



BHP Billiton Mitsubishi Alliance

Submissions of BHP Billiton Mitsubishi Alliance in response to the QCA's paper entitled "Proposed Investment Framework" for QR Network

1. Introduction

- 1.1 These submissions are made by the BHP Billiton Mitsubishi Alliance (**BMA**) in response to the QCA's paper entitled "Proposed Investment Framework" for QR Network (**the QCA Paper**).
- 1.2 BMA endorses the submissions made by the Queensland Resources Council (**QRC**). BMA has worked collaboratively with the QRC in the development of those submissions. In this submission BMA makes submissions on matters additional to those in the QRC submission.
- 1.3 BMA strongly endorses the statements in the QCA Paper that QR Network should not be able to exploit its monopoly power and that users should have the right to fund expansions at their option. The existence of a viable user funding mechanism provides a means by which users can prevent QR Network from exploiting its monopoly power.
- 1.4 BMA submits that to ensure that QR Network cannot to exploit its monopoly power in respect of expansions, the user funded expansion provisions must provide a reliable, efficient and effective avenue for users to fund expansions without frustration by QR Network. The provisions should include:
 - (a) detailed mechanisms for user funded expansions, that provide certainty for users and deliver a viable and real alternative to the expansion terms proposed by QR Network; and
 - (b) prompt enforcement and dispute resolution processes, to ensure that the user funded expansions cannot be delayed or frustrated by QR Network.
- 1.5 The detailed drafting that gives effect to the statements of principle concerning the investment framework must be done with a high degree of detail, clarity and certainty. Otherwise, any right to user fund an expansion will be illusory and QR Network will be able to exploit its monopoly power in respect of expansions.
- 1.6 BMA has set out below some examples of the kinds of issue that the user funded mechanism will need to address in detail and appropriately, if the user funded expansion mechanism is to be effective.

2. Averaging down of capital costs of expansion funding

- 2.1 Users may be reluctant to fund an expansion if it is significantly more capital intensive (on a \$/tonne of capacity created) than subsequent planned expansions, unless the capital costs are averaged.
- 2.2 Each user may be reluctant to deploy its capital in a more capital intensive expansion, preferring to wait until someone else funds that expansion, so that the user can fund a subsequent, less capital intensive expansion, and thereby retain its capital for other uses.

- 2.3 There is also a risk QR Network could cherry pick which expansions it will fund, and elect to fund only those expansions that have a relatively low capital intensity per tonne of expanded capacity created, leaving users to fund the relatively high capital intensity expansions. QR Network could in effect force users to deploy their capital in the more capital intensive expansions.
- 2.4 If this issue is not properly addressed there is a risk that expansions will be delayed or will not proceed.
- 2.5 BMA submits that capital expansions (on a \$/tonne of capacity created) for an expansion block on a system should be averaged down for subsequent lower capital expansion blocks on the same system. (The order and composition of required expansion blocks on a system would be determined under the CRIMP process.)
- 2.6 This is necessary to ensure that the capital contributed by the expanding parties (on a cost per tonne basis) is the same, regardless of the order in which the expansions occur.
- 2.7 BMA proposes that a subsequent expanding party (QR Network or the user funder, as applicable) would make a capital payment to the first expanding party. The capital payment would be for an amount which is sufficient to equalise the capital costs of the two expansions on a cost per tonne basis, plus an appropriate rate of interest to be determined.

3. Initiation of the capital expansion process

- 3.1 The QCA Paper states at paragraph 41(b) that QR Network will initiate an expansion process where it is requested to do so by the owner or operator of an expanding or new multi-user unloading facility.
- 3.2 QR should initiate the expansion process at the request of the owner or operator of an expanding or new unloading facility, regardless of whether the facility is a multi-user facility.
- 3.3 Further, where a below rail expansion is required to meet the construction or expansion of an unloading facility, the timeframes set by the QCA for completion for the below rail expansion should be designed to ensure that the below rail expansion can be completed as close as practicable to the date of completion of the construction or expansion of the relevant unloading facility.

4. Development of a fully documented investment framework

- 4.1 BMA submits that if the detailed drafting that gives effect to the investment framework is not done with a high degree of detail, clarity and certainty, QR Network will be able to exploit its monopoly power and frustrate user funded expansions.
- 4.2 BMA believes that ideally the QCA should not approve any draft access undertaking unless it contains a fully documented investment framework.
- 4.3 Alternatively, if the QCA does propose to approve any draft access undertaking before the investment framework is fully documented, the QCA should only do so if the access undertaking:
- (a) enshrines, in reasonable detail, the investment framework principles which the fully documented investment framework must address: the level of detail should be no less than that contained in the QCA Paper (as supplemented and/or amended to address any industry submissions made on the QCA Paper); and
 - (b) sets out a timetable for the development of the framework, and provides that if QR Network fails to provide an appropriate framework in accordance with the timetable, the QCA will draft the details of the investment framework.

- 4.4 BMA recommends that the investment framework should be in place no later than 31 December 2010. A longer period would fail to provide the investment certainty industry needs. Further, a 31 December 2010 deadline is not unreasonable, because QR Network has been working on this issue for many months.

5. Dispute resolution mechanism

- 5.1 BMA submits that the QCA dispute resolution and arbitration processes must be effective in resolving any disputes between QR Network and funding users in an efficient manner.
- 5.2 These arbitration processes should cover disputes regarding the proposed user funding terms, as well as disputes arising under user funding agreements once those agreements have been put in place.
- 5.3 The arbitration processes must facilitate prompt resolution of disputes. If disputes cannot be resolved promptly, the user funding provisions may prove ineffective. Unless users are confident that disputes about user funding can be resolved promptly, users will be reluctant to exercise their right to user fund, because of concerns that the expansion will be delayed pending resolution of disputes.
- 5.4 The absence of such dispute resolution mechanisms would enable scope for QR Network to frustrate and delay user funded expansions, and may discourage users from funding expansions.

6. Security

- 6.1 BMA agrees with the QCA's proposal at paragraph 24 of the QCA Paper that funding users should be given security over the cash flows generated under the access agreements which contract the capacity created by the expansion.
- 6.2 However, BMA submits that the QCA should consider additional security arrangements to provide greater protection against QR Network default and/or insolvency.
- 6.3 For example, QR Network should be required to grant security over its fixed assets in appropriate circumstances and to establish suitable security arrangements for the construction period of the expansion (such as use of "controlled accounts" to disburse funding, "step-in" rights to complete construction, security over insurance proceeds and appropriate performance guarantees).

7. Scope control

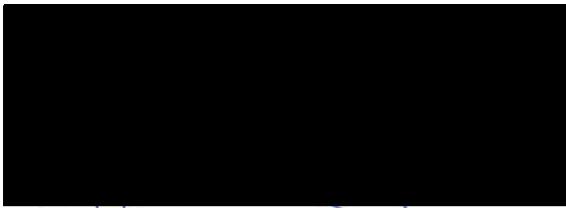
- 7.1 There should be a collaborative approach between user funders and QR Network in relation to all key matters affecting the cost and timing of the expansion. The scope of collaboration should extend to matters including the project's scope, cost, procurement strategy (including competitive tender, as appropriate), construction and timing.
- 7.2 User funders should have genuine participation in QR Network's decision-making process on these matters, with any disputes capable of referral to the QCA for arbitration.

8. Capacity queue

- 8.1 BMA notes the QCA's proposals at paragraphs 15-16 of the QCA Paper that all users should be given the opportunity to participate in the funding of an expansion.
- 8.2 BMA submits that any existing "queue" for additional capacity should be respected such that, where the capacity requirements of all users in the queue cannot be met by an expansion, the opportunity to fund the expansion should be offered in the order of the relevant queue to those users who have enough evidence of sufficient port and mine capacity at the time capacity is to be delivered utilise the expansion capacity sought.

- 8.3 Without this protection, QR Network would be incentivised to deal with those users who are more likely to accept its access conditions, rather than those users who want to user fund the expansion. QR Network could discriminate against users who want to user fund.

Yours Sincerely



Nilson D'avila

General Manager

Supply Chain Development

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