



HERBERT
SMITH
FREEHILLS

Charles Millstead
Chief Executive Officer
Queensland Competition Authority
Level 27, 145 Ann Street
Brisbane QLD 4001

29 October 2019

By Email

Dear Mr Millstead

Confidential

UT5 - Draft amending access undertaking

We act for the Queensland Resources Council (**QRC**) and the coal producers that signed a 'UT5 DAAU Implementation Deed' (**Coal Producers**).

We refer to:

- (a) the draft amending access undertaking submitted to the Queensland Competition Authority (**QCA**) for approval by Aurizon Network Pty Ltd (**Aurizon Network**) on 17 September 2019 (**Revised DAAU**);
- (b) the letters of support given by the Coal Producers in respect of the draft amending access undertaking submitted to the QCA for approval by Aurizon Network on 3 May 2019 (**Prior Letter of Support**); and
- (c) the QCA's Position Paper in respect of the Revised DAAU dated 24 September 2019 (**Position Paper**).

The QRC and the Coal Producers have been involved in the process by which the responses to the QCA's requests for information (**RFIs**), and the associated revised drafting contained in the Revised DAAU, were developed.

There are some matters contained in the Revised DAAU on which the QRC and the Coal Producers do not express a view and in respect of which the QRC and the Coal Producers are happy for the QCA to determine in accordance with its discretion. Those matters are listed in Attachment 1 to this letter. These are the same reserved matters identified by the Coal Producers in their Prior Letter of Support.

In the Position Paper, the QCA requested stakeholder views on:

- the End User voting rights proposed in the Revised DAAU;
- the QCA's proposal to progress the appointment of the Independent Expert through use of the dispute resolution procedures in circumstances where Aurizon Network and End Users are unable to agree on that appointment;
- the revision of system operating parameters and the process for reflecting those revised parameters in access agreements and train operating deeds;
- the application of the ringfencing provisions in the event that Aurizon Network is no longer part of the Aurizon Holdings group; and
- whether regulatory functions performed by Aurizon Network are captured by clause 3.4(c) or the definition of Below Rail Services such that Aurizon Network is not able to delegate those functions.

Each of these matters is addressed in turn below.

End User voting rights

The QRC and the Coal Producers have further considered the voting thresholds applicable to votes of End Users which are contained in the Revised DAAU. The QRC and the Coal Producers propose that those voting thresholds be amended in the manner set out in Attachment 2. Those changes are designed to ensure that the relevant decision is supported by a broad cross-section of End Users. In particular, the changes seek to



ensure that all End Users, including small End Users, have a real impact on the voting outcomes in respect of particularly significant matters. This is achieved by:

- elevating the voting requirements of certain important decisions to require a Special Majority of End Users rather than a Majority of End Users; and
- revising the test for a Special Majority of End Users to require a two-tiered threshold which depends on both tonnage entitlements of End Users and the number of End Users voting in favour of the relevant matter.

The QRC and the Coal Producers expect that the proposed changes will assist in addressing concerns regarding the ability of all End Users, both big and small, to truly impact voting outcomes.

The QRC and the Coal Producers have also suggested removing the concept of End User IE Voting Rights. Where this test was used in the Revised DAAU, the QRC and the Coal Producers would recommend instead using the test for a Majority of End Users. Having an additional test based on contracted tonnage by distance creates unnecessary complication and may cause inconsistent outcomes in the various voting methods.

The QRC and the Coal Producers understand that Aurizon Network are supportive of these changes. The QRC, the Coal Producers and Aurizon Network are willing to meet with the QCA to assist the QCA in understanding the reasoning behind the proposed changes to the voting thresholds.

Appointment of Independent Expert

The QRC and the Coal Producers are supportive of the QCA's proposal for the appointment of an Independent Expert to be referred to dispute resolution in the event Aurizon Network and End Users are unable to agree on that appointment. The existing dispute resolution procedures are well equipped to assist with the resolution of this matter.

Revised system operating parameters

The QRC and the Coal Producers support the QCA's interpretation of the Revised DAAU with respect to the flow through effects of any amendment to the system operating parameters. In particular, the QRC and the Coal Producers agree that:

- access agreements will only be amended with the agreement of the access holder; and
- any consequential amendment to a train operating deed will require the consent of the train operator.

Ringfencing provisions

The Revised DAAU provides that many of the ringfencing provisions will not apply in the event that Aurizon Network ceases to be part of the Aurizon Holdings group. The QRC and the Coal Producers support this approach as many of the ringfencing provisions have been drafted to address the particular risks that arise in the context of Aurizon Network being part of the Aurizon Holdings group. Those provisions would no longer be appropriate in circumstances where Aurizon Network is no longer owned directly or indirectly by Aurizon Holdings. Whilst it is undeniable that strong ringfencing provisions will remain appropriate, the content of those provisions will depend on the particular risks associated with the new ownership structure. As it is not possible to exhaustively predict what those risks will be, it is appropriate to rely on other methods of requiring amendments to the access undertaking at the appropriate time as highlighted by the QCA in its Position Paper.

Regulatory functions

The QRC and the Coal Producers agree with the QCA's interpretation of the definition of Below Rail Services, namely that those services are broadly defined and would capture the regulatory functions performed by Aurizon Network in respect of the access undertaking.



HERBERT
SMITH
FREEHILLS

Summary

Subject to the matters listed in Attachment 1 and Attachment 2, the QRC and the Coal Producers are satisfied that the content of the Revised DAAU in the form submitted by Aurizon Network to the QCA reflects the Coal Producers' intent with respect to their RFI responses. The QRC's and the Coal Producers' support of the Revised DAAU is conditional on the Revised DAAU being approved by the QCA in substantially the same form as it was submitted to the QCA (subject to Attachments 1 and 2).

Yours sincerely

Jay Leary
Partner, Global Head of Mining
Herbert Smith Freehills

+61 7 3258 6619
+61 408 101 028
jay.leary@hsf.com

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership ABN 98 773 882 646, are separate member firms of the international legal practice known as Herbert Smith Freehills.



Attachment 1

The QRC and the Coal Producers do not express a view in respect of the following matters contained in the Revised DAAU and the QRC and the Coal Producers are happy for the QCA to determine the following in accordance with its discretion:

- 1 the Reference Tariff values in Schedule F (7.2, 8.2, 9.2, 10.2, 11.2);
- 2 the System Allowable Revenue values in Schedule F (7.3, 8.3, 9.3, 10.3, 11.3);
- 3 any changes to payloads in Schedule F compared to those shown in the approved UT5;
- 4 loading times for additional mines not included in the approved UT5;
- 5 Gtk forecasts within Schedule F, to the extent that they differ to those contained in the approved UT5; and
- 6 the values shown in Schedule K.

End User voting thresholds

The following table describes the decisions that End Users are required to make under the revised UT5 DAAU that was submitted to the Queensland Competition Authority by Aurizon Network on 17 September 2019 and the proposed threshold for each decision.

1 End User decisions

End User decision	Threshold	DAAU reference
Whether to approve Aurizon Network's proposal to: <ul style="list-style-type: none"> Transfer a Senior AN Employee or a Key AN Commercial Personnel; or accept a Senior Related Operator Employee or Senior Related Competitor Employee, where such Transfer would otherwise be prohibited	Majority of End Users At least 50% of the End User IE Voting Rights ¹ held by the Voting End Users for the Year in which the Transfer is to be effected	3.6(b)
Nomination of an independent observer to attend Aurizon Network board meetings	Majority of End Users ²	3.9(f)
Proposal of an alternative third party index or rate for the determination of a Preliminary Limited Update Input or Limited Update Input to be put to the QCA (acknowledging that the proposal is subject to the agreement of Aurizon Network)	Majority of End Users	6A.6
Appointment of Independent Expert (acknowledging that the appointment is subject to the agreement of Aurizon Network)	Special Majority of End Users	7A.3.1(a)
Appointment of replacement Independent Expert (acknowledging that the appointment is subject to the agreement of Aurizon Network)	Special Majority of End Users	7A.3.1(c)
Whether to terminate the engagement of the Independent Expert following the QCA review which is undertaken 4 years after the Approval Date (acknowledging that the termination is subject to agreement with Aurizon Network).	Special Majority of End Users ³	7A.3.3(b)(i)

¹ See definition of 'End User IE Voting Rights' in section 3.

² See definition of 'Majority of End Users' in section 2.

³ See definition of 'Special Majority of End Users' in section 2.

End User decision	Threshold	DAAU reference
Termination of Independent Expert for default or, with the agreement of Aurizon Network, for convenience	Special Majority of End Users	7A.3.3(c)(i) and (ii)
Appointment of an expert advisor to attend meetings of the RIG and Aurizon Network in relation draft Maintenance Strategies and Budgets and draft Renewals Strategies and Budgets	Special Majority of End Users	7A.11.3(e)
Amendments to the draft Maintenance Strategy and Budget and draft Renewals Strategy and Budget to be notified to Aurizon Network	Special Majority of End Users	7A.11.3(f)
Approval or rejection of final draft Maintenance Strategy and Budget for a Coal System and a final draft Renewals Strategy and Budget for a Coal System	Special Majority of End Users for a Coal System	7A.11.3(j)(i) and (iii)
Approval or rejection of an alternative Maintenance Strategy and Budget or alternative Renewals Strategy and Budget	Special Majority of End Users for a Coal System	7A.11.3(j)(ii)
Request Aurizon Network to engage an Auditor to undertake an audit of whether Aurizon Network has complied with its maintenance obligations	Audit Majority of End Users	10.6.3(a)(ii)
Appointment of Auditor to undertake an audit of whether Aurizon Network has complied with its maintenance obligations	Audit Majority of End Users ⁴	10.6.4(a)
Additional reports required to be included in the Independent Expert's monthly report for a Coal System	Majority of End Users in a Coal System	10.8.3(c)(x)
Whether to submit and End User DAAU to the QCA	Special Majority of End Users	12.6(a)(viii) and 12.6(c)

^{4 4} See definition of 'Audit Majority of End Users' in section 2.

2 Thresholds for End User votes

The Chair must procure the Returning Officer to determine the outcome of the votes of End Users in respect of the Undertaking Matters in accordance with the threshold specified in the Undertaking for the relevant matter. The thresholds in the Undertaking are:

Audit Majority of End Users In respect of End Users with Access Rights in any Coal System (**Voting End Users**), a number of Voting End Users that in aggregate hold at least 35% of the End User Voting Rights (Network)⁵ held by the Voting End Users for the Year.

Majority of End Users In respect of End Users with Access Rights in:

(a) where a Majority of End Users for a Coal System is required, the relevant Coal System; or

(b) where a Majority of End Users generally is required, any Coal System.

(Voting End Users):

(ca) a number of Voting End Users that in aggregate hold at least 60% of the End User Voting Rights (Coal System) or End User Voting Rights (Network) (as applicable) held by the Voting End Users for the Year; and

(db) if the threshold in paragraph (ac) is not satisfied:

(i) at least 50% of Voting End Users by number at the relevant time; and

(ii) a number of Voting End Users that, in aggregate, hold at least 50% of the End User Voting Rights (Coal System) or End User Voting Rights (Network) (as applicable) held by the Voting End Users for the Year.

Special Majority of End Users In respect of End Users with Access Rights in:

(a) where a Special Majority of End Users for a Coal System is required, the relevant Coal System; or

(b) where a Special Majority of End Users generally is required, any Coal System,

(Voting End Users),

(c) a number of Voting End Users that in aggregate hold at least 75% of the End User Voting Rights (Coal System)⁶ or End User Voting Rights (Network) (as applicable) held by the Voting End Users for the Year; and

~~(d) if the threshold in paragraph (a) is not satisfied:~~

~~(di) at least 60% of Voting End Users by number at the relevant time; and~~

~~(ii) a number of Voting End Users that, in aggregate, hold at least 60% of the End User Voting Rights (Coal System) or End User Voting~~

⁵ See definition of 'End User Voting Rights (Network)' in section 3.

⁶ See definition of 'End User Voting Rights (Coal System)' in section 3.

~~Rights (Network) as applicable) held by the Voting End Users for the Year.~~

3 Definitions

~~**End User IE Voting Rights** The voting rights in respect of an End User for a Year determined by the Independent Expert on an annual basis in accordance with the following formula:~~

~~**$$EUVR = MCT/AMCT$$**~~

~~Where:~~

~~**EUVR** means the End User's voting rights for the Year~~

~~**MCT** means the highest volume of the End User's Access Rights (expressed on a contracted tonnage kilometre basis) in any Year during the 5 Year Forecast Period; and~~

~~**AMCT** means, in respect of the 5 Year Forecast Period, the aggregate of the MCT for all End Users (expressed on a contracted tonnage basis).⁷~~

End User Voting Rights (Coal System)

The voting rights in respect of an End User with Access Rights in the relevant Coal System for a Year determined by the Independent Expert on an annual basis in accordance with the following formula:

$$EUVR \text{ (Coal System)} = MCT/AMCT$$

Where:

EUVR (Coal System) means the End User's Voting Rights (Coal System) for the Year

MCT means the highest volume of the End User's Access Rights in the Coal System (expressed on a contracted tonnage basis) under existing Access Agreements:

(a) assuming Renewals occur in respect of the Access Rights under those Access Agreements;

(b) excluding any Access Rights that are conditional on the construction of a Customer Specific Branch Line or an Expansion; and

(c) excluding any Access Rights for a Cross System Train Service,

in any Year during the 5 Year Forecast Period; and

AMCT means the aggregate of the MCT for all End Users with Access Rights in the Coal System (expressed on a contracted tonnage basis),

provided that neither an Access Seeker nor a person in respect of which an Access Seeker is intending to use Access Rights holds any End User Voting Rights (Coal System) in respect of the Access Rights that are the subject of the relevant Access Application.

⁷ The reference to "End User IE Voting Rights" in clause 7A.11.8 should be replaced with "End User Voting Rights (Network) and End User Voting Rights (Coal System)". The reference to "End User IE Voting Rights" in 7A.11.8(b)(ii) should be deleted.

**End User Voting Rights
(Network)**

The voting rights in respect of an End User for a Year determined by the Independent Expert on an annual basis in accordance with the following formula:

$$\mathbf{EUVR\ (Network)\ =\ MCT/AMCT}$$

Where:

EUVR (Network) means the End User's Voting Rights (Network) for the Year

MCT means the highest volume of the End User's Access Rights across all Coal Systems (expressed on a contracted tonnage basis) under existing Access Agreements:

(a) assuming Renewals occur in respect of the Access Rights under those Access Agreements;

(b) excluding any Access Rights that are conditional on the construction of a Customer Specific Branch Line or an Expansion; and

(c) excluding any Access Rights for a Cross System Train Service,

in any Year during the 5 Year Forecast Period; and

AMCT means the aggregate of the MCT for all End Users (expressed on a contracted tonnage basis),

provided that neither an Access Seeker nor a person in respect of which an Access Seeker is intending to use Access Rights holds any End User Voting Rights (Network) in respect of the Access Rights that are the subject of the relevant Access Application.
