



26 August 2011

John Hall
Chief Executive Officer
Queensland Competition Authority
Level 19, 12 Creek Street
GPO Box 2257
Brisbane QLD 4001

Dear John

Alternative Form of Access Agreement

BHP Billiton Mitsubishi Alliance (BMA) supports the development of a new form of standard access agreements to enable producers to directly hold and manage capacity access rights required to haul coal from their mine loading facilities through to export coal ports. The objective is to provide producers with greater flexibility in the way they contract their haulage services and promote greater train path utilisation as rail operators will have greater opportunities and incentives to compete for the opportunity to deliver haulage services using a producer's access entitlements.

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

We endorse the submission made by the Queensland Resources Council (QRC) in relation to the proposed alternative form of standard access agreements and the consequential amendments to QR Network's 2010 Access Undertaking (AUT3). BMA, along with other QRC members, has worked collaboratively with the QRC in the development of that submission.

In addition to the matters raised by the QRC in its submission, we have identified a number of aspects of QR National Network's (QRNN) proposed alternative form of standard access agreement which are of strategic importance to BMA (at Attachment 1). Key elements to note include the following.

AUT3 transitional provisions to support the new form of agreement

Currently BMA holds access entitlements in two forms:

1. Transport Service Agreements whereby BMA's contracted rail operator effectively owns and controls the access entitlements through which haulage services are delivered for BMA; and
2. Access Holder Agreements where the access entitlements are held directly by BMA.

In the absence of an End User Access Agreement, we have most recently entered into a number of Access Holder Agreements to ensure greater certainty over the capacity being created by the infrastructure expansions undertaken by QRNN. In contracting directly with QRNN, we have been involved in the engineering scope and development phase of each infrastructure expansion, confirming project delivery timeframes and monitoring the construction process to ensure alignment with our mine development plans.

This contracting process has delivered a range of benefits regarding project, cost and timing certainty at each stage of the BMA Coal Chain investment process. However, we have had to accept liability obligations for above rail operational issues in the absence of a fully developed new form of agreement framework. Accordingly, we recommend QCA include appropriate transitional provisions in AUT3 to enable Access Holders to transition, without penalty, from existing Access Holder Access Agreements over to the Alternative Form of Access Agreement once endorsed by the QCA.

Transitional arrangements should enable the parties to easily transition to the three way contractual framework of the alternative form of access agreement, such that the three way delineation of risks and liabilities can be undertaken to ensure the party most able to control the liability risk bears the liability risk under the new contracting framework. The transitional arrangements should operate as a means of facilitating the transition of the agreements, with the obligation for QR Network to:

- a) act reasonably in responding to any customer initiated request to transition (i.e. that QR Network not unnecessarily frustrate or simply refuse a request with no explanation); and
- b) appropriately assign liability obligations given that rail operators, as accredited operators, are the most appropriately placed to bear the risks and liabilities associated with operating trains on the network.

End user flexibility in utilisation of access rights

The BMA Coal Chain manages the logistics portfolio of mines across the central Queensland coal network. Given the size and scale of our operations we are seeking greater flexibility in the utilisation of our access rights and the ability to divert access rights amongst rail operators in the day of operations environment.

QRNN's proposed End User Access Agreement stipulates that an end user must nominate the rail operator(s) who will utilise all or part of the end user's access rights by written notice at least 30 days prior to that operator being able to utilise the access rights. This 30 day timeframe for notification does not appear to guarantee implementation within 30 days as it remains subject to QRNN's prompt implementation, with no penalties where delays are caused beyond the 30 day period.

This approach is not acceptable to the BMA Coal Chain. It destroys the flexibility and transparency sought in the new form of access agreement. The ability for end users to gain pre-approval of a number of rail operators for its different mine to port combinations effectively enables QRNN to maintain a watching brief on all nominated operators to ensure they continue to meet the minimum requirements under clause 3.3(c). In this context, the allocation of access rights amongst pre-approved operators could be significantly more flexible.

The following nomination process amongst pre-approved rail operators is therefore recommended:

- At least 30 days prior to operation, the end user will nominate the rail operator(s) and the number of access rights (mine to port combinations) to enable the nominated operator(s) to input into QRNN's monthly train plan;
- At least 14 days prior to operation, the end user has another opportunity to re-nominate the rail operator's access rights to enable the nominated operator(s) to input into the fortnightly planning cycle; and
- At least 7 days prior to operation, the end user is required to confirm or re-nominate the rail operator's access rights. This will enable the nominated operator(s) to input into QRNN's weekly train plan.
- The end user retains the flexibility to re-nominate rail operators within the 48 hour period, subject to the re-nomination enabling the end user to continue to meet QRNN's daily train plan and its scheduled train path services.

This day of operations flexibility is sought to maximise the utilisation of train paths by enabling an end user to switch between rail operators where a rail operations issue (e.g. breakdown or late running of

trains) may have otherwise jeopardised the ability for an end user's service to be run in accordance with the daily train schedule (e.g. train cancellation due to a rollingstock issue).

Where an end user wishes to nominate a rail operator who does not have QRNN pre-approval, then we accept the 30 day period, subject to further minimum timeframes and clear notification processes within this period for approval by QRNN. This will allow sufficient time for an end user to have a new operator engaged to utilise Access Rights on its behalf.

Structure of the access agreements

We have concerns with the current structure of the alternative form of access agreement as proposed by QRNN and have proposed a number of amendments to address these concerns. Our specific concerns relate to:

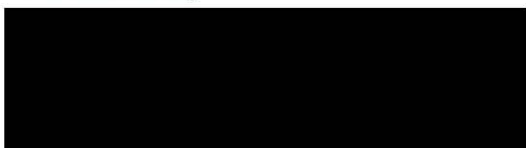
- a) the proposed structure of the agreements, particularly the fact that it is anticipated that each operator will only enter into one train operation agreement with QRNN and not one in respect of each access agreement; and
- b) the appropriateness of the proposed allocation of the functions, obligations and liabilities of the access holder under the existing standard access agreement (coal) between:
 - (1) the operator under the new train operations agreement; and
 - (2) the end user under the new end user access agreement.

These matters are outlined in more detail in attachment 1.

For the reasons outlined in the QRC submission and our submission, we request the QCA not approve QRNN's proposed alternative form of standard access agreements and the consequential amendments to QR Network's 2010 access undertaking.

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

Yours sincerely



Nilson D'Avila 
General Manager
Rail Ports and Infrastructure Department
BHP Billiton Mitsubishi Alliance



Definitions

EUAA means the End User Access Agreement (Coal) – the new access agreement between the end user (miner) and QR Network.

TOA means the Train Operations Agreement (Coal) – the new access agreement between the train operator and QR Network.

QR Network means QR Network Pty Ltd.

Item	Issue	Description	Suggested resolution
1	Structure of agreements	<p>The TOA is intended to be able to be used by the train operator in respect of multiple end users. That is, QR National or Pacific National could enter into one TOA in respect of all of the end users to which they provide haulage services. Therefore, a breach by an operator of its TOA will materially and adversely affect multiple end users, even if the breach only related to trains operated for a single end user.</p> <p>This is not the case under the recently approved access agreements for the Hunter Valley coal network. Under that system, there is a separate 'operator sub-agreement' in respect of each access agreement.</p>	<p>Amend the TOA so it is clear that a separate TOA must be entered into in respect of each end user and each EUAA.</p>
2	Structure of agreements	<p>As outlined in detail below (see for example items 13, 14 and 15), there are several items in respect of the TOA over which the end user requires a degree of control. While these can be covered off in the rail haulage agreement and/or the EUAA it is common contracting practice for parties to enter into tripartite agreements so that all three parties have the same understanding of their respective rights and obligations.</p>	<p>Develop a form of tripartite (or umbrella) agreement between the train operator, the end user and QR Network to accompany the EUAA and the TOA.</p>

Item	Issue	Description	Suggested resolution
3	End user liability for above rail operational issues	<p>The key objective of the proposed contractual structure is to allow end users to contract directly with QR Network for rights of access to QR Network's rail network without bearing liability and obligations for above rail operational issues. Such liability is to be borne by the relevant train operator. This objective has not been fully achieved. The EUAA is drafted such that both the end user and the operator accept sole liability for, release and indemnify QR Network for all claims in respect of any loss or damage to property or personal injury or death:</p> <ul style="list-style-type: none"> • due to or arising out of the TOA and caused by the wilful default or any deliberate or negligent act or omission of the operator; or • where such person or property is being transported on train services. <p>given the operator is responsible for operating the train services, the end user is therefore liable for the actions of the operator in the above circumstances.</p>	<p>This indemnity should be deleted from the EUAA as QR Network:</p> <ul style="list-style-type: none"> • will have the benefit of an identical indemnity from the operator; • has the right to approve each operator nominated by the end user; and • will receive security from each operator for the performance of its obligations.
4	QR Network's approval of nominated operator	<p>The EUAA provides that QR Network are only obliged to accept an end user's appointment of an operator where the operator is:</p> <ul style="list-style-type: none"> • financially sound; and • capable of performing its obligations under the TOA. <p>What constitutes 'financially sound' should be specified, so that QR Network's expectations are understood upfront.</p>	<p>Insert an objective financial test into the EUAA.</p>

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5	Changes to operator	<p>The process to change operators is cumbersome and lengthy. This is in contrast to the Hunter Valley coal network process which allows transfers to take place in a matter of days (48 hours).</p> <p>In addition, under the proposed clause 12.5(f) of the access undertaking a change in operator is deemed to be a transfer of access rights – triggering the other clauses of the undertaking relating to transfer of access rights.</p>	<p>EUAA should be amended to allow both long, short and spot (in the day of operations) term changes in operators to take place with as few barriers to such transfers as possible. Changes in operators should not incur any charges or fees payable to QR Network.</p> <p>The proposed clause 12.5(f) of the access undertaking should not be accepted.</p>
6	Short term transfers of access rights	<p>The EUAA does not allow short term transfers of access rights to other end users and to other origins within a coal system.</p> <p>One of the key reasons that end users have sought to directly hold access rights is to allow them to manage a portfolio of access rights to best suit their mining operations. Part of this portfolio management would be the ability to transfer access rights to other qualified end users or to other mines owned or operated by that end user.</p> <p>The ability to make short term transfers would help ensure that the entire network was efficiently utilised at all times.</p>	<p>Short term transfer of access rights should be permitted (subject to actual, not perceived, operational constraints). The transferor would remain liable to QR Network for those access rights irrespective of the transfer.</p> <p>This concept has been incorporated into the recently approved access agreements for the Hunter Valley coal network, and is common in other regulated infrastructure assets (such as pipelines).</p>

Item	Issue	Description	Suggested resolution
7	QR Network's liability for infrastructure	QR Network's liability under the EUAA for claims in relation to the standard of the infrastructure or any failure of or defect in the infrastructure is narrower than that set out in the existing standard access agreement (coal). In the latter agreement, QR Network is liable for claims where it has failed to, or has been negligent in performing its obligations to, carry out maintenance work on the network. Under the EUAA, QR Network is liable for claims in relation to the standard of the infrastructure or any failure of or defect in the infrastructure, only where it has failed to perform the maintenance work and not where it has been negligent in performing maintenance work.	Amend the EUAA so that QR Network is liable where it has negligently performed its maintenance work.
8	Consequential loss	Under the EUAA neither party is liable to the other for consequential loss. This differs from the position under the existing standard access agreement (coal) and the TOA, where: <ul style="list-style-type: none"> QR Network is liable for consequential loss incurred by the access holder (or operator, in the case of the TOA) under the agreement as a result of a wrongful suspension of the access holder's train services (or part thereof); and a party is liable for the consequential loss of the other arising from a wrongful inspection or audit requested by the party in specified circumstances. 	Amend the EUAA so that it is the same as the existing standard access agreement (coal).
9	Security	QR Network has requested that both the end user under the EUAA and any operator under a TOA provide security (i.e. a bank guarantee) each for an amount representing 12 weeks of access charges. The aggregate security amount received by QR Network will therefore represent 24 weeks of access charges. This is double what is required under the existing standard access agreement (coal).	End users or operators who (or are related to entities that) have an investment grade credit rating should not be required to provide security. Amend the EUAA and the TOA as outlined in the QRC submission.

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10	Security	Train services may not commence until the relevant security has been provided.	<p>A form of bank guarantee which is acceptable to QR Network should be annexed to the EUAA and the TOA.</p> <p>End users who have (or whose parent company has) a credit rating of BBB or higher should not be required to provide any security.</p>
11	Variations to train service description	Both the EUAA and the TOA grant QR Network a unilateral right to vary the train service description (e.g. train service levels or sectional running times) where an operator has not complied in any material respect with such description. Such a variation may significantly alter the access rights granted to an end user.	<p>Amend agreements such that any such variation should only be made with the consent of both the end user and QR Network or pursuant to a regime where the end user is given an opportunity to cure the default.</p> <p>As a minimum, the end user must have a right to first withdraw or vary (if appropriate) its nomination of the non-compliant operator.</p>

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12	Insurance	The insurances to be held by the end user and the operator are the same and are not appropriate in all circumstances. This is an unnecessary expense for the parties.	Further consideration needs to be given to what insurances (and what levels of insurances) are appropriate for each of the end user and operator to hold given the relevant risks associated with each party's performance of their obligations are different. It is difficult to see what insurances the end user actually should be required to provide. End users are not required to provide insurance under the recently approved access agreements for the Hunter Valley coal network.
13	Suspension of train services	QR Network is entitled to suspend train services under a TOA for (among other things) a breach of either the operator of specified terms of the TOA or the end user of specified terms of the EUAA. However there is no requirement in the EUAA for QR Network to provide notice of suspension to the end user. Further a suspension can only be lifted by the operator rectifying the relevant default.	This could be dealt with in a tripartite agreement, or alternatively by way of amendment to the EUAA. The notice obligation could also be included in the rail haulage agreement.

Item	Issue	Description	Suggested resolution
14	Termination	The EUAA requires amendment to ensure that the end user may exercise some control over the termination of a TOA (whether for default of a party or as a result of a sustained force majeure event). Otherwise the end user may face delays to its operations upon termination by QR Network of a TOA, while the end user sources another operator and complies with the nomination process.	<p>The EUAA should be amended so that the end user must be involved in any consultation between the operator and QR Network to overcome the effects of a force majeure event.</p> <p>The end user should also have:</p> <ul style="list-style-type: none"> • step-in rights, where appropriate, in the event of any default by the operator which may give rise to QR Network's suspension rights (e.g. operator's default of payment of obligations); and • an express right to transfer access rights to another operator.
15	Control	The end user needs to retain a degree of control over the TOA. As discussed above, the end user is not a party to that agreement.	<p>The EUAA should be amended so that:</p> <ul style="list-style-type: none"> • copies of all relevant notices served by QR Network on an operator should also be provided to the end user; and • no amendments to the TOA are to be made without the consent of the end user. <p>Alternatively these matters could be covered in the tripartite agreement.</p>

Item	Issue	Description	Suggested resolution
16	Breach by QR Network	Amendments are necessary to the EUAA to ensure that QR Network's breach of the TOA does not relieve QR Network of its obligations under the EUAA.	The definition of 'QR Network Cause' in the EUAA should be amended to include a breach of the TOA by QR Network.
17	QR Network's obligations	A substantial amount of QR Network's obligations under the existing standard access agreement (coal) have been stripped out of the EUAA and now appear in the TOA only. The result of this is that an end user may not directly enforce such obligations against QR Network as they are owed to the operator, not the end user. Some of QR Network's key obligations, which have been distributed to the TOA, should also be owed to the end user under the EUAA.	Amend the EUAA so that the following obligations of QR Network to: <ul style="list-style-type: none"> • provide train control; • have and maintain accreditation to the extent required to perform its obligations; and • comply with the QR Network performance levels, which are to be set out in the TOA, are owed to the end user as well.