

Proposed Users of the Wiggins Island Coal Terminal

Application for Authorisation -
A91241 - lodged by various users
of the Wiggins Island Coal
Terminal

Response to QR Network
submission

Dated 3 August 2010

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Application for Authorisation - A912241 lodged by various Wiggins Island Coal Terminal users

Response to QR Network submission

The Applicants refer to QR Network's submission dated 29 July 2010 in relation to the applications for interim authorisation and final authorisation by the Applicants.

The Applicants welcome QR Network's support for the grant of interim and final authorisation and note QR Network's acknowledgement that it will likely lead to significant public benefits, including a reduction in transaction costs and project timing, as well as contractual alignment across the coal supply chain.

In its submission, QR Network raised four principle points and the Applicants' response to these four key points is provided below. As such, this response is not intended to address each individual point referred to in the attachment to QR Network's submission.

1 Authorisation should be restricted to negotiations concerning rail transport infrastructure which is owned and controlled by QR Network

The Applicants confirm that the authorisation application is intended to apply to collective negotiations relating to below-rail infrastructure (and associated services) and not to above-rail access services.

Further, it is intended that the authorisation being sought will facilitate collective negotiations with QR Network in relation to infrastructure that it owns, operates, manages or controls, or below-rail infrastructure that it will in the future own, operate, manage or control once such infrastructure has been built. Therefore, the Applicants do not intend to negotiate collectively for the purpose of accessing private mine-specific rail infrastructure which may be owned by a producer. It is also unclear on what basis the Applicants could undertake such negotiations with QR Network.

The Applicants submit that the description of the conduct for which authorisation is sought, as described in section 2(a) of Form B and in the Supporting Submission, indicates that the Applicants intend to collectively negotiate terms under which access will be acquired from QR Network and not from other third party infrastructure owners.

The Applicants submit that the definition of the below-rail infrastructure which forms the subject matter of the authorisation for collective bargaining, as provided for in the application, together with the definition of the conduct to be authorised, is appropriate. However, the Applicants will discuss this further with the Commission if the Commission considers it necessary.

The Applicants also note the voluntary nature of the collective negotiation process, which does not compel any party to negotiate or reach any agreements if it does not consider it to be in its best interests or to be appropriate. It is further noted that the authorisation facilitates collective

negotiation amongst the Applicants and QR Network, in compliance with the provisions of the TPA; it does not compel the parties to negotiate on particular issues.

2 *Authorisation should cater for coal mining companies who are not currently a WICET producer (i.e. are not an Applicant) but subsequently become a WICET producer*

The Applicants respectfully submit that this point has been adequately addressed in the application for authorisation and does in fact apply to the current Applicants as well as future users who are not currently Applicants.

The list of Applicants comprises an identified list of coal producers who anticipate contracting for port capacity at the Terminal, whether as Stage 1 or Stage 2 users or as future users. For this reason, the Applicants have been termed “potential users”.

The Applicants do not intend to exclude any producers from engaging in any joint negotiations, pursuant to authorisation being granted. Rather, the Applicants intend to include future users who are not currently part of the Applicant group and, accordingly, the authorisation application has been specifically drafted to provide for this. In particular section 3(b) of Form B, includes a request that the Commission, in any authorisation to be granted, includes express authorisation for “*future users of the Terminal who will similarly need to negotiate below-rail access as the staged development and expansion of the Terminal occurs*”. This protection for future users is sought under section 88(10) of the Trade Practices Act 1974 (Cth) (“TPA”), as indicated in section 3(b) of Form B, as well as the cover letter to the application and on pages 7, 21 and 31 of the Supporting Submission.

Therefore, the Applicants respectfully submit that this issue has been adequately addressed by the manner in which the application has been drafted and that all potential future users of the Terminal will, subject to authorisation being granted by the Commission, be able to participate in any collective negotiations with QR Network.

3 *The duration of the Authorisation should be restricted to the period of negotiation of access-related terms relevant to each WICET development stage.*

(a) Restricting discussions for Stage 1 access to Stage 1 users

QR Network’s point in the last paragraph on page 1 of its cover letter, requesting that authorisation for collective bargaining be restricted to those Applicants relevant to each particular WICET development stage, appears to be in contradiction to its submission requiring that collective bargaining be open to all producers (as discussed in the point above), regardless of what stage of development they would be seeking access.

It is envisaged that all producers be entitled to take part in collective discussions regarding issues associated with access to below-rail infrastructure supporting the Terminal. As provided in the Supporting Submission, this will enable industry to reach consensus on what below-rail infrastructure is required to support the Terminal, the timing of delivery of

such infrastructure and general transparency relating to below-rail access supporting the Terminal.

(b) The authorisation being applicable only during periods of negotiation of access and not for the duration of the access agreements

QR Network appears to suggest that the authorisation should only apply to discrete periods during which actual negotiations for access are to take place. The consequence of this suggestion appears to be that the Applicants would not be able to collectively discuss or agree on any issues amongst themselves, or with QR Network, for the entire duration of the access agreements concluded.

The Applicants submit that it is not practical for an authorisation to be granted on the basis that it will be ‘switched on and off’ from time to time. The authorisation should be granted for a particular number of years, and provide immunity to the Applicants for any collective negotiations which may occur at any point during that time period in relation to securing access to below-rail infrastructure supporting the Terminal.

In this regard, the Applicants submit that they require the ability to collectively discuss and negotiate ongoing issues such as system optimisation initiatives relating to the below-rail infrastructure supporting the Terminal, amongst themselves and with QR Network throughout the term of any access agreements which are concluded. This may involve ongoing changes to below-rail configurations in order to achieve throughput targets in the most efficient manner. Naturally, discussions of this nature may occur intermittently, outside of the discrete periods for negotiations regarding access relating to particular development stages of the Terminal.

The Applicants, accordingly, submit that the term for which authorisation is sought is reasonable and practical in the circumstances, as described in detail in section 3 of the Applicants’ public response to the submission by Asciano dated 27 July 2010.

The Applicants again note that the authorisation facilitates a process of collective negotiation amongst the Applicants and QR Network in compliance with provisions of the TPA; it does not compel the parties to negotiate on particular points.

4 *Authorisation should exclude network expansions conducted by QR Network in accordance with the Access Undertaking and without particular access conditions or user funding*

QR Network has submitted that there is no requirement for collective bargaining in relation to rail infrastructure enhancements which have a capital cost of less than \$300 million because QR Network has committed in its 2010 Draft Access Undertaking to undertake such enhancements.

Firstly, the Applicants note that the Queensland Competition Authority (“QCA”) has yet to accept the 2010 Draft Access Undertaking submitted by QR Network (“DAU”). Therefore, there is uncertainty regarding what precise terms relating to expansions will be included in any final undertaking (including whether QR Network’s commitment will be unconditional or will

be subject to certain protections/limitations). Nevertheless, it is the Applicants' view that the authorisation and the final access undertaking are able to operate simultaneously and not to the exclusion of one another. Therefore, authorisation to collectively negotiate will not detract from the terms of any access undertaking which is ultimately accepted by the QCA.

Secondly, while QR Network submits that it is committed to undertaking enhancements of less than \$300 million under the proposed terms of the DAU, the Applicants submit that, in the absence of authorisation, they may be unable to collectively discuss important issues regarding the way in which these infrastructure enhancements to support the Terminal will be provided, including specifications of the infrastructure, timing of construction activities (including integration with related projects) and any efficiency-enhancing mechanisms that the Applicants may consider necessary. To the extent that the ability to negotiate collectively in relation to such enhancements result in more efficient access to the Terminal, authorisation will allow such discussions and negotiations to take place.

Thirdly, the Applicants note that the QCA is currently considering whether "users should be permitted to fund expansions at their option, even if QR Network is willing to do so". In the event that this concept is included in the final undertaking, users may choose to fund a project despite QR Network also being willing to fund. In such a case, a range of matters would need to be negotiated, including details regarding user input into the user-funded construction project, rebates of revenue earned from the assets by QR Network, and a user-funding agreement.

The Applicants, therefore, consider that it would be inappropriate to impose any thresholds on potential enhancements or expansions to below-rail infrastructure supporting the Terminal which may form the subject of collective discussions.

The Applicants note that while QR Network has offered 'user funding' as part of the RFP process for incremental capacity on the Blackwater and Moura systems, much of the detail still needs to be fleshed out and discussed and, accordingly, remains uncertain at this stage. The ability to engage in collective discussions in this regard would be important.

Conclusion

In addition to the above points, the Applicants welcome QR Network's endorsement in its submission of the need to seek contractual alignment across the supply chain. In addition, the Applicants welcome QR Network's acknowledgement that practical implementation of a "user funded project" would entail discussion and agreement between the various user funders. Therefore, to the extent that user funded expansions or enhancements of the below-rail infrastructure supporting the Terminal are required, the authorisation being sought will facilitate such discussion and agreement.

The Applicants would be pleased to discuss the contents of this response further if that would be of assistance.

3 August 2010