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Mr Ted Malone MP  
Chair  
State Development, Infrastructure and Industry Committee  
Parliament House  
BRISBANE QLD 4000

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Dear Mr Malone

## **SURAT BASIN RAIL (INFRASTRUCTURE DEVELOPMENT AND MANAGEMENT) BILL 2012**

### **SUBMISSIONS TO THE STATE DEVELOPMENT, INFRASTRUCTURE AND INDUSTRY COMMITTEE**

The Surat Basin Rail Joint Venture ("**SBR**") is Queensland's first private investor in rail and was formed to develop a 214 kilometre railway line from near Wandoan to near Banana (also known as the Southern Missing Link) ("**the Project**"). The Project will open up approximately 6.3 billion tonnes of coal reserves in the Surat Basin for large scale mining and export through the Port of Gladstone.

The lack of coal transport infrastructure from the Surat Basin has meant that coal mining in the region is not considered cost effective. The State granted SBR an exclusive mandate for the Project in 2006 ("**Exclusive Mandate**").

SBR estimates that the Project will create approximately 1000 jobs during construction and a further 20 long term jobs during operation. SBR estimates that its investment in the development and operation of the Project will exceed \$1 billion.

The Exclusive Mandate obliges the State (through the Coordinator-General) to acquire land for the rail corridor under the *State Development and Public Works Organisation Act 1971* ("**SDPWO Act**"). The rail corridor will be owned by the Coordinator-General ("**CG**") in freehold, licensed and subsequently leased to SBR for the construction and operation of the railway.

To facilitate the construction, development and operation of the railway, the CG and SBR will enter into a Development Agreement, Operating Agreement, Agreement for Lease and Lease (collectively referred to as the "**State Documents**").

SBR intends to enter into a Design and Construct Contract ("**D&C Contract**") for the design and construction of the railway. SBR also intends to procure rail infrastructure manager services and train control services during the operation of the railway by entering into a rail infrastructure manager agreement ("**RIM Agreement**") for that purpose. As result of the operation of the *Transport (Rail Safety) Act 2010*, during construction the counterparty to the D&C Contract will be the railway manager (as defined in the Bill) and during operation the counterparty to the RIM Agreement will be the railway manager (as defined in the Bill).

SBR appreciates that the State has drafted the *Surat Basin Rail (Infrastructure Development and Management) Bill 2012* ("Bill") to assist in accommodating the first case of private investment in rail infrastructure in Queensland, including the transposition of current legislation to regulate the operation of the railway (such as the *Transport Infrastructure Act 1994* ("TIA")).

Although the Bill has achieved the State's policy intent in many cases, there are some instances where, in SBR's view, the transposition of the TIA provisions has given rise to unintended outcomes. Those outcomes could detrimentally affect the implementation of the Project and its bankability. Overall, SBR supports the Bill and appreciates the opportunity to make submissions to the Committee to amend the Bill in an effort to further align the interests of the Project and the State.

This submission has been approved by SBR's participants.

## 1. SUMMARY OF SUBMISSION

Broadly, SBR submits that the Bill needs further refinement to address the following key concerns:

- (a) **(third party access)** – Some of the provisions of the Bill have the unintended consequence of facilitating third party access to the rail corridor without the approval of SBR and/or its railway manager.
- (b) **(SBR's role)** – Some provisions of the Bill which have been transposed from the TIA do not:
  - (i) give SBR or its railway manager an opportunity to be consulted on significant issues; or
  - (ii) adequately recognise the relationship between SBR, the CG and the Key Contractors.

SBR understands that part of the State's policy intent behind the Bill is to ensure that SBR's railway is managed in a way which '*complements existing statutory arrangements for rail infrastructure*'. To achieve this, the State has transposed into the Bill provisions of the TIA with some amendment where considered necessary.

## 2. THIRD PARTY ACCESS TO THE RAIL CORRIDOR

SBR will be required to give control of the rail corridor land to its D&C Contractor (under its D&C Contract (during construction)) and rail infrastructure manager (under a RIM Agreement (during operation)) (collectively "**Key Contractors**") during the term of the State Documents. This is necessary because SBR's Key Contractors will have legislative safety obligations under the *Transport (Rail Safety) Act 2012* (as rail infrastructure managers) and under the *Work Health and Safety Act 2011* (as the managers of a workplace).

It is for this reason that SBR is concerned about those parts of the Bill under which a State entity (being the CG or the Queensland Civil and Administrative Tribunal ("**QCAT**")) could permit third parties to access the rail corridor and/or carry out works on the rail corridor without the approval of SBR.

SBR believes that the following parts of the Bill give rise to the possibility of third party access to the rail corridor:

- (a) Part 5, Division 2 – Works near the Railway (sections 44-46); and
- (b) Part 10 – Reviews (section 60 and 61).

## 2.1 Works near the railway (sections 44-46)

Sections 44-46 of the Bill reflect, but are not identical to, sections 168 and 476B of the TIA. Section 168 applies specifically to railways and section 476B applies to transport infrastructure (but does not include rail transport infrastructure).

The policy intent of section 476B of the TIA is to protect transport infrastructure from risks arising from development on adjoining land in an urban environment as indicated in the Explanatory Notes to the *Transport and Other Legislation Amendment Bill 2010* (which introduced section 476B into the TIA). The Explanatory Notes for section 476B states that the section was inserted into the TIA:

- because of the increasing need to build transport infrastructure within the existing urban landscape; and
- to address limitations on the chief executive of the Department of Transport and Main Roads' ("DTMR") right to condition development applications under the *Sustainable Planning Act 2009* ("SPA"), as a referral agency, because not all works which may threaten transport infrastructure are captured by the SPA.

The protection provided by section 476B is reinforced by the right of the DTMR chief executive to register a notice on the title to land which is near transport infrastructure (under section 476D). This notice would alert a landowner (and future owners) to their obligation to seek the DTMR chief executive's approval to carry out works on that land which the chief executive reasonably believes are likely to threaten the safety or operational integrity of transport infrastructure.

SBR supports the policy intent of section 476B of the TIA and sections 44-46 of the Bill, namely the protection of transport infrastructure from nearby development. However, SBR believes that the application of those provisions to the Project in a rural environment may have the unintended consequence of facilitating third party access to the Surat Basin rail corridor land. SBR holds this view for the following reasons.

- (a) **(railway)** – 'railway' is defined in section 5 of the Bill to mean the railway and rail transport infrastructure situated, or proposed to be situated, within the rail corridor land. 'Works near the railway' could therefore include works undertaken on the rail corridor land adjacent to the railway.
- (b) **(section 44(1))** – This section would prohibit a person from carrying out works 'near the railway' (which would include land within the Surat Basin rail corridor land), without the CG's approval, if the works threaten, or are likely to threaten, the railway's safety or operational integrity. This section also suggests that works of that nature may be carried out with the CG's approval.

- (c) **(section 44(2))** - This section is not contained in the TIA and provides that the CG can approve works near the railway (which would include land within the rail corridor) if the CG reasonably believes that those works don't or are not likely to threaten the safety or operational integrity of the railway. This may create a legislative obligation on the CG to grant an approval to a person to carry out works if the reasonable belief is formed.

SBR submits that the State's policy intent would be better implemented by amending section 44 of the Bill so the application of those sections is limited to land near, but not including, the Surat Basin rail corridor land.

This approach is consistent with the drafting of section 50 of the Bill which addresses interference with the railway. Under section 50, interference with the railway includes carrying out works in or on the rail corridor.

Sections 44 and 45 will potentially overlap with section 50 in their application to the rail corridor land if sections 44(1) and (2) are not amended as submitted. Potentially, a railway manager could refuse to approve interference on the railway under section 50, but the CG could approve the same works under section 44. In addition, if this overlap is not corrected, an approval for interference under section 50 and an approval under section 44 could operate inconsistently or in a manner which threatens the safety systems for the railway.

SBR submits that sections 44(1) and (2) of the Bill should be amended so that they apply with the following effect:

- (a) **(section 44(1))** works must not be undertaken on any land near (but not including) the Surat Basin rail corridor land if the works threaten, or are likely to threaten, the railway's safety or operational integrity; and
- (b) **(section 44(2))** works may be undertaken on land near (but not including) the Surat Basin rail corridor land, with the CG's consent, if the CG reasonably believes that works do not threaten, or are not likely to threaten, the railway's safety or operational integrity.

Section 50 of the Bill is then the only provision which addresses works undertaken on the rail corridor land.

If SBR's submission is supported, then consequential changes will be required to sections 45 and 46 to similarly limit the application of those provisions to near (but not including) the Surat Basin rail corridor land.

## **2.2 Third party access rights granted on review of decisions**

Sections 60 and 61 of the Bill almost mirror sections 485 and 485A of the TIA. The operation of sections 60 and 61 are limited to decisions made by the railway manager under sections 35 (Closing railway crossings) and 50 (Interfering with railway) of the Bill.

SBR is concerned that the review mechanism, so far as it applies to decisions of the railway manager under section 50, may result in third party access to the rail corridor without input from SBR or its railway manager in the review process. This concern arises for the following reasons:

- (a) section 50 prohibits anyone from interfering with the railway (which includes carrying out works in or on the rail corridor land) unless:
  - (i) they have the written approval of the relevant person (defined as the railway manager or, otherwise, the CG); or
  - (ii) they are permitted to do so by statute;
- (b) a person who is unhappy with the railway manager's decision under section 50 ("an **Applicant**") may ask the CG to review that decision and neither SBR nor its railway manager is entitled to be heard or consulted by the CG when that review is undertaken;
- (c) SBR or its railway manager is not entitled to apply for an external review of the CG's decision if it is unhappy with the outcome; and
- (d) the Applicant may apply to the QCAT to review the CG's decision and neither SBR nor its railway manager is entitled to be heard by the QCAT.

The practical effect of the review process included in the Bill is that a third party could be given rights to access the rail corridor and interfere with the operation of the railway by the CG or the QCAT, despite a decision to the contrary by the railway manager.

SBR submits that section 60 and 61 should be amended so that in each case:

- (a) the CG or the QCAT is obliged to invite, accept and consider submissions by the original decision maker when carrying out a review under sections 60 and 61; and
- (b) the original decision maker has a right to appeal the outcome of the review in addition to the original applicant.

### **2.3 Section 20 – Coordinator-General or associated person may enter land and carry out railway works – potentially inconsistent access rights**

Section 20 of the Bill permits the CG to enter the rail corridor land and the land adjacent to the rail corridor land to carry out railway works (to the extent of the activities listed in subsection (2)). There is no limitation on when the CG can exercise the powers under this section, meaning that it is possible that the CG could carry out railway works on the rail corridor land during the term of the State Documents. SBR is concerned that the ability for the CG to unilaterally exercise this power during the term of the State Documents will create financing issues.

SBR submits that the power given to the CG under section 20, so far as it relates to the rail corridor land, should be limited so that it cannot be exercised while there is a railway licence or railway lease.

## **3. RECOGNITION OF SBR'S ROLE**

SBR, as the railway licensee/lessee of the freehold Surat Basin rail corridor land, but not the railway manager for the railway, occupies a unique position that has not been previously considered in the context of the TIA. As discussed above, the transposition of provisions from the TIA has been largely successful in considering SBR's role. However, SBR submits that there

are some provisions in the Bill where the application of powers and rights to the railway manager or the CG does not reflect:

- SBR's interest (as owner and licensee/lessee) in the rail corridor and the rail transport infrastructure;
- SBR's contractual arrangements with both the CG and its Key Contractors; or
- the legislative safety obligations imposed on SBR's Key Contractors.

### 3.1 Section 34 – Impact of change of management of local government road on railway

This section reflects section 258A of the TIA. A local government must apply to the CG for approval to make a change to the management of a local road which would require works to be carried out on the railway, or have a significant adverse impact on the safety or operational integrity of the railway. The CG must decide the application within 30 days (or longer if notified) after the application is received. The CG is deemed to have approved the application (section 34(4)) if the applicant does not receive notice of the CG's decision within the required time frame.

An application need only be made when the change in the management of the road would require works on the railway or have significant safety or operational impacts. Given the significance of the possible impacts on the railway, SBR's ownership of the infrastructure and the legislative safety obligations of SBR's Key Contractors, SBR submits that this section should be amended so that:

- (a) the CG must consult with the railway licensee or railway lessee and the railway manager before making any decision to refuse or approve an application under section 34 – in a manner similar to section 33(4) of the Bill in respect of the extension of roads; and
- (b) a failure by the CG to respond to a local government application within the required time frame under section 34(4) is deemed to be a refusal of the application.

### 3.2 Section 40 – CG may enter land and carry out activities for watercourses

Section 40 of the Bill does not reflect the equivalent section in the TIA, section 487. Under section 487 of the TIA, the rights and powers afforded by the section to enter land and carry out works if water is or is likely to obstruct the railway, can be exercised by the railway manager for the railway "if the manager's accreditation states that the person may act under this section".

It seems appropriate that appropriately accredited railway managers for SBR's railway should have the same rights to carry out works to prevent water obstruction as railway managers under the TIA.

SBR submits that section 40 should be amended so that a new subsection is included which interprets references to the CG to include appropriately accredited railway managers in the same manner as subsection 487(8) of the TIA.

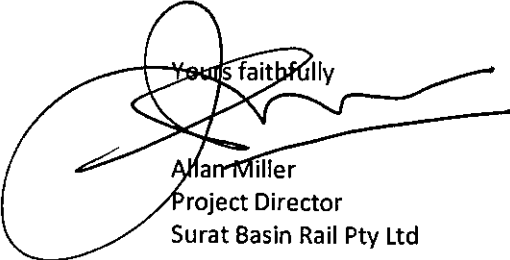
### 3.3 Section 53 – Altering materials or railway works

Section 53(3) (based on section 488 of the TIA) makes it an offence to deposit rubbish or abandon goods or materials on the railway without the approval of the relevant person for the railway.

'Relevant person' is defined in subsection (4) as being the railway manager or the CG. This indicates that a person could apply to the CG during the concession period to deposit rubbish or abandon goods without recourse to the railway manager. This interpretation is reflected in the Explanatory Notes. In addition, by referencing the 'railway' and not the 'Surat Basin rail corridor land' the section makes it possible for a person to apply for and obtain the CG's approval to deposit rubbish or goods within the Surat Basin rail corridor land.

SBR submits that it is not appropriate for the CG to have the power to authorise third parties to dump waste or other materials in the Surat Basin rail corridor land which will be leased or licensed to SBR; particularly when that land is also subject to the arrangements between SBR and its Key Contractors and the legislative safety obligations imposed on those Key Contractors. SBR submits that section 53(4) should be amended so that the CG may only be the relevant person if there is no railway manager.

Yours faithfully



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Surat Basin Rail Pty Ltd

