Submission on Queensland Rail's Draft Access Undertaking 1

1. Introduction

Xstrata Queensland Limited (***Xstrata***) is providing this submission 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.

Xstrata participated in the pre-submission consultation process undertaken by Queensland Rail Pty Ltd (***Queensland Rail***) and would like to thank Queensland Rail for the opportunity to be involved in that process and the Queensland Competition Authority (***QCA***) for the opportunity to provide submissions on the draft access undertaking (***AU1***) that has ultimately been submitted.

Given that many of Xstrata's comments relate to reinstating positions that are in the undertaking that currently applies to Queensland Rail or including positions that exist in the QR Network 2010 access undertaking which applies to the central Queensland coal region network (the ***QRN AU***), Xstrata has not sought to include proposed drafting at this stage.

However, Xstrata would welcome any future opportunity to discuss specific drafting amendments that would address the issues raised in this submission with Queensland Rail and/or the QCA.

2. Executive Summary

Xstrata accepts that Queensland Rail is not an actual or likely provider of above rail haulage (other than in respect of passenger services) and accepts that that justifies a number of changes to the regulatory access framework which used to apply to the central Queensland below rail network. In particular it largely removes the risk of discrimination between access holders on the basis of preferring a related above rail haulage operator.

However, Queensland Rail remains a monopoly infrastructure provider, with the potential to engage in monopolistic behaviour against access seekers and access holders even in the absence of being vertically integrated. The efficient and certain provision of rail access 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.

Some comfort that Queensland Rail will not engage in monopolistic behaviour can currently be taken from Queensland Rail's position as a government owned business. However, it is clear from the terms of the proposed Standard Access Agreement (the ***SAA***), and equivalent principles in Schedule C of AU1 that Queensland Rail is seeking to have the ability to freely assign its obligations, such that the undertaking should not be approved in a less robust manner on the assumption of continuing government ownership.

Consequently, Xstrata considers it is appropriate to retain certain protections for access holders (and their end customers) which Queensland Rail have proposed reducing or removing.

In particular, Xstrata is concerned to ensure that:

- the negotiation framework remains sufficiently robust, 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 having objective criteria for allocating capacity between competing access seekers (see section 3 below);
- the expansion framework remains sufficiently robust that Queensland Rail cannot prevent expansions which meet appropriate criteria and are funded by access seekers (including providing for a standard user funding agreement to enable that to occur) (see sections 4 and 5 below);
- there is greater transparency and protections for access seekers in relation to access charges (see section 6 below);
- Queensland Rail is required to develop an end user standard access agreement (with operational aspects separately dealt with in a train operations agreement), and a standard access agreement which applies to bulk minerals freight (see section 8 below); and
- the standard access agreement(s) (and principles in Schedule C) retain a similar risk profile for Queensland Rail, and similar rights and protections for the access holders, to that which currently exists rather than the nearly risk free position and reduced rights of access holders that Queensland Rail is proposing it should have (see sections 8 and 9 below).

Details of these and other issues are set out in sections 3 to 10 of this submission.

3. Negotiation Framework

3.1 Protections for renewals

The protections for continuation of existing access rights provided in 2.7.2(c) of AU1 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.

This seems highly inequitable, and exposes all companies using other parts of the network (and non-coal mining companies using the Western System) with substantial existing investments to great uncertainty about their ability to continue their exiting access rights.

Even where clause 2.7.2(c) does apply, it contains some serious flaws, namely:

- the requirement that an existing access holder commit to the period of access which the new access seeker is proposing is potentially unworkable for the owner of an existing mine which may have a shorter remaining mine life than the term sought by the new access seeker. The approach taken in the queuing provisions of the QRN AU of allowing a renewing access holder priority where it is willing to renew for the remaining life of the relevant mine (where less than 10 years) should be retained;

- that to obtain this protection, an existing access holder can be required to apply for new access at any time during the term of their access agreement other than the last 12 months. 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 it existing term; and
- it does not provide a right of renewal on the existing terms of the access holder's access agreement, making it possible that a failure to reach agreement on an extension prior to the time periods noted in clause 2.7.2(c) and the resulting potential inability to extend access rights, can arise from Queensland Rail requesting onerous terms for an extension rather than the access holder failing to promptly seek an extended term.

3.2 Access Conditions

There are no restrictions in AU1 on the circumstances in which Queensland Rail can request access conditions, the extent of access conditions which it can require, or how an access condition obligation should be shared between the original access seeker on which it was imposed and a future access seeker who stands to benefit from it.

Xstrata requests that the QCA require Queensland Rail to incorporate similar protections to those that exist in the QRN AU, particularly the general principle in clause 6.5.2 QRN AU 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 Queensland Rail 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 AU1; 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.

3.3 Competing access seekers

Xstrata could accept the proposed removal of a formal queuing regime as reasonable subject to:

- appropriate protections for renewing access holders being incorporated (as discussed in section 3.1 of this paper above). Xstrata notes that clause 3.13(g) of the ARTC's Hunter Valley Access Undertaking approved by the ACCC (the ***ARTC***

HVAU) is an example of how, even in the absence of a queuing framework, access regulators consider it appropriate to give renewal rights priority; and

- providing an objective test regarding when entering an access agreement with one access seeker will be more favourable to Queensland Rail than another access seeker, such that Queensland Rail will give the first access seeker preference, rather than this being left in Queensland Rail's absolute discretion.

Any such objective test should have regard to factors including the volume of access rights requested, risks of financial or other default and past performance by the access seeker/haulage operator.

A test of this nature is important to ensure that the absence of the queuing framework does not result in damaging the certainty of access and consequently hindering major developments of resources projects which depend on obtaining secure access rights.

Xstrata does not consider this an onerous requirement. However, If the QCA considers that more prescriptive criteria of this nature is too much of a regulatory burden, Xstrata requests that the QCA considers whether such requirements could apply, but be limited in application to those parts of the rail network, including the Mt Isa line, which are predominantly used for transportation of bulk minerals related products.

3.4 Negotiation of Connection Agreements

Any new mine developments will often require a connection agreement to connect a mine spur to the existing network in order to make any use of the access rights sought. Xstrata considers that clause 2.6.2(b) is not sufficiently robust to prevent the connection agreement being an impediment to gaining access on reasonable terms.

At a minimum, Xstrata suggests AU1 should include a set of principles for such connections similar to clause 8.3 of the QRN AU.

However, given that a connection agreement will effectively be a pre-condition to utilising access in some circumstances, Xstrata also considers it would be appropriate to include a provision similar to clause 8.4 of the QRN AU obliging Queensland Rail to submit a form of standard connection agreement (and related amendments to AU1) during the term of AU1. To reduce the regulatory burden imposed on Queensland Rail in preparing such amendments, Xstrata would accept that it may be appropriate for the timing for development of such amendments to occur to be after it is anticipated the standard connection arrangements under the QRN AU would be settled (as Xstrata anticipates the terms of those arrangements, or the alternative models discussed in developing those arrangements, may provide a useful starting point).

3.5 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 AU1 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 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).

4. Limits on obligation to develop Extensions

Clause 1.4.1 places substantial limitations on the circumstances in which Queensland Rail will be obliged to construct an Extension.

Queensland Rail's supporting submission indicates that these limitations are based on the restrictions in section 119 of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***).

Firstly, Xstrata notes that that section does not technically restrict what can be included in the terms of an access undertaking, rather it restricts the decisions the QCA can make in an access determination. The terms of the QCA Act concerned with the content of undertakings (s 137) and enforcement of undertakings (s 152) contain no such restrictions.

Secondly, the limitations Queensland Rail proposes in clause 1.4.1 go well beyond those imposed by section 119 QCA Act.

Xstrata's particular concerns with clause 1.4.1 are that:

- the requirement in clause 1.4.1(a)(iii)(B) that Queensland Rail bears no cost or risk in relation to constructing, owning, operating or managing the Extension goes beyond the prohibition in s 119(2) QCA Act against requiring the access provider to 'pay some or all of the costs of extending the facility';
- it would seem reasonable that Queensland Rail should be obliged to assist in obtaining necessary authorisations, consents and procuring relevant land access (particularly where land has to be added into Queensland Rail's lease arrangements with the State), and it is likely to be very difficult for an Access Seeker to meet the requirements of clause 1.4.1(a)(iii)(C)-(D) if Queensland Rail required it to be responsible for those actions without such assistance;
- the matters in clause 1.4.1(a)(iv) should be tests to be satisfied objectively – not matters determined in Queensland Rail's opinion based on its absolute discretion;
- it is not clear what clause 1.4.1(a)(iv)(C) adds to clause 1.4.1(a)(iv)(B);
- the requirement in clause 1.4.1(a)(iv)(D) that there is no adverse affect on Capacity should be qualified so that a minor degree of incidental disruptions during construction and development are permitted – otherwise it will nearly be impossible for an Extension to meet this requirement; and
- the requirement in 1.4.1(a)(v) that the access agreements to be entered in respect of the Extension are on terms and conditions satisfactory to Queensland Rail (particularly without any limitations on the reasonableness of access conditions which can be asked for – see section 3.2 of this submission above) means that even if the other criteria are satisfied, Queensland Rail retains a complete discretion to refuse to develop an Extension.

Xstrata is conscious that section 119(1) prohibits the QCA from making an access determination that is inconsistent with an approved access undertaking for a declared service. As the dispute provisions in this undertaking rely on the QCA utilising those access determination powers, if the QCA approves an undertaking including clause 1.4.1 in its current form, Xstrata is concerned that the QCA will have effectively prevented itself being able to make a future determination regarding the terms on which an Extension can proceed if an access dispute arises and Queensland Rail refuses to do so on the basis of one of the absolute discretions provided to it by clause 1.4.1.

5. Funding of Extensions and Reinstatement

5.1 User funding of Extensions

Given the current pressure on the State's budget it cannot be assumed that Queensland Rail will be willing to fund Extensions even where a private below rail operator would consider it economically feasible to do so. In addition a provider of natural monopoly infrastructure has an economic incentive to limit capacity in order to generate monopoly returns (unmitigated in Queensland Rail's case by the potential for a vertically integrated haulage business to also gain haulage revenue from any such Extension). As the QCA recognised in its decisions on the QRN AU, user funding arrangements assist in mitigating these risks by providing a degree of countervailing power to access seekers.

Consequently, in order to ensure that the capacity of the Network continues to expand where justified by new demand, it is important that there is a robust user funding model.

Clause 1.4.1(b) AU1 merely provides an obligation to use reasonable endeavours to negotiate a user funding agreement. At a bare minimum clause 1.4.1(b) should reflect clause 7.5 of the ARTC's Hunter Valley Access Undertaking (the ***ARTC HVAU***) which provides for good faith negotiations and an express power for the regulator to arbitrate the terms of user funding arrangements where agreement is not reached.

The difficulty with such a provision is that, as has become evident during the process occurring under the QR Network Access Undertaking (the ***QRN AU***) to submit a form of standard user funding agreement, the detailed terms of a user funding agreement can have a substantial impact on whether user funding provides a credible and economically efficient alternative for access seekers.

Xstrata therefore considers that, for similar reasons to those for which it was considered appropriate to develop a standard user funding agreement in the context of QR Network's central Queensland coal network, it would also be appropriate to do so here.

Xstrata therefore suggests that AU1 be amended to incorporate a requirement similar to clause 7.6 of the QR Network Access Undertaking (the ***QRN AU***) to submit a form of standard user funding agreement (and related amendments to AU1) during the term of AU1. To reduce the regulatory burden imposed on Queensland Rail in preparing such amendments, Xstrata would accept that it may be appropriate for the timing for development of such amendments to occur to be after it is anticipated the standard user funding arrangements under the QRN AU would be settled (as Xstrata anticipates the

terms of those arrangements, or the alternative models discussed in developing those arrangements, may provide a useful starting point).

5.2 Funding of reinstatement work

User funding arrangements of the type described in section 5.1 of this submission will also need to be provided for where Queensland Rail elects not to proceed with repairs or replacement of parts of the rail network in the event of damage or destruction through a force majeure event (which Queensland Rail proposes to have a right to do, see clause 17(b) of Schedule C AU1 and 18.1(d) of the SAA).

An end user is in a much worse bargaining position to negotiate funding arrangements in relation to reinstatement (as opposed to an expansion), as the related investment in a mine or industrial facility will already be a sunk cost – such that without very robust user funding arrangements it can easily be held hostage by a monopoly below rail access provider asking for onerous terms before it conducts the repairs or replacement. Given the amount of financial costs that will be involved for users such as Xstrata in the event of non-provision of access following a force majeure event, it is critical that there is a standard user funding agreement which can be quickly negotiated and executed so that the reinstatement works can begin as expeditiously as possible.

Xstrata also considers that Queensland Rail should be obliged to:

- fund all repair and reinstatement below an appropriate materiality threshold; and
- apply recoveries under any insurance policies relating to the relevant force majeure event to fund the repair or reinstatement works.

6. Pricing and Reference Tariffs

6.1 Reference tariffs

AU1 only provides reference tariffs in relation to access rights relating to coal mines using the Western System. Consequently there is no reference tariff that will apply to the Mt Isa line

While Xstrata does not wish to impose the regulatory burden on Queensland Rail of developing reference tariffs unnecessarily, Xstrata considers the ability for an access holder or access seeker to require such a reference tariff be developed is an important protection which should be available (at least for major resources or industrial users with a material demand for access rights).

6.2 WACC

Xstrata notes that he WACC requested is not dissimilar to the weighted average cost of capital used for the purposes of the QRN AU. However, if the Authority is minded to accept the reduced risk profile for Queensland Rail that would result from accepting Queensland Rail's position on other aspects noted in this submission, then Xstrata considers that the WACC should be closer to the risk free rate.

It should be clarified that paragraph (b) of the WACC definition also provides a nominal post-tax rate (consistent with paragraph (a)).

6.3 Cost transparency and ring-fencing

Xstrata notes that Queensland Rail will continue to have responsibilities for issues other than below rail access, such as the above rail passenger business.

In the absence of a reference tariff, the proposed negotiate-arbitrate model provides limited protections for access seekers in respect of pricing. Access seekers will particularly face the challenge in access pricing negotiations of asymmetric information (i.e. a much lesser awareness of the costs involved in providing access than Queensland Rail).

To aid in pricing negotiations, it would be appropriate to require at least financial separation of the below rail business and the passenger business, and meaningful and transparent reporting of the costs relating to the below rail business. Such financial separation and reporting would have the dual benefits of going some way to addressing the asymmetric information issue and reducing the potential for cost shifting or cross-subsidisation between the regulated and unregulated businesses.

In theory, there is also the potential for Queensland Rail's vertical integration to raise issues about decision making in a way that unfairly favours the above rail passenger business over other third party users of the Queensland Rail network. Xstrata has not had concerns with Queensland Rail's decision making in this regard to date and does not want to unnecessarily increase regulatory costs for Queensland Rail (which will indirectly increase access prices). However, Xstrata suggests that provisions are included in the undertaking which provide the Authority with the power to subsequently require a draft amending undertaking providing a ring-fencing regime to be submitted if it considers such preferential decision making has occurred or there is a material risk of such preferential decision making occurring in the future. This will impose no immediate regulatory burden on Queensland Rail but provides for the Authority to be able to take appropriate action in implementing a ring-fencing regime if the risks associated with preferential decision making eventuate during the term of AU1.

7. Capacity Management

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.

Particularly in the context of the SAA being restricted to coal train services in the Western system and the principles in Schedule C providing limited protections in relation to these issues (see section 8.3 of this submission below), Xstrata considers that these provisions should be included in the undertaking itself.

Xstrata's comments on the position that Queensland Rail is proposing on these issues is discussed further below.

8. Scope of Standard Access Agreement

8.1 No 'End user' Access Agreement

The QCA (in respect of the central Queensland coal network) and the ACCC (in respect of the Hunter Valley) have considered it appropriate for end users to have a right to hold access rights directly themselves (without having to contract in relation to above rail operational matters).

The need for such arrangements is driven by issues, which equally apply in the Queensland Rail context, including:

- the promotion of greater competition in the above rail haulage market which such a structure provides (by the end user being able to change the nominated operator for particular access rights);
- the desirability of having the below rail access provider having a contractual relationship with both the end user (in respect of capacity and pricing) and the rail operator (in relation to operational issues); and
- removing the risk to access seeker's that they will lose their access rights when, through no wrongdoing of their own, the operator breaches an access agreement with the below rail access providers.

Xstrata considers that the same rights should be provided to end users in respect of the Queensland Rail network.

To reduce the regulatory burden imposed on Queensland Rail in preparing a standard access agreement under which an end user could directly hold the relevant access rights (and a related operational agreement for entry by haulage operators nominated to utilise those access rights), Xstrata would accept that it may be appropriate for the timing for development of such an agreement to occur to be after it is anticipated the new standard access agreements of this nature under the QRN AU would be settled (as Xstrata anticipates the terms of those arrangements, or the alternative models discussed in developing those arrangements, may provide a useful starting point).

The existing standard access agreement should then contain a provision entitling the access holder to require, following approval of the new form of access agreement, for Queensland Rail to enter such a new form of access agreement.

If the QCA considers there does not need to be an end user access agreement, then at a minimum there needs to be a process for an end user to initiate a transfer of access rights from one operator to another (similar to what exists in clause 7.3.7 of the QRN AU, but allowing for changes of operator in a shorter timeframe).

8.2 No Standard Access Agreement applicable to Xstrata

The standard access agreement proposed in connection with AU1 is proposed to only apply to coal access rights in respect of the Western System.

Xstrata acknowledges that this is a similar position to what exists under the existing undertaking. However, Xstrata considers that standard access agreement should be

expanded to accommodate the parts of the standard agreement which would change for certain other defined types of train services.

In past negotiations, Xstrata's experience was that only having a coal standard access agreement provided other users with the 'worst of both worlds', where on occasion the access provider would insist terms had to remain consistent with the standard coal access agreement, but would equally insist on diverging from those terms where it commercially suited them to do so.

Xstrata submits that a change in approach is warranted given this undertaking is restricted in its application to the Queensland Rail network, and Xstrata's non-coal below rail access rights now represent a much more significant proportion of the network to which access is being regulated than ever before.

In addition, Xstrata's experience with past negotiation of access rights for the Mt Isa line is that the then current coal standard access agreement basically provided the access provider's starting point subject to a small number of amendments customised to the product for which train services were being sought. Consequently, providing for the extra variables for certain different types of freight would not be a major imposition.

8.3 Schedule C Principles not sufficiently robust

Xstrata acknowledges the existence of clause 2.7.4(c) and Schedule C, which provides some protections regarding the terms of access which can be requested for other types of train services, but has a number of concerns with the limits of that Schedule.

Many of those concerns also occur in the terms of the SAA and are therefore discussed in section 9 of this submission below, but those concerns equally arise in Schedule C where the same position is expressed in a summarised form.

In addition to those issues, the principles in Schedule C suffer from often being so high level they provide no protections for access seekers. For example:

- there is no principles provided in respect of dangerous goods – other than that they cannot be transported except as provided in the Access Agreement (effectively providing no limitations on what Queensland Rail can ask for in relation to access rights relating to dangerous goods);
- the ability to impose operational constraints is completely unlimited in Schedule C, and does not include the obligation to use reasonable endeavours to minimise disruption which exists in the SAA (see 5.1(c) Schedule C, clause 5.2 SAA);
- the liability position is actually worse than in the SAA (compare clauses 10 and 11 of Schedule C to clauses 10 and 11 in the SAA) due to important issues like liability caps, exceptions to which that cap does not apply, and the circumstances in which Queensland Rail will be liable for non-provision of access in the event of train cancellations caused by its breach or negligence not being specified;
- the length of a force majeure event which gives rise to a right to terminate is only described as being 'prolonged' (clause 17(c) Schedule C); and

- the criteria for resumption of access rights are left to be agreed (clause 18.1 Schedule C).

9. Terms of Standard Access Agreement

9.1 Relevance to Xstrata

While Xstrata understands that the Standard Access Agreement (***SAA***) is proposed to only apply to coal train services on the Western System, Xstrata is making comments on the standard access agreement in the hope that:

- a standard access agreement will be developed for other types of train services ;
- if a standard access agreement is not developed for other types of train services, the principles in Schedule C will be amended to address the issues noted in this section 9; and
- as noted above, Xstrata anticipates that any QCA approved SAA will form the starting point for negotiations even for train services to which it does not apply – such that all potential access seekers have an interest in its terms.

Xstrata expects that rail haulage operators will have additional comments in respect of the terms of the SAA and Schedule C.

9.2 Lack of renewal rights

Xstrata is disappointed by the lack of renewal rights. This is a step backwards from the renewal provisions of the existing standard access agreement. As noted earlier in this submission, the limited protections in clause 2.7.2(c) AU1 for extension of existing access rights are fundamentally flawed in their current form.

By damaging existing access holder's certainty of obtaining future access rights the proposed arrangements have the potential to impede investment in mine developments and industrial facilities which involve large sunk costs with a view to obtaining a return on equity across a period substantially longer than the likely term of an access agreement.

9.3 Maintenance obligations and rail availability

Xstrata is concerned that the maintenance obligation in clause 5.1 SAA is insufficient as it does not provide a sufficient objective standard against which maintenance performance can be measured (see by way of contrast, the current standard access agreements and the QR Network standard access agreements, which all also refer to the maintenance work being such that the infrastructure is consistent with the rollingstock interface standards).

In addition, Xstrata is concerned about the lack of transparency which currently exists regarding the reasons for unplanned outages. Queensland Rail should be required (potentially under the undertaking rather than the access agreements) to report on levels of railway availability, and the major causes of non-availability, at least for major lines such as the Mt Isa to Townsville line and Western System.

9.4 Liability and Indemnities

Queensland Rail is proposing to substantially worsen the risk allocation and liability position for access holders compared to the current standard access agreements.

In particular:

- the indemnity in the current standard access agreement provided by Queensland Rail in respect of property damage and personal injury or death caused by the wilful default or deliberate or negligent acts or omissions of Queensland Rail or its staff has been removed;
- the indemnity provided by the operator is significantly wider than that previously provided – which was restricted to property damage and personal injury or death caused by the wilful default or negligence of the operator or its staff (10.2 SAA);
- very wide exclusions of liability, additional to those which are in the current standard access agreement, have been introduced in clause 11.3, including an exclusion of all liability for any loss of anything carried by a Train Service (11.3 SAA);
- the threshold below which claims cannot be made has increased to $500,000 (see 11.4 SAA);
- the new exclusions from the circumstances in which Queensland Rail will be liable for non-provision of access makes the prospects of Queensland Rail ever being liable for non-provision of access extremely remote. In particular:
    - the requirement that 10% or more train services are not provided in a month before any claim can be made has the effect of only providing an access holder with a reasonable degree of certainty regarding 90% of its train services being provided. This threshold is also being proposed in addition to (not instead of) the financial limit before a claim can be made under clause 11.4(b). If Queensland Rail wishes to insist on this such that an access holder has only really securely contracted 90% of its train services, take or pay should only be paid on 90% of contracted train services; and
    - where the 'Claim Event' does not constitute Queensland Rail Cause (see 11.6(e) SAA) liability is excluded. However part (c) of the definition of Queensland Rail Cause will result in Queensland Rail not being liable for non-provision of access arising from Queensland Rail's actions other than where those actions were exercising a right or complying with an obligation in accordance with the access agreement, access undertaking or applicable law.

Xstrata considers the previous risk allocations should be maintained (including having these specific changes reversed) as the existing risk profile was already a heavily negotiated one that the QCA had determined to be appropriate in previous regulatory decisions. The fact that these liability provisions only directly impact on the operator rather than end users (under the current form of the SAA) does not protect end users as it merely

means that the operator will be seeking to pass many of these risks to end users via back to back provisions in the haulage arrangement.

If the QCA considers a change in the risk profile is appropriate, then presumably there should also be a commensurate substantial reduction in the revenue derived from access charges reflecting that reduced risk profile.

9.5 Rights of termination

Xstrata has a number of concerns about the circumstances in which the access rights can be terminated. In particular:

- where the access holder is a rail haulage operator – the end user should be given notice of an default under clause 13.3 of the SAA (so it has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach);
- an operator's failure to comply with a train service description is now an event which may give rise to termination (without the qualifications in the previous standard access agreement about the failure having to be 'in any material respect'), such that immaterial non-compliances with happy regularly create a risk of termination;
- a change of control of an operator should not cause a termination of this agreement (as it does under clause 13.4 of the SAA). If the operator remains accredited, continues to have the required insurances, and meet the other requirements imposed on the operator, Xstrata is uncertain as to why they should not continue to be able to hold the access rights without any need for a further Queensland Rail consent. This also seems to be a new provision which is not reflected in the previous standard access agreements even though it is difficult to see how Queensland Rail's risk position in this regard is any different from QR Network. If this provision is going to remain there needs to be an exception for change of control that occurs to listed entities (such as QR National and Asciano).

At a more general level, the risk of access rights being terminated due to operator non-compliance, is a serious business risk for end users like Xstrata that have made significant investments (in mining projects and industrial facilities and in entering take or pay rail haulage contracts and port user agreements) on the basis of certainty of access rights. This is not a risk that can be adequately mitigated through provisions of a haulage agreement. Consequently, if operator default is going to remain a cause for termination:

- there needs to be a right for end users such as Xstrata to maintain the existing access rights where the breach is an issue of the operator's conduct not being contributed to by the end user (potentially through a deemed assignment or by nominating a new haulage operator) – so that the innocent end user could recommence utilising the access rights upon having contracted a different haulage provider; and
- the requirement in the current standard access agreement that the operator first be suspended before any termination right is exercised should be reinstated.

Xstrata notes that many of these issues are removed if it was possible for end users to directly contract to obtain access rights as Xstrata has suggested.

9.6 Rights of suspension

Xstrata considers that the qualifications on Queensland Rail's right to suspend access rights which exist in the current standard access agreement should be reinstated in clause 12.1 SAA. For example:

- there used to be a 7 day grace period in relation to failure to pay access charges – now administrative errors which result in late payment by 1 day can result in suspension without further notice; and
- the failure to comply with a train service description automatically provides a right to suspend when it previously only did so if it adversely affected other operators or caused or was likely to cause an increased risk to the safety of any person or material risk to property.

While Xstrata appreciates that suspension is obviously a lesser remedy than termination, which should be exercisable for events which may fall short of providing a right to terminate, it should still not be something that is exercised without cause due to the substantial disruption it will result in for the user's operations. Minor failures to comply with train service descriptions are not an abnormal occurrence, and it is unjustified and incredibly onerous to provide that such circumstances create a risk of suspension when it is not adversely affecting others or creating additional material risks.

In addition, where the access holder is a rail haulage operator – the end user should be given notice of suspension under clause 12 SAA at the same time as the operator (so the end user has an opportunity to seek to take action under the haulage agreement to require the operator to remedy the breach which has given Queensland Rail the right to suspend).

9.7 Termination for prolonged force majeure

Xstrata considers that the termination for force majeure provision (clause 18.2 SAA) should revert to the current standard access agreement wording which provides a right to the party not affected by the force majeure to terminate, as opposed to providing either party with a right to terminate.

Given that Queensland Rail has proposed that it not be required to conduct repair or rectification works after a force majeure event, and it would not be required to provide access during the force majeure event, it would seem that it would not be seriously adversely affected by the agreement continuing under a force majeure scenario. Whereas a user such as Xstrata will face significant costs (through take or pay haulage and port user arrangements) and a significant fall in revenue (through loss sales of product) and should have the right to require the agreement to continue while there might be some prospect of rectifying the situation even if it will take more than 3 months to resolve the situation.

9.8 Resumption

Xstrata is concerned that clause 19.1(a) SAA provides a right to Queensland Rail to resume capacity without the Access Holder having any opportunity to show a sustained

demand for the relevant access rights as applies under Queensland Rail's current access undertaking. Consequently a temporary difficulty has the potential to result in a loss of access rights. Where the access agreement is a take or pay contract it is difficult to see the justification for not having some more protection for the end user for temporary non-utilisation of access rights where it does have a sustained demand for those access rights.

9.9 Costs of compliance with operating requirements

The operating requirements/system wide requirements provisions have removed the obligations relating to adverse financial effects on the operator of changes in such requirements. This is most immediately an operator issue if Queensland Rail changes its signalling or train control systems and that requires the haulage operators to install new equipment at significant cost. However, if any such costs are to be borne by the haulage operators they are likely to seek to pass them through to end users such as Xstrata via the haulage agreement.

10. Other miscellaneous comments

While this submission is intended to focus on high level comments, Xstrata has noted below a few additional areas that should be improved:

- clause 1.2.3(b) AU1 might be read as providing Queensland Rail with the right to remove parts of its rail network from coverage under the undertaking (without consent of affected access holders or approval of the QCA). Xstrata assumes the intent is simply that the line diagrams would be updated to reflect the actual state of the network from time to time, and request that this be clarified;
- clause 5.3.2(a) AU1 the purpose for which the QCA can obtain documents should presumably be similar to clause 9.5 of the QRN AU. It currently would not allow the QCA to gain information to determine whether to exercise its powers under the undertaking and the reference to 'complying with this undertaking' should be to 'performing its obligations or functions in accordance with this undertaking or an access agreement';
- it would be preferable if clause 6 contained some form of compliance audit provisions, even if these were only triggered if the QCA had, or access seekers/holders raised concerns in relation to, non-compliance'; and
- the requirement of a mechanism for providing adjustments to an access agreement in the event of a material change (clause 16 SAA) is one-sided in that it only operates to remove net adverse financial effects on Queensland Rail, and if it is going to be included should also require Queensland Rail to remove net beneficial financial effects that might occur.

11. 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.