



BHP Billiton Mitsubishi Alliance

QR Network Pty Ltd Access Undertaking

Submissions of BHP Mitsubishi Alliance in response to QR Network Pty Ltd's 2010 Draft Access Undertaking

1 Introduction

- 1.1 These submissions are made by BHP Mitsubishi Alliance (**BMA**) in response to QR Network Pty Ltd's (**QR**) 2010 Draft Access Undertaking (**2010 DAU**).
- 1.2 In summary, BMA endorses the submissions made by the Queensland Resources Council (**QRC**) (of which BMA is an active member). BMA (along with other QRC members) has worked collaboratively with the QRC in the development of those submissions.
- 1.3 In addition to the matters raised by the QRC in its submissions, BMA wishes to make further submissions to the QCA on the provisions of clause 11.3 ('Conditional Access Rights' and contracting for capacity in coal supply chains), specifically in relation to the proposed basis on which Conditional Access Rights can be reduced upon completion of an expansion which does not result in planned capacity targets being achieved.
- 1.4 For the reasons outlined in the QRC submissions and these submissions below, BMA urges the Queensland Competition Authority (**QCA**) not to approve the 2010 DAU in its current form.
- 1.5 BMA notes the relatively short time period the QCA has allowed for submissions to be made on the 2010 DAU. As such, these submissions endeavour to highlight only the key areas of concern for BMA (not otherwise addressed in the QRC submissions). BMA believes appropriate levels of consultation are essential to achieve a satisfactory regulatory framework for the Queensland Rail Network and looks forward to further opportunities to consider the full scope, impact and effect of the 2010 DAU with the QCA and industry generally in due course and before a final decision on the 2010 DAU is made by the QCA.

2 BMA

- 2.1 Jointly owned by BHP Billiton and Mitsubishi Development Pty Ltd, BMA is Australia's largest coal miner and exporter, and the world's largest supplier to the seaborne coking coal market.
- 2.2 BMA owns and operates 7 Bowen Basin mines – Goonyella Riverside, Broadmeadow, Peak Downs, Saraji, Norwich Park, Gregory Crinum, and Blackwater (all of which fall within QR's Central Queensland Coal Rail Network) – and the Hay Point terminal near Mackay. BMA also manages the South Walker Creek and Poitrel mines (also located in the Bowen Basin). Almost all of the coal produced from BMA mines is exported for steel production. The coal is transported to the Hay Point Terminal via the Central Queensland Coal Rail Network.
- 2.3 The mines managed by BMA have a capacity to produce (in aggregate) 58 million tonnes of coal annually. The Hay Point Terminal, following a recent expansion program, has the capacity to handle and despatch around 43 to 45 million tonnes of coal annually.
- 2.4 BMA is accordingly one of Queensland Rail's largest customers. BMA's rail haulage contracts currently provide for the haulage of approximately 30% of total (estimated) contracted capacity for the network.

3 BMA's involvement in the consultation process for the 2009 and 2010 DAUs

- 3.1 As a significant stakeholder in the regulatory regime which applies to the Central Queensland Coal Rail Network, BMA has participated in the consultation process for access undertakings governing QR's rail network in prior years, and most recently the Draft Access Undertaking submitted by QR on 9 September 2008 (**2009 DAU**), upon which the 2010 DAU is largely based.
- 3.2 BMA (either directly or via the QRC) has made a number of submissions to the QCA in response to the 2009 DAU.
- 3.3 In response to the QCA's Issues Paper (which was released in October 2008), BMA made submissions directly to the QCA, noting its support of the QRC's submissions (of November 2008) and urging the QCA not to approve the 2009 DAU.
- 3.4 Following the release of the QCA's Draft Decision on the 2009 DAU in December 2009, BMA, through the QRC, made further submissions to the QCA in response to its call for comment. BMA respectfully requests the QCA to consider the concerns raised by the QRC on behalf of its members in those submissions when deciding whether to approve,

or not approve, the 2010 DAU. BMA considers the submissions provide useful context to the industry position, which holds true notwithstanding the 2009 DAU has in some respects undergone changes in its evolution in to the 2010 DAU. As noted in the QRC's submissions in response to the 2010 DAU, notwithstanding those changes, the 2010 DAU still gives rise to a number of concerns for industry which, BMA submits, must be addressed by the QCA to ensure the ultimate regulatory framework for the Queensland Rail network achieves the objectives of part 5 of the *Queensland Competition Authority Act 1997 (Qld) (Act)*.

- 3.5 BMA's involvement with the Access Undertaking consultation processes to date underlines its commitment to working with QR, industry and the QCA to facilitate the development of an approved Access Undertaking which promotes the economically efficient operation, use of, and investment in the Central Queensland Coal Rail Network, and encourages a consistent approach to access regulation. BMA believes the access regime delivered by any Access Undertaking should be fair and transparent, providing a commercial outcome for both QR and access seekers and access holders.

4 Structure of these submissions

- 4.1 In this submission, BMA:
- (a) endorses the submissions made by the QRC on behalf of its members in response to the 2010 DAU, highlighting the key principles BMA considers any Access Undertaking for QR's network should seek to achieve (section 5); and
 - (b) requests that the Authority rejects the 'Conditional Access Rights', as per clause 11.3 of 2010 DAU or, in the event of accepting any mechanism to ration access rights, this authority ensures equity across all access holders (section 6).
- 4.2 As noted in paragraph 1.5 above, due to the relatively short consultation period, BMA's submissions are necessarily high level and not definitive of BMA's response to each of the amendments proposed by QR in the 2010 DAU. They merely summarise the key areas of concern for BMA which are otherwise not addressed in the QRC submissions. Where BMA does not comment on a particular aspect of the 2010 DAU (and where the QRC's submissions also do not cover that aspect), BMA should not be taken to accept QR's proposal.

5 Endorsement of the QRC submissions

5.1 The QRC has made 3 submissions to the QCA, in response to its call for comment on the 2010 DAU. These submissions are consistent with the guiding principles BMA considers an effective regulatory regime should enshrine:

- (a) **transparent negotiation framework:** the process an access seeker must follow to apply for access to the network must be clear and transparent, with defined time lines;
- (b) **efficient capacity allocation:** capacity allocation must be undertaken to maximise the efficiency of the network and the coal industry, and to maximise the use of the assets. There must be a fair and transparent process for capacity allocation and where capacity is constrained, it must be allocated fairly between competing access seekers;
- (c) **transparent and equitable queuing mechanism:** the queue process must be transparent so the access seeker (and the customer) can make a reasonable assessment of the likelihood of securing access, the likely timing and the key factors which influence that timing;
- (d) **appropriate methodology for the determination of capacity:** capacity assessments must take into account the integrated coal chain, so as to avoid misalignment in the capacity of the system and be determined by appropriate and certain indicia; and
- (e) **certainty of capacity expansion obligations:** capacity expansion must occur to meet current and future demands of access seekers/holders. Triggers should be specifically identified so stakeholders have certainty of investment and expansion works must occur within reasonable (and known) timeframes. Access seekers should be permitted to sole risk projects. Expansion plans should provide for investment ahead of demand.

5.2 BMA fully endorses each of the QRC's submissions, and emphasises the following points arising from those submissions relating to QR's obligation in invest in expansion of the network, which is of particular importance to BMA as an expanding coal producer:

- (a) BMA considers the 2010 DAU does not provide adequately for ongoing future investment in the below rail aspects of the network. Any approved Access Undertaking must make appropriate provision for increased demand for capacity by access seekers and alignment with other components of the coal chain. Investment hold up is a significant concern for BMA, and industry in general. While QR has attempted to address industry concerns about

investment hold up in the 2010 DAU, BMA concurs with the QRC that the amendments do not go far enough in this regard.

- (b) BMA concurs with the principal concerns of the QRC in relation to the proposed expansion provisions. In particular, BMA is concerned the investment obligations in the 2010 DAU are not sufficiently certain to be enforceable. Further, the triggers for investment lack sufficient transparency and essentially allow the decision about capacity expansions to be made solely by QR, without reference to any objective and identifiable criteria. Ultimately, any investment regime must be robust, subject to pre-determined and objective criteria and require the access provider to be accountable to access holders for decisions not to invest. In addition, consultation is a key element and the Access Undertaking must require QR to follow well defined and appropriate processes in this respect.
- (c) The expansion regime must include sufficient safeguards to ensure that there is limited scope for delays in the making of investment decisions. In turn, the QCA must have sufficient power to enforce investment obligations voluntarily assumed by QR under the Undertaking. In this respect, BMA supports the QRC's submission on proposed amendments to the Act.
- (d) Finally, the Access Undertaking must provide for a workable industry funded model to supplement access provider funded expansion. BMA considers the most effective way to encourage investment in the network to overcome the current hold up in expansion works is to allow industry to fund and carry out expansion works itself. BMA supports the QRC's submissions on this issue.

5.3 BMA considers the other issues addressed in the QRC's submissions as equally important, however believes the obligation to invest in expansion of the network requires particular emphasis, given its significance to the industry and in circumstances where the network is not currently being managed to ensure capacity meets demand.

6 Reduction of Conditional Access Rights where there is a shortfall in planned capacity

- 6.1 BMA does not support the Conditional Access Rights framework provided for the 2010 DAU. However, QR's proposal to scale back Access Rights in circumstances where the change in capacity does not meet or exceed planned capacity poses particular concern for BMA and it is this issue BMA addresses further below.

- 6.2 The 2010 DAU allows QR to reduce on a pro rata basis Conditional Access Rights against the change in capacity by reference to the proportion that those Conditional Access Rights bear to the aggregate Conditional Access Rights for all of the Conditional Access Holders.
- 6.3 New entrants and expanding miners including BMA rely on Access Rights when making mine production and expansion plans and investment decisions. Based on those decisions, producers enter in to long term take or pay supply contracts with customers and other service providers (including port and rail providers) in respect of the production arising from the development of the new mine or the expansion of an existing mine. The practical outcome of clause 11.3 of the DAU is that the determination of Conditional Access Rights occurs after the producer has committed to the investment and long term take or pay contracts are in place (creating binding obligations on the miner). For expanding miners, these long term supply contracts are usually for large amounts of coal, and the resulting exposure, in the event the planned capacity is not delivered, is not insignificant.
- 6.4 While BMA does not support Conditional Access Rights in principle, it requests that if the regime is adopted there must necessarily be a sharing of the risk that expansion works may not always deliver planned capacity. However, BMA submits that risk must be shared equitably between access holders. In its current form, the 2010 DAU does not achieve this objective.
- 6.5 For these reasons BMA submits the current scaling back regime for Conditional Access Rights (where planned capacity is not achieved) discriminates between expanding miners and non expanding miners, with the result that expanding miners such as BMA are unfairly prejudiced. As the scaling back rights are effected on a pro rata basis, expanding miners alone bear the risk, notwithstanding all users stand to benefit equally from the expansion if it results in planned capacity being delivered. For example, it is possible that under the 2010 DAU Conditional Access Regime a new miner could be granted only 50% (or less) of its contracted capacity if the change in capacity does not meet planned capacity forecasts. Such an outcome jeopardises the viability of new projects.
- 6.6 BMA considers that while a risk of this magnitude remains in the regulatory framework, the value proposition for investment in new ventures in the Central Queensland Coal Rail Network is materially compromised. In this regard, BMA considers the lack of certainty around the granting of Access Rights may discourage new investment in Queensland, as the Conditional Access Rights regime imposes an additional burden on expanding miners who already bear the existing risk of expansion timing falling short of demand as is occurring under the current Access Undertaking. BMA submits that miners who are investing in the Queensland coal region should have sufficient certainty their contractual

arrangements will be honoured. BMA further submits the inequity of the scaling back regime proposed in the 2010 DAU is unjustified and should not be enshrined in any regulatory regime, particularly where expanding users are driving and funding enhancements of the network which benefit all users.

- 6.7 If the QCA is minded to approve the adoption of a Conditional Access Rights model, BMA submits any shortfall in planned capacity should be shared equally amongst all users, rather than proportionately.

7 Conclusion

- 7.1 BMA considers that the 2010 DAU in its current form does not achieve the objectives of part 5 of the Act. For the reasons outlined in these submissions, BMA submits the QCA should decide not to approve the 2010 DAU.