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23 March 2010

Our reference
AS.MDEA.10024545

By email: richard.chadwick@accc.gov.au

Dr Richard Chadwick
General Manager, Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Dear Dr Chadwick

North West Iron Ore Alliance (NWIOA) - application for authorisation A91212

We refer to your letter of 4 March 2010 informing us of the ACCC's favourable response to our authorisation application, as set out in the draft determination dated 4 March. In response to the ACCC's request for further submissions, we make the following points:-

Proposed Conditions

We support the ACCC's analysis of the public benefit and competition issues, and accept the two following proposed conditions, namely, that:

- NWIOA must, within 5 business days, provide the ACCC with information in writing in relation to any change in the current shareholders of NWIOA or any change in the non-shareholder members of the collective bargaining group; and
- NWIOA must provide the ACCC with the name of any target, not being a target identified by NWIOA in its application for authorisation, approached by the collective bargaining group within 5 business days of that approach.

In respect of the ACCC's third proposed condition, namely, the obligation on the NWIOA upon receipt of a direction from the ACCC, including a direction by any employee of the ACCC, to:

- furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC; and /or
- produce information, documents and materials to the ACCC within NWIOA's custody, power or control in the time and in the form requested by the ACCC,

we say that this obligation is not warranted, and is in any event too broad in its scope, and consequently will:

(1) impose a significant time and cost burden on the NWIOA;

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(2) will impede the ready flow of information between the NWIOA and individual members; and

(3) will act as an impediment in future negotiations with service providers who will be concerned to maintain confidentiality over their negotiating proposals.

Accordingly, we request that the draft condition be withdrawn.

We appreciate that given the underlying history of this matter, and its significance for the Australian economy, the ACCC wishes to be kept informed of NWIOA's conduct and the conduct of the service providers. For its part, the NWIOA wishes to keep the ACCC informed on a regular basis of the progress of such matters pursuant to this authorisation, as it anticipates that it will encounter a number of significant hurdles to an early resolution of agreements for rail haulage and/or below rail access, as exemplified in BHP Billiton's (**BHPB**) submission of 15 February 2010, commented upon below in the section "BHPB's twin fallacies".

Pre-decision conference

Subject to resolution of the preceding matter with the ACCC, the NWIOA does not seek to call a pre-decision conference.

BHPB's twin fallacies

The challenges facing the NWIOA, its members and third party users are exemplified in BHPB's submission to the ACCC dated 15 February 2010.

In that letter, BHPB perpetuates twin fallacies in respect of:

(1) the extent of its rights over the railway system; and

(2) the nature of its rail haulage obligations.

The first fallacy - "BHPB is the single user of the railway system"

BHPB (re)states the nature of its rights over "its" (sic) railway system in the following terms (page 2, first paragraph):

> *'...if there is a market for "iron ore transportation services" (or any narrower market), BHP Billiton has clear operational economic incentives to preserve the fully integrated, **single-user** nature of its rail system to maximise its economically efficient operation. BHP Billiton faces serious operational inefficiencies and uncompensated operational costs if it were to compromise the fully-integrated, **single-user status** of its rail system. Hence, unless otherwise required to do so, BHP Billiton is unlikely to participate in any such market.' (Our emphasis added).*

This formulation mis-states the extent of BHPB's rights over the railway system arising under the *Rail Transport Agreement* made in 1987 between the Premier of Western Australia on behalf of the State and a group of mining companies, including BHPB (**RTA**). The RTA was made pursuant to the *Mount Newman Agreement* of 1964 between the State and the Mount

Newman Company (**MNA**). The MNA made provision for the carriage of freight of third parties (but not expressly iron ore) **on the railway constructed (by BHPB) pursuant to the MNA.**

The purpose of the RTA, as recited and agreed by BHPB, was to "set forth the principles on which iron ore products of third parties shall be carried on the Mount Newman railway system".

The correct legal position as to the extent of BHPB's rights under the RTA has been stated unequivocally by the Full Court of the Supreme Court of Western Australia in *Hancock Prospecting Pty Ltd v BHP Minerals Pty Limited* (2003) WASCA 259 as follows:

> *"It is important to keep in mind, in seeking to construe the Rail Transport Agreement harmoniously, and as a whole, that the railway line* ***cannot be regarded simply as a private facility owned by (BHPB)****, albeit established at their expense, for* ***from the outset it was envisaged that the railway was not for the exclusive use of (BHPB). A right of access would be available for third parties."*** *per Hasluck J at para 77 (our emphasis added).*

BHPB, as one of the parties and authors of the RTA, agreed upon a range of sophisticated principles in 1987 - many years before the formulation of access reforms of wider application under the Trade Practices Act 1974 - which expressly addressed and sensibly provided for the physical and financial mechanisms by which the rail transportation needs of one or more third party iron ore producer's would be accommodated, added onto and integrated into BHPB's existing rail system. Express provision has been made for the addition and incorporation of the third party's railway system to the existing railway system, including the addition of capacity, facilities, equipment and enhancements.

Contrary to the sentiments expressed by BHPB in its submission, the NWIOA does not seek to interfere with BHPB's operation of the rail system. Nor is the NWIOA seeking "to compromise efficiencies" or to "uncompensate" BHPB for proper operational costs - to do so would be contrary to a third party's own obligations owed to BHPB under the RTA.

What the NWIOA simply seeks is that BHPB performs fully its clear contractual obligations to provide rail haulage services to third parties arising under the RTA. This necessarily requires BHPB to acknowledge what the Hancock decision said about the true nature of its own rights in respect of the railway line---the railway line is not "its" railway line for "its exclusive use".

In exchange for the privileged position granted to it by the State of Western Australia, BHPB accepted and assumed what may be termed ***'BHPB's commercial community service obligation' (CCSO)*** to future iron ore producers. As observed by Mr Justice Templeman in the Hancock decision (para 32):

> ***"I have only slight sympathy for (BHPB's) unwillingness to deal with a prospective third party. While I accept that there are costs involved, I regard that burden as an incident of (BHPB's) privileged position under the Mount Newman Agreement."*** (Our emphasis added).

Thus BHPB has always known since 1964, restated in 1987 in more detailed terms, and cannot therefore continue to deny, that in exchange for being given "the keys to the commercial Kingdom" in 1964, BHPB agreed to leave the backdoor always open for the inevitable day when

an iron ore producer would call upon BHPB to fulfil its CCSO to it. BHPB expressly agreed (clause 4(b) of the RTA) that third party users could be competitors of BHPB.

Accordingly, BHPB has never been legally entitled, no matter what manner of economic arguments it wishes to assert in its own self-interest, to claim single user status, to proceed on the assumption that the railway line was for its own 'single user' exclusive use. BHPB has never been entitled to barricade the backdoor as a means to deny the performance of its CCSO.

Further, the NWIOA notes that BHPB is not legally entitled to cite "clear operational economic incentives" as a basis to maintain exclusive single user status. For the legal reasons outlined below in respect of BHPB's second fallacy, under the RTA BHPB's obligation is to enter into detailed arrangements to carry third party iron ore. It cannot claim undue prejudice or interference as a threshold disqualifying matter to preclude this obligation to enter into such arrangements. Clause 4(a) of the RTA addressed the issue of possible prejudice or interference with BHPB's operations by providing-

> ***"The detailed contractual arrangements referred to in clause 2 shall subject to this Schedule be structured so that the same shall not unduly prejudice or interfere with the operations of (BHPB) under the Mount Newman Agreement."***

Thus, for all of the foregoing reasons, the first BHPB fallacy – exclusive single user right - must be finally put to rest and replaced instead by BHPB's acceptance of, and commitment to perform, BHPB's commercial community service obligation in favour of third party iron ore companies under the RTA.

The second fallacy - BHPB's refusal to deal

In its submission to the ACCC, as quoted above, BHPB questions whether there is a ***'market for iron ore transportation services (or any narrower market)"***, and BHPB goes on to say (in denial of the true nature of its own rights and obligations to third parties as discussed above):

> ***"Hence, unless otherwise required to do so, BHP Billiton is unlikely to participate in any such market."***

It is inescapably the case that BHPB irrevocably agreed under the MNA and the RTA to be a supplier of rail haulage services to third parties when the call was made upon it to do so. Accordingly, since the MNA of 1964 and the RTA of 1987, BHPB accepted that it was "IN" that market and required by those agreements to participate in that market. Contrary to the cited remarks, there is now no further need for any third party to take some action to "require BHPB to do so". In order to avoid acting in breach of its obligations under the MTA and RTA, BHPB must now agree to deal with the NWIOA acting on behalf of each of its members. Refusal to deal in all of its manifestations is not an option.

It should also be noted that BHPB has elsewhere mis-described the nature of its obligations as a provider in the market. In its opening submission in the Australian Competition Tribunal's proceedings relating to the declaration of its Newman and Goldsworthy railways, BHPB asserted that:

"BHBP is not obliged to provide a rail haulage service to the extent that it would unduly prejudice or interfere with its operations.."[1]

This assertion states the position under the 1964 MNA but not the position under the RTA. As noted by Mr Justice Hasluck in *Hancock (para 51)* the RTA altered the arrangements. The original obligation to transport third party freight, where that could be done without unduly prejudicing or interfering with the operations of BHPB, was replaced *'by a requirement to carry the iron ore products of a third party in accordance with detailed contractual arrangements to be negotiated'.*

As noted above, those detailed contractual arrangements are to be structured so that they do not unduly prejudice or interfere with BHPB's obligations.

Thus, for all of the above reasons, the second BHPB fallacy - BHPB can refuse to deal - must finally be put to rest.

Please do not hesitate to contact me, if you have any queries.

Yours sincerely

Murray Deakin
Partner

copy to: Steven Mackay, Middletons
Catherine Pinchin, NWIOA

[1] Opening submissions of BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd in the Australian Competition Tribunal, p31.