

30 October 2012

John Hall
Chief Executive Officer
Queensland Competition Authority
Level 19, 12 Creek Street
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Brisbane QLD 4001

Dear John

Proposed Standard Alternative Form of Access Agreement

Thank you for the opportunity to respond to the Authority's Draft Decision on the Alternative Form of Access Agreement.

BHP Billiton Mitsubishi Alliance (BMA) and BHP Billiton Mitsui (BMC) support the Authority's Draft Decision and recommends further consideration be given to the QRC's submission, including the QRC's proposed amendments to the agreements which are outlined in its submission on the Draft Decision. BMA and BMC, along with other QRC members, have worked collaboratively with the QRC in the development of that submission.

The Authority's Draft Decision, in combination with the QRC's suggested amendments, will deliver greater train path utilisation / coal throughput as rail operators will have the opportunity and incentive to compete to deliver haulage services using a producer's access entitlements. This will promote a material increase in competition and cost efficiency in the above rail market as well as continuous improvement and innovation in the provision of above rail services.

As you are aware, the future expansion of the BMA Coal Chain is reliant on the development of sound contracting frameworks, including the new form of access agreements, in order to facilitate the commercial negotiation process with various supply chain service providers. In addition to the matters raised by the QRC in its submission, we have identified a number of improvements for the Authority to consider in finalising its Final Decision on the Alternative Form of Access Agreement (see attached document)

If you have any queries or require more information, please feel free to contact Ms Tanya Boyle on mobile 0459 812257.

Yours sincerely



Neil Buckley
Rail Ports and Infrastructure Department
BHP Billiton Mitsubishi Alliance

Standard Alternative Form of Access Agreement

BMA and BMC support the QCA's Draft Decision and proposed amendments to the Standard Alternative Form of Access Agreement. However, certain improvements could further improve flexibility, efficiency and clarity in the contracting arrangements between producers and operators. Such improvements include the following.

1. Access Applications

The QCA's amendments do not provide for 'pre-approval' of operators. A pre-approval approach would enable the End User to take preparatory steps in advance of reallocating utilisation of its access rights to a new operator. This approach would save time at the reallocation stage (by enabling expedited final approval) and provide greater certainty to End Users by reducing the likelihood that the new operator will be rejected at the reallocation stage.

The QCA rejected the pre-approval approach on the following bases:

- It would require QR Network to maintain a pre-approval register. This would be administratively cumbersome due to operators' capabilities, or other factors, changing over time.
- The QCA might not have jurisdiction to compel QR Network to negotiate with a party who is not an access seeker.

We do not agree with the QCA's jurisdictional concerns, bearing in mind that (under the EUAA and TOA framework) the End User is the primary access seeker and the operator is merely utilising the End User's access rights.

We would like the QCA to consider 'in principle pre-approval', under which certain items are dealt with in advance and the remaining items are dealt with at the time the End User allocates a portion of its access rights to the incoming operator (subject to a condition that none of the pre-approved items have materially changed). This would provide an End User with some comfort that the incoming operator is less likely to be rejected at the allocation stage. For example, QRNN could confirm in principal approval for a rail operator who is already operating on QRNN's rail network under TOAs for other producers (i.e. if Operator A is already operating in the Goonyella System under an approved TOA, then Operator A is deemed to be an approved operator should BMA or BMC wish to use their service).

If it would overcome the QCA's jurisdictional concerns, a condition to pre-approval could be to require the End User to certify there is a reasonable likelihood of it allocating a portion of its access rights to the relevant operator within a stated period of time. Such certification would not, however, bind the End User to allocate access rights to the relevant operator within that period.

Alternatively, or in addition, we would like the QCA to consider an expedited process for negotiating TOAs where there is an existing EUAA and the access application is for the introduction of a replacement operator. We acknowledge that the various operational matters will still need to be addressed (to the extent they differ as between the outgoing and replacement operators) and there are likely to be some consequential changes to the EUAA in this regard. However, negotiating the TOA will in some respects involve little more than ensuring it conforms to the existing EUAA. In particular, the scope/quantity of access will already be determined by the EUAA and the only question being reviewed is what portion of the EUAA scope is to be utilised by the replacement operator. Finally, the outgoing operator's TOA might prove a helpful starting point.

For the above reasons, there is significant merit in the QCA differentiating between EUAA negotiations and TOA negotiations by way of either a separate expedited TOA access application process (based on, but sitting outside of, clause 4 of UT3) or reducing the timescales set out in the access application process, where the applicant is an operator seeking a TOA to supply an existing EUAA.

Recommendation 1

The QCA consider either or both:

- a process for 'in principle pre-approval' of operators, whereby certain approval items are dealt with in advance with the remaining approval items dealt with at the time the End User allocates a portion of its access rights to the incoming operator;
- a separate expedited TOA access application process (based on, but sitting outside of, clause 4 of UT3); or reducing the timescales set out in the access application process where the applicant is an operator seeking a TOA to supply an existing EUAA.

2. Assignment of a Train Operator Agreement (TOA)

Assigning a TOA provides an alternative means of introducing a replacement operator. The conditions to assignment are that the replacement operator is financially sound, accredited and otherwise capable of performing the operator's obligations under the TOA. The current test is entirely subjective (to QR Network's satisfaction). We believe the test should be aligned with the corresponding test for QR Network rejecting an End User's nomination of an operator (or variation of a nomination) under the EUAA, which includes a reasonableness requirement. If the QCA improves the threshold test for QR Network rejecting an End User's nomination or variation under the EUAA (see our recommendation 4 below) then the same criteria could similarly apply to the test for TOA assignments.

Recommendation 2

The QCA consider approving an objective operator test which QR Network must consider when deciding whether to accept or reject a TOA assignment.

3. Nominations and Variations

End Users will need to use the EUAA process for changing the nominated operator for particular access rights to be capable of being used not only on an ad hoc basis, but also in the context of a longer term and broader reallocation of access. We are of the view that the QCA's proposed amendments permit this. However, it is clear from the QCA's draft decision and accompanying commentary that the process is aimed primarily at short term changes to maximise usage of train paths on a day-to-day basis. We suggest the QCA clarifies this point in its final decision.

Recommendation 3

The QCA clarify the EUAA process for changing the nominated operator is capable of being used for longer term reallocations of access.

The End User's right to nominate or vary a nomination under the EUAA is subject to the following requirements:

- the relevant operator is not in breach of its obligations under an existing TOA; and
- QR Network is satisfied that the relevant operator is financially sound and otherwise capable of performing the obligations of an operator under a TOA.

In our view the second bullet is vague and might permit QR Network to reject a nomination or variation on a number of 'financial' or 'capability' grounds. We believe the term 'financially sound' and 'capable' could be defined with reference to the rail accreditation criteria in the Rail Safety Act (Qld).

In this regard, please would the QCA note that the 'financial' and 'capability' criteria apply in all cases (and not only where the operator is in breach of its obligations under an existing TOA).

Recommendation 4

The QCA consider approving an entirely objective operator test and clarify the definitions of financially sound and operationally capable by reference to the Rail Safety Act (Qld).

The QCA's draft decision alludes to a potential improvement to the nomination and variation process under the EUAA, being the 'overlapping allocations' approach. This is not implemented in the QCA's proposed amendments and is at present in effect prohibited by the provisos to clauses 2.3(b) and 2.3(f)(i)(A) of the EUAA. The QCA's suggested approach would allow an End User to nominate two or more operators with respect to the same access rights. The End User would, at the relevant time, inform QR Network which of the operators it has selected.

We support this approach and note it would be likely to still require the End User to make its operator selection with 48 hours written notice. The advantage in this approach is that it would:

- provide greater certainty to End Users by reducing the likelihood of an operator being rejected in the final 48 hours, leaving the End User free to make its selection from the pre-nominated operators; and
- deliver more streamlined flexibility in the short term reallocation of access rights between existing operators.

Recommendation 5

The QCA implement the overlapping allocations approach in the EUAA.

4. Accounting Governance

The EUAA provides for the End User to be responsible for the take-or-pay element but leaves open who (the end user or the operator) will be responsible for the payment of monthly access charges. The take-or-pay element is calculated for each financial year and invoiced (together with information as to how QR Network calculated it) following completion of that financial year. The End User may dispute QR Network's calculation and withhold a portion of the payment pending resolution of the dispute.

We believe the accounting governance arrangement in the EUAA is inadequate. The EUAA does not require QR Network to provide any 'advance notice' of the take-or-pay element for the End User as it accrues throughout the financial year. We recommend the EUAA should oblige QR Network to provide monthly updates as to whether the End User is ahead of, or behind, the contracted quantities (on a non-binding good faith basis if needs be) and state an estimated, non-binding, take-or-pay calculation estimate to be payable at the end of the Financial Year.

Recommendation 6

The QCA amend the EUAA to require QR Network to provide monthly updates to the End User on Year To Date usage of contracted quantities and estimated take-or-pay liability which may be payable at the end of the Financial Year.