;
 - having an independent condition based assessment of the rail infrastructure undertaken (similar in nature to the obligations imposed on QR Network by clause 5 of Schedule A of its access undertaking) with rail infrastructure that is found to be in an inappropriate condition for the relevant contracted train services being required to be rectified;
 - provide greater security that Queensland Rail is not over contracting, by including a requirement in the undertaking and/or access agreements not to contract access rights above existing capacity on a line (taking into account the existing levels of planned and unplanned outages), except where such access rights are conditional on completion of an expansion reasonably anticipated to create the required access rights; and
 - provide a system master plan which would reflect system operating assumptions for the relevant supply chain, identify contracted capacity and, where the line was capacity constrained, efficient capacity expansion options (including cost and lead time estimates).

This sort of reporting and planning should apply on a corridor basis (at least for major lines like Mt Isa - Townsville), rather than simply being aggregated at the level of coal and other freight (as clause 5.1.2(b) AU1 proposes in relation to reporting), as combining information for lines that have such different traffic mixes as Mt Isa – Townsville and the North Coast Line will obscure performance issues relating to individual corridors and how they can best be rectified.

5.3 Maintenance and operational constraints

Xstrata raised in its initial submission the inadequacy of the maintenance obligations in the SAA (to maintain the network in a condition such that the operator can operate train services in accordance with the access agreement) and the width of Queensland Rail's rights to impose operational constraints and outages. It supports the substantially similar comments of Asciano and QR National regarding those issues.

An obligation to maintain the network in a condition such that train services can be operated in accordance with the access agreement (which may sound appropriate at first glance) is entirely insufficient because of:

- the lack of an objective standard of required maintenance;
- the width of Queensland Rail's rights to impose operational constraints and perform rail infrastructure operations under the agreement (such that the maintenance obligation would not be contravened where such operational constraints were imposed due to poor maintenance practices) without liability for any disruption or damage caused;

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- the requirement for the operator to warrant that it has assessed the quality and standard of the network and satisfied itself as to the standard and suitability of the network; and
 - the exceptions introduced by clause 5.4 which permit conduct that would otherwise be a breach of the agreement.

The combination of those positions place substantial risk regarding the standard of the network and maintenance practices employed by Queensland Rail on the party which is least able to control such issues.

Consequently Xstrata submits that at a bare minimum:

- the warranty in clause 21(a)(viii)(A) of the SAA should be deleted;
- Queensland Rail should instead warrant that the relevant parts of the Network are of a standard appropriate for the purposes of operating the Train Services;
- clause 5.4 should not permit documents which are solely controlled by Queensland Rail (such as the Operating Requirements) to prevail over the terms of the access agreement to the extent of any inconsistency (as this clause currently entitles Queensland Rail to effectively authorise its own non-compliance with the access agreement without liability or consequences of default – which obviously creates an issue in respect of all obligations in the access agreement not just maintenance obligations); and
- clause 5.1-5.2 of the SAA be amended so that they read as follows (with equivalent amendments to the Schedule C principles and consequential definition amendments):

5 Network management

5.1 Maintenance

Queensland Rail must carry out Maintenance Work on the Network such that:

- (a) *the Network is consistent with the Rollingstock Interface Standards;*
- (b) *the Operator can operate Train Services in accordance with their Scheduled Times, and*
- (c) *the Network is otherwise maintained in accordance with Prudent Practices, having regard to the train services contracted to access the various parts of the Network.*

5.2 Operational Constraints

Queensland Rail may impose such Operational Constraints as it considers necessary for the protection of any person or any property (including the Network) or to facilitate the performance of Maintenance Work or Enhancements, provided that in exercising its rights under this Clause 5.2 Queensland Rail must:

- (a) *use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing*

alternate Scheduled Times having regard to the Operator's and End User's reasonable requirements); and

- (b) *comply with the relevant procedures specified in the Interface Risk Management Plan.*

This drafting envisages utilising the following definitions (with the existing definition of Rail Infrastructure Operations being deleted):

"Enhancements" *means the improvement, upgrading, or other variation of the whole or any part of the Network which enhances the capabilities of the Network and any major replacement programme for elements of the Network.*

"End User" *means [the customer of the Operator which holds the access rights].*

"Maintenance Work" *means any work involving repairs to, renewal, replacement and associated alterations or removal of, the whole or any part of the Network (other than Enhancements) and includes any related inspections or investigations of all or any part of the Network.*

"Rollingstock Interface Standards" *means those rollingstock interface standards agreed as part of the Interface Risk Assessment and included in the Interface Risk Management Plan.*

5.4 Other miscellaneous issues

While Xstrata's submissions are focused on the issues of the highest concerns, it also has 'second-order' concerns with the detailed drafting proposed in relation to a number of issues.

In that regard, Xstrata requests that the QCA give careful consideration to the more detailed comments provided by each of the haulage operators (Asciano and QR National), which identify a number of drafting deficiencies which are consistent with the issues of high level principles that Xstrata is raising.

As one example, Xstrata supports the submissions made by QR National that the definition of 'Access' should encompass the additional and incidental rights which are necessary to utilise below rail access services - as referred to in the definition of 'Access' in QR Network's approved access undertaking.

6. Dangerous Goods

Xstrata has significant concerns with Queensland Rail's proposed treatment of access rights in respect of train services carrying dangerous goods and Queensland Rail's submissions in relation to the right to operate such services and the applicable liability and indemnity position.

6.1 What constitutes a dangerous good

Firstly, it is important to recognise that 'dangerous goods' includes a much wider category of goods than the explosives, cyanide and radioactive materials which are referred to in the

PricewaterhouseCoopers paper which forms Attachment A to the Queensland Rail submission (the **PWC Paper**).

In particular, train services relating to the following materials (which are currently operated on behalf of Xstrata) are treated as being services that carry dangerous goods:

- Mt Isa copper concentrate;
- Ernest Henry copper concentrate; and
- Mt Isa zinc concentrate.

These goods do not explode on contact with oxygen or flame and are classified as dangerous goods solely because of the effects they can have if left in water for substantial periods of time (rather than any immediate fatal effects on humans or wildlife). If they were spilled from trains onto land there is no immediate serious health risk or risk of material property damage and the spill can generally be cleaned up using common equipment (such as a front loader) to recover the spilled product.

The risks posed by these materials are fundamentally different to the risks posed by haulage of explosives, cyanide or radioactive materials, and it is inappropriate to simply apply a blanket position to goods with such different risk profiles.

6.2 Queensland Rail's position in AU1/SAA different to PWC Paper

The SAA prohibits the operator from carrying dangerous goods (which may be appropriate for the coal carrying train services to which the SAA relates, but is not an appropriate position more generally).

The provisions of Schedule C AU1 (which are proposed to set out the principles for other access agreements) provides that:

- the Access Holder must not carry, or permit to be carried, Dangerous Goods, except as expressly provided in the Access Agreement (clause 8.1 Schedule C); and
- the Access Agreement must include specific provisions regarding the Access Holder's indemnity relating to the carrying of Dangerous Good if applicable (clause 10(c) Schedule C).

The PWC Paper indicates that clause 10(c) of Schedule C AU1 is intended to allow Queensland Rail to negotiate an indemnity from an operator for 'claims or losses where Queensland Rail is at fault other than claims or losses that would have arisen anyway if only non-dangerous goods were being carried' (section 2, page 2 PWC Paper).

Xstrata disputes the merits of the position discussed in the PWC Paper (as discussed in sections 6.3 to 6.4 discussed below), but at the outset it is worth noting that Schedule C does not require Queensland Rail to offer or agree to the position proposed in the PWC Paper. Rather it seeks to give it absolute discretion as to both:

- whether it agrees to provide access rights for the operation of train services carrying dangerous goods (subject only to the potential for an arbitrated access determination requiring that it does so); and

- the indemnities requested from an access holder as a condition of operating train services carrying dangerous goods.

6.3 Right to operate train services

In order to be able to operate existing train services for the commodities noted above, Xstrata's contracted haulage operators have obtained approvals to do so from the Department of Transport and Main Roads.

These approvals are only granted on the basis of the Department considering that it is safe to operate such train services based on compliance with the conditions of those approvals, including the requirements for the containers in which such goods are transported.

Xstrata considers that:

- AU1 should make it clear that Queensland Rail cannot unreasonably refuse to provide access for train services carrying dangerous goods where the access seeker (or the relevant haulage operator) has all the required State approvals for such services; and
- Schedule C (and any standard access agreement which might be used for dangerous goods) should include a provision equivalent to that in clause 8.3 of the Operator Standard Access Agreement under the 2008 access undertaking that currently applies to Queensland Rail (which for convenience is set out below with references to QR Network changed to Queensland Rail):

8.3 Carriage of Dangerous Goods on Train Services

- (a) *The Operator must ensure that where Dangerous Goods are to be carried on a particular Train Service:*
- (i) *all requirements of the Dangerous Goods Code are fully complied with (including placement of relevant, accurate and current documentation on Trains);*
 - (ii) *Queensland Rail is advised of the details of the Dangerous Goods (including a description and the applicable Dangerous Goods United Nations (UN) Number) prior to the operation of a Train as part of the Train List; and*
 - (iii) *any authorisation or prior approvals required under the Dangerous Goods Code have been obtained and are available for inspection by Queensland Rail if so requested.*
- (b) *The Operator must ensure that, where there is any likelihood of Train Services carrying Dangerous Goods and before any Dangerous Goods can be carried on Train Services, the Operator's Emergency Response Plan prepared in accordance with Clause [#] includes procedures for responding to an Incident involving Dangerous Goods of the type to be carried.*

6.4 Liability and indemnity position

The PWC Paper proposes that an access holder for train services carrying dangerous goods should indemnify Queensland Rail in relation to part of certain losses caused by the fault of Queensland Rail itself.

The PWC Paper (see section 2, pages 2-3) expressly recognises that the QCA has already considered a similar issue in respect of the carriage of dangerous goods on QR Network's central Queensland coal network and decided that:

- the allocation of risk is efficient when the risk is borne by the party that is in the best position to manage that risk; and

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- that the access holder is not in a position to manage risks associated with QR Network's negligence or default (QCA Draft Decision, QR Network 2009 Draft Access Undertaking, December 2009, page 138).

Yet, a nearly identical approach to what the QCA has previously rejected as inefficient is what Queensland Rail (according to the PWC Paper) is now seeking. The fact that Queensland Rail is seeking such an indemnity in relation to what the PWC Paper refers to as the 'incremental liability' arising (rather than all loss arising as sought by QR Network), should not obscure the fact that Queensland Rail is asking the access holder to indemnify it for the result of Queensland Rail's own actions.

Xstrata disputes the assertions in the PWC Paper that the access holder is somehow best placed to manage the risks of Queensland Rail's fault based purely on the type of goods being hauled.

The arguments raised about needing to do extra maintenance should also be dismissed, at least in respect to the Mt Isa to Townsville lines where goods of this nature have been a substantial part of the haulage mix using that line on a longstanding basis.

In addition, the assertions in the PWC Paper about information asymmetries regarding dangerous goods at the time of negotiating access terms, seem to give insufficient consideration to Queensland Rail's rights under the negotiation framework. For example, Queensland Rail has the ability to request additional information under clause 2.3.1 AU1 and would be expected to receive significant disclosure regarding proposed dangerous goods to be hauled as part of negotiating operating plans and interface risk management plans under clause 2.6.2 AU1.

If the Authority is minded to accept Queensland Rail's proposal in some form, then at the very least it should be restricted to only certain dangerous goods which are truly likely to cause substantially greater harm when a train service carrying those goods is involved in an incident (such as the examples the PWC Paper mentions: explosives, cyanide and radioactive materials).

7. Contacting Xstrata

If you have any queries in relation to this submission or Xstrata can provide any further assistance in relation to the process of considering AU1 and the SAA please do not hesitate to contact Mark Roberts on (07) 4781 8205 or Merv Sharkey on (07) 4781 8210.