

Proposed Users of the Wiggins Island Coal Terminal

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

Response to submissions by QR
National Network Services and
Asciano dated 20 October 2010

Dated 3 November 2010

Proposed Users of the Wiggins Island Coal Terminal

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

Response to submissions by QR National Network Services and Asciano dated 20 October 2010

We refer to the submissions dated 20 October 2010 by each of QR National Network Services (“**QR Network**”) and Asciano in relation to the application for final authorisation by the Applicants.

The Applicants welcome both QR Network and Asciano’s support of the ACCC’s Draft Determination and note the points raised in each of their submissions. The Applicants’ response to each of the points is provided below.

1 QR Network’s concern regarding the duration of the authorisation period

The ACCC is proposing to grant authorisation for a 13 year period in order to allow collective discussion and negotiation for access to below-rail infrastructure to support the staged development of the Terminal, as well as for the duration of any access agreements concluded as a result of such negotiation.

The Applicants refer to their previous submissions¹ in which they provided detailed reasons for why they consider a 20 year authorisation necessary and appropriate.

Moreover, as noted previously, additional future expansions to the Terminal may occur if justified by increased demand from industry over time, requiring associated expansions in relation to below-rail infrastructure which supports the Terminal.

[**Confidential to WICET**] This would involve further negotiation with QR Network, beyond the current expansion process, which will likely be required to occur within the next 3 to 5 years.

It would, therefore, be appropriate for the authorisation to be granted for a 15 year period, to allow for supplementary expansion negotiations to occur on a staged basis within the next 5 years, together with a 10 year period to provide for the duration of the access agreements which will be executed pursuant to these negotiations.

Therefore, the Applicants consider a 15 or 20 year authorisation appropriate. However, to the extent that the ACCC is not minded to grant either a 15 or 20 year authorisation, the duration should not be less than 13 years, as proposed in the Draft Determination.

¹ The Applicants’ submissions dated 27 July 2010, 28 July 2010, 3 August 2010 and 25 August 2010.

2 ***QR Network's proposal that the Identified Below Rail Infrastructure definition should be expanded***

QR Network has proposed that the definition of the Identified Rail Infrastructure, to which collective bargaining will apply, be expanded to include additional rail systems that may need to be expanded to support the Terminal.

In particular, QR Network has proposed that the definition of Identified Rail Infrastructure be as follows:

"...below rail infrastructure comprising the Goonyella, Blackwater and Moura systems including: all expansions to these systems, all extensions to these system, including the proposed new railway connecting the Surat Basin to the Moura system..."

The Applicants intention from the outset of the authorisation process has been to seek immunity for collective negotiations in relation to all below-rail infrastructure which is necessary to support the Terminal. Accordingly, the definition of Identified Rail Infrastructure is intended to include all infrastructure linked to the Terminal project and necessary to support the transportation of coal to the Terminal.

For that reason, the Applicants' proposed definition included the words "...as well as access to any other below-rail infrastructure necessary to support the Terminal..." (emphasis added). The definition is not intended to be exhaustive and it is, therefore, intended to include all below-rail infrastructure which from time to time may require additional capacity in order to support the Terminal. It is understood that a link between the particular below-rail infrastructure and the Terminal is necessary.

It appears that QR Network's suggestion is not a substantive issue but simply seeks to provide further clarity in relation to the subject matter of the collective bargaining, in accordance with the Applicants' underlying intentions.

The Applicants consider that any additional below-rail infrastructure which supports the transportation of coal to the Terminal will be included under the initial definition proposed by the Applicants in the application. However, to the extent the ACCC may consider that further clarity is necessary, it could make this clear in any Final Determination which it may grant. In this regard, if the ACCC is minded to clarify the position, the following definition would be acceptable to the Applicants:

"below-rail infrastructure primarily comprising the Blackwater and Moura systems, as well as any other below-rail infrastructure system necessary to support the Terminal, and all expansions and extensions to these systems necessary to facilitate transportation of coal to the Terminal for export. For the avoidance of doubt, this may include, from time to time, the Goonyella system, the proposed infrastructure connecting the Surat Basin to the Moura system, and below-rail infrastructure necessary to support the reallocation of capacity from Barney Point to RG Tanna and the Terminal."

This will ensure that train services that originate in the Goonyella system or Surat Basin and which terminate at the Terminal will be included under the authorisation. [Confidential to WICET].

3 *Asciano's proposal regarding ongoing monitoring of authorisation conditions*

The Applicants do not consider it necessary for a specific ongoing monitoring mechanism to be imposed in order to ensure that collective negotiations do not extend to above-rail access.

Significant penalties may be imposed by the ACCC for contraventions of the *Trade Practices Act*. Therefore, in order to ensure regulatory compliance, the Applicants have applied for statutory immunity, by way of the authorisation, for particular defined conduct. In the event that the Applicants were to go beyond the scope of the authorised conduct, it would be a question on the facts and circumstances as to whether such conduct constitutes a breach of the law. In any event, the potential for the imposition of penalties being imposed in the event of a breach of the law, acts as sufficient incentive for the Applicants.

Furthermore, to the extent that the Applicants were to attempt to collectively negotiate with above-rail operators, the above-rail operators are able to approach the ACCC with any concerns they may have. Therefore, regulatory protection and oversight currently exists.

It is not appropriate for authorisations to include a monitoring mechanism to ensure parties do not go beyond the scope of an authorisation and, in this regard, similar authorisations granted by the ACCC have not included such monitoring mechanisms. Importantly, an authorisation is not akin to a section 87B Undertaking.

Therefore, sufficient regulatory incentives exist to prevent the Applicants from attempting to negotiate with above-rail operators and comply with their respective legal obligations.

4 *Asciano's proposal regarding the condition for the change in ownership notification*

The Applicants submit that it is not necessary to include a specific condition requiring the ACCC to consult in the event that a change in ownership of QR Network is notified to the ACCC. Regardless of the identity of the owner of the Identified rail infrastructure, the public benefits as outlined in the Supporting Submission will also arise through the collective bargaining process with a future owner and that minimal impact on competition will occur. Further, the ACCC will follow its existing internal processes in this regard, without the need for a specific condition being included in the final authorisation.

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

3 November 2010