

MALLESONS STEPHEN JAQUES

By email

Mr Scott Gregson
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Dear Scott

BHP Billiton Minerals Pty Ltd - POSMAC Joint Venture

Thank you for your email last night to which you attached the public version of a submission lodged last night by Hope Downs Management Services Pty Limited ("**Hope Downs**"). It is appropriate to record and confirm that the Applicants are most concerned that Hope Downs, having made no expression of interest during the whole public consultation process, has chosen to make a submission after the close of business on 25 February 2003.

The following represents our response to the Hope Downs Submission.

1 The essential nature of the "two sale structure"

- 1.1 The only element of the Proposed Transactions and the Transaction Documents to which Hope Downs directs the Commission's attention, is the so-called "two sale structure". That "two sale structure" is fundamental to, and an inseverable part of, the Proposed Transactions. It is an integral part of the mechanism for risk allocation and assumption between all the parties.
- 1.2 The Hope Downs assertions in paragraph 4.2 of its Submission can be dealt with as follows:
 - (a) The balance of risks assumed between parties to a commercial arrangement is a matter of negotiation between them. The outcomes represent the commercial bargains they make. Hope Downs is in no position to assert that "POSCO is therefore already accepting the risks usually associated with mining activities and operations" or that the risk allocation between the parties is in some way inappropriate.

The Proposed Transactions and the Transaction Documents comprise an inseverable commercial bargain involving a contribution of capital, iron ore purchase obligations and acceptable risk profiles for the parties.
 - (b) It is intended that the "Marra Mamba" iron ore to be produced by the POSMAC Joint Venture will be blended with other grades of iron ore and sold as a blend

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and also sold as discrete product in international markets. The issue of whether any of that "Marra Mamba" iron ore is blended at the port by the Goldsworthy Participants (as owners) with other grades of iron ore is irrelevant when it comes to international prices and the competitive processes at work in negotiating prices with buyers. The anticipated international benchmark price for "Marra Mamba" iron ore will be a starting point for all negotiations undertaken by the Goldsworthy Participants for FOB sales of that iron ore and will be relevant to blends that include that iron ore. Whether the Goldsworthy Participants sell "Marra Mamba" iron ore or blends that include "Marra Mamba" iron ore, they will be subject to the competitive constraints imposed by the international negotiation and sales processes.

2 *The "discounting" assertion*

- 2.1 The "two sale structure" does not involve any concept of "discounting" as asserted by Hope Downs. In particular, it does not lead to "discounting of the price of Marra Mamba ore to POSCO".
- 2.2 In any event, this alleged concept of "discounting" is quite irrelevant to, and would be unaffected by, the condition being sought by Hope Downs. Even if the Proposed Transactions did involve a concept of "discounting" as asserted by Hope Downs (which is not the case), the condition would not remedy, modify or have any effect upon that "discounting".
- 2.3 The margin to apply is relevant only to the POSMAC Joint Venture and the POSMAC Sales Agreement. The margin is an essential part of the risk profile that POSCO has been prepared to assume and it is facilitated by the "two sale structure". It has no relevance to, or bearing upon, the POSCO Sales Agreement or the re-supply (including the price of re-supply) of iron ore by the Goldsworthy Participants to buyers.
- 2.4 Even if the "two sale structure" did involve "discounting" of the price of Marra Mamba iron ore produced by the POSMAC Joint Venture (which is not the case), that is pro-competitive conduct and of benefit to consumers. The observations of the High Court of Australia in *Boral* are conclusive in this regard.

3 *Barriers to Entry*

- 3.1 Hope Downs asserts in paragraph 5.2 of its Submission that "the effect of the two-sale structure is to entrench control of the infrastructure in the hands of the Mount Newman participants and thereby increase barriers to entry for the development of new projects."

The "two sale structure" has no effect upon, or relevance in connection with, the question of access at all, whether by Hope Downs or any other third party.

- 3.2 The mechanisms for third party access are set out in a combination of Part IIIA of the *Trade Practices Act*, the Iron Ore (Mount Newman) Agreement and the Rail Transport Agreement. These mechanisms are not affected (and could not be affected) by any contractual structure between the parties to the Transaction Documents.

Even if the transactions were capable of being structured without a "two sale structure" (which was not the case), the question of access for Hope Downs or any other third party under each of those mechanisms would be exactly the same.

- 3.3 The "two sale structure" does not confer any advantage upon any party to the Transaction Documents in connection with the carriage of iron ore over the Mount Newman railway.

The iron ore produced by the POSMAC Joint Venture is delivered FOR on to ore wagons at the load outstation at the Project Area. Title passes to the Goldsworthy Participants as the iron ore passes into ore wagons as it is being delivered at the Delivery Point. This fact was made clear in paragraph 4.6(e) of the Applicants' Submission.

The iron ore to be carried from the mine to the port will be owned by the Goldsworthy Participants, not the POSMAC Participants and not the Mount Newman Participants. The Goldsworthy Participants will be a "third party" as defined in the Rail Transport Agreement. Accordingly, when the Goldsworthy Participants qualify as a "third party" the right of the Goldsworthy Participants to have their iron ore carried, and the terms upon which it will be carried, will be determined in accordance with the Rail Transport Agreement.

- 3.4 Hope Downs asserts that:

"The effect of the position being adopted by the Newman Participants is that a potential mine operator will have to build its own railway line in order to have sufficient certainty as to the transport of its iron ore".

However, in *Hancock Prospecting Pty Ltd v. BHP Minerals Pty Ltd*, McKechnie J expressed the following view of the rights of Hope Downs in respect of the Rail Transport Agreement¹:

"Once its mine is operating, Hope Downs is guaranteed access to an existing railway. The Mount Newman Participants must carry the iron ore products. They cannot refuse. All that is to be settled is the terms upon which those products are to be carried. Whether the

¹ [2002] WASC 224

terms are ultimately either agreed or determined by an independent expert, nevertheless carriage is obligatory.

...

In order to achieve the purpose in the public interest however, it is not necessary to construe the agreement in the manner suggested by Hope Downs. Indeed, the public purposes of the State might well be said to be better served by the requirement that there is a mine operating before the provisions of the Rail Transport Agreement enure for the benefit of third parties."

Hope Downs is in no different position in relation to the Rail Transport Agreement than the Goldsworthy Participants and has no basis to assert otherwise.

CONFIDENTIALITY IS CLAIMED FOR PARAGRAPH 3.5

3.5

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3.6 In any event, the suggestion of a condition relating to access would not be within the power of the Commission.

Part IIIA of the *Trade Practices Act* sets out the legislative regime for third party access under the *Trade Practices Act* and it is not permissible for Hope Downs to attempt to gain a right of access under the *Trade Practices Act* other than by Part IIIA. In particular, statutory rights and protections set out in Part IIIA cannot be limited, modified or excluded by a form of condition attaching to an authorisation granted under Division 1 of Part VII of the *Trade Practices Act*.

The Applicants would be very happy to discuss this response with the Commission.

Yours sincerely

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