

AUST COMPETITION &  
CONSUMER COMMISSION  
BRISBANE  
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## Form B

Commonwealth of Australia

*Competition and Consumer Act 2010 — subsections 88 (1A) and (1)*

### AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

#### 1. Applicant

- (a) Name of Applicant:  
*(Refer to direction 2)*

A91278

The Applicants are the coal producers described in Schedule 1 of the supporting submission.

- (b) Short description of business carried on by applicant:  
*(Refer to direction 3)*

The Applicants are coal producers. They mine and supply coal to customers, principally located overseas. Coal for export is transported from mine to port by rail.

Further details of the Applicants' business activities are provided in Schedule 1 of the supporting submission.

- (c) Address in Australia for service of documents on the applicant:

C/- Matthew Bull  
Freehills  
L38, CP1, 345 Queen Street  
Brisbane QLD 4000

## 2. **Contract, arrangement or understanding**

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:  
*(Refer to direction 4)*

The Applicants seek authorisation under section 88(1A) and section 88(1) of the CCA to:

- collectively discuss and negotiate terms and conditions with QR Network Pty Ltd (**QR Network**), including price, for access to the below rail infrastructure necessary to service the proposed development at Dudgeon Point (**Below Rail Infrastructure**) – the Below Rail Infrastructure and the proposed development at Dudgeon Point (**Terminal**) are described in more detail in the supporting submission;
- discuss matters relating to those discussions and negotiations amongst themselves; and
- enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired (the **Proposed Conduct**).

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:  
*(Refer to direction 4)*

The Proposed Conduct described above might give rise to cartel provisions. See the supporting submission for further information.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The application relates to the acquisition of access to the Below Rail Infrastructure. See the supporting submission for further information.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The Applicants are seeking authorisation for a period of 15 years. See the supporting submission for further details.

## 3. **Parties to the proposed arrangement**

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

QR Network and any future owner of the Below Rail Infrastructure. QR Network is currently the sole owner of the Below Rail Infrastructure.

QR Network's address is:

Level 21, Pipe Networks House, 127 Creek Street  
Brisbane QLD 4000

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:  
(Refer to direction 5)

The Applicants' contact details are outlined below (Registered Office Address):

Carabella Resources Limited

Level 1, 1 Breakfast Creek Road  
Newstead, Brisbane QLD 4006

Macarthur Coal

Level 5, 100 Melbourne Street  
South Brisbane QLD 4101

Middlemount Coal

Level 8, 100 Edward Street  
Brisbane QLD 4000

New Hope Corporation Limited

3/32 Magnolia Drive  
Brookwater QLD 4300

Peabody Energy Australia Pty Ltd

Level 13, 259 Queen Street  
Brisbane QLD 4000

See Schedule 1 of the supporting submission for further information on the business of the Applicants.

In addition, as provided under s 88(10) of the *Competition and Consumer Act 2010*, the Applicants request that any authorisation granted be expressed to apply to future users of the Terminal who may similarly need to negotiate access to the Below Rail Infrastructure with QR Network.

**4. Public benefit claims**

- (a) Arguments in support of authorisation:  
(Refer to direction 6)

The Proposed Conduct is likely to result in benefits for all participants within the coal supply chain, including QR Network and end customers.

The main public benefit is significantly lower transaction costs. QR Network and the Applicants will enjoy significant cost savings by negotiating collectively.

The Proposed Conduct will also improve business efficiency and commercial outcomes with regards to negotiated below rail access arrangements. It will support the timely development of mines in the Bowen Basin and the Terminal, which will lead to increased exports and export revenues.

See the supporting submission for further information.

- (b) Facts and evidence relied upon in support of these claims:

See the supporting submission for further information.

## 5. **Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*(Refer to direction 7)*

The most relevant market is the market for the supply and acquisition of access to Below Rail Infrastructure associated with the Terminal.

Possible secondary markets include:

- the supply and acquisition of above rail haulage services and coal handling services at the neighbouring ports; and
- the global markets for the supply of thermal and metallurgical coal.

## 6. **Public detriments**

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

*(Refer to direction 8)*

The Proposed Conduct is likely to result in minimal (if any) public detriment. To the extent that any public detriment might exist, the Applicants have taken steps to minimise that detriment. For example:

- participation in the Proposed Conduct is voluntary and there is no collective boycott activity;
- the composition of the group is limited and the authorisation will extend to future prospective users of the Terminal;
- information sharing will be restricted - the Applicants will not discuss commercially sensitive information (such as customer identities and pricing); and
- the Proposed Conduct relates only to the rail infrastructure needed to service the Terminal.

- (b) Facts and evidence relevant to these detriments:

See the supporting submission for further information.

**7. Contract, arrangements or understandings in similar terms**

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

*(Refer to direction 9)*

Not applicable

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not applicable

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Not applicable

**8. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable


**9. Further information**

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Matthew Bull  
C/- Freehills  
L38, CP1, 345 Queen Street  
Brisbane QLD 4000

Dated. 28/9/2011 .....

Signed on behalf of the Applicants

*PM*  .....

(Signature)

**Peter McDonald**  
(Full Name)

**Freehills**  
(Organisation)

**Partner**  
(Position in Organisation)



## DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
  - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
  6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
  7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
  8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
  9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.



Confidential

## Dudgeon Point Coal Export Terminal Producers

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Application for authorisation - supporting  
submission

**PUBLIC VERSION**

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## 1 Overview

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The Applicants are the coal producers described in Schedule 1.

The Applicants hold mining leases and/or exploration licences for coal mines or tenements in the Bowen Basin. The Applicants need to transport coal from their mines to a port for export to overseas customers.

The Port of Hay Point is close to several of the Applicants' current mines and tenements. The North Queensland Bulk Ports Corporation (**NQBP**) holds around 1400ha of land at Dudgeon Point which is an undeveloped part of the Port of Hay Point. Dudgeon Point is intended for port development<sup>1</sup>. Dudgeon Point Project Management Pty Ltd (**DPPM**) and Adani Mining have been awarded preferred developer rights to develop coal terminals at Dudgeon Point.

The Applicants are proposing to seek access to one of the new coal terminals at Dudgeon Point. In this Application, '**Terminal**' means each and any of the terminals to be developed at Dudgeon Point by DPPM to which the Applicants seek access.

To transport coal from their mines to the Terminal, the Applicants will require access to QR Network Pty Limited's (**QR Network**) below rail infrastructure comprising the Goonyella and Blackwater coal rail systems (to the extent that these systems are used to service the Terminal), including:

- all expansions to these systems;
- access to any other QR Network rail infrastructure necessary to support the Terminal; and
- all services relating to such access for the purpose of transporting the Applicants' coal to the Terminal (**Below Rail Infrastructure**).

The Applicants seek authorisation under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (Cth) to:

- collectively discuss and negotiate terms and conditions with QR Network for access to the Below Rail Infrastructure;
- enter into and give effect to contracts, arrangements or understandings with QR Network; and
- discuss related matters amongst themselves (**Proposed Conduct**).

Access agreements for Below Rail Infrastructure will be entered into by the Applicants individually.

Authorisation is sought for a period of 15 years. This period is appropriate given the long term nature of the infrastructure investments and the need to allow the Applicants to negotiate any changes that may be required to 10 year access agreements.

- Collective negotiations for access to the Below Rail Infrastructure are likely to occur in line with the development of the Terminal. Negotiations are likely to occur over a 3-5 year period.
- The Applicants will likely need to conduct ongoing collective negotiations with QR Network during the term of any access agreements, especially regarding potential price review mechanisms.

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<sup>1</sup> North Queensland Bulk Ports Corporation website.

Authorisation is sought for the Applicants and:

- their successors, assigns, related bodies corporate, associated entities and joint venture partners; and
- any coal producers who wish to use the Terminal in the future.

If authorisation is not granted, the most likely counterfactual is that the Applicants (or some of them) will negotiate with QR Network on an individual basis.

Compared to the counterfactual, the Proposed Conduct is likely to result in substantial public benefits.

- the key public benefit is significant transaction cost savings for QR Network and the Applicants.
- smaller producers will be able to leverage off the experience of the larger producers enabling their coal assets to be developed more effectively.
- other public benefits include potentially facilitating more timely investment, improving business efficiency and growth in export markets.

The Proposed Conduct is likely to result in minimal (if any) public detriment. To the extent that any public detriment exists, the Applicants have taken steps to minimise that detriment:

- participation in the Proposed Conduct is voluntary and there is no collective boycott activity;
- the composition of the group is limited and the authorisation will extend to future prospective users of the Terminal;
- information sharing will be restricted - the Applicants will not discuss commercially sensitive information (such as downstream customer identities and pricing); and
- the Proposed Conduct relates only to the rail infrastructure needed to service the Terminal.

The substantial public benefits outweigh any minimal detriments. As such, authorisation should be granted for the Proposed Conduct for a period of 15 years.

The Applicants are also separately applying for authorisation of conduct with respect to negotiations with DPPM for access to Terminal infrastructure. These applications for authorisation are related to, but not conditional upon each other.

## 2 Background information

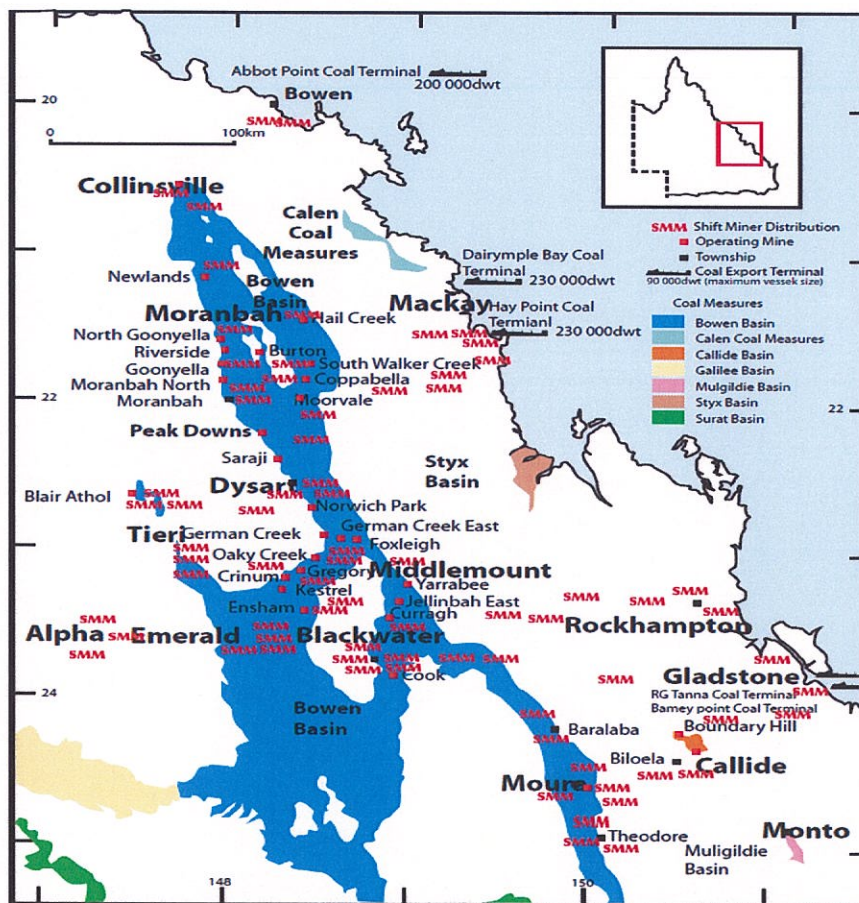
### 2.1 The Queensland coal industry<sup>2</sup>

Queensland coal deposits are primarily located in central Queensland.

The majority of operational coal mines in central Queensland are located in the Surat, Bowen and Callide Basin.

The Clarence-Moreton Basin (also producing coal) is further south and is not geographically relevant for the purposes of this Application. The Galilee Basin, which is adjacent to the Bowen Basin, is not currently producing coal but future production is expected from the Kevin's Corner, China First and Alpha sites. Development of the Galilee Basin will require significant infrastructure investment.

Figure: Central Queensland coal



Source: Shift Miner (2009)

Australia is a major global coal producer and the biggest exporter of seaborne coal. The black coal mining industry is a major source of GDP for the Australian economy, and is expected to generate revenue of ~\$57 billion in 2010-11. This is a significant increase from ~\$36 billion in 2005-06. Despite recent flooding in the major coal mining areas of Queensland, May 2011 data estimated growth in industry revenue of ~27% in 2010-11 and strong expansion of the industry's net profit to ~\$18 billion in the same period.

<sup>2</sup> IBISWorld Industry Report: B1101, Black Coal Mining in Australia, May 2011.

Queensland is the largest producer of black coal in Australia. The Applicants are primarily producers of two types of black coal – thermal coal and metallurgical coal. The Queensland coal industry has expanded rapidly in recent years. This has primarily been driven by growth in the Bowen Basin. Estimates for 2010-11 predicted that Queensland would produce 53% of Australia's black coal output.

Industry performance is expected to improve over the next five years, as improving global economic conditions see the demand for coal surge. Strong output growth is expected through to 2015-16. Overall, industry revenue is expected to expand at an average annual rate of about 4.7% over the five years ending in 2015-16, with revenue amounting to \$72.24 billion by the end of that period. It is expected that much of the revenue increase will be driven from Queensland mines.

Most of the coal industry's output is exported. Domestic market revenue amounts to an expected \$7.67 billion in 2010-11, compared to \$57.32 billion in total revenue. Growth in output and exports was delayed by the global financial crisis in 2008-09, but rebounded strongly in 2009-10 as demand recovered, especially from buyers in Asia. Exports were estimated at around 291 million tonnes for 2010-11, with Japan, South Korea and the European Union making up the main export markets.

Approximately 86% of Queensland's coal production is exported. Many of the newer mines in Queensland are effectively dedicated to export trade (i.e. their construction is based on agreements and understandings with overseas buyers). This export focus places pressure on mine to port infrastructure. Currently, bottlenecks on rail infrastructure are common. Bottlenecks on rail or at the ports undermine the industry's ability to grow exports. Capacity infrastructure issues have been a problem for the industry over the past few years and will continue to restrict the expansion of the industry unless the supply chain is operated in an optimal fashion. It is anticipated that capacity will improve with the development of port infrastructure, including at Dudgeon Point.

The black coal mining industry is a major Australian employer, with about 28,400 employees in 2010-11 and a wages bill for the year estimated at \$4.27 billion.

## **2.2 Coal transportation logistics**

### **(a) Overview of infrastructure**

Central Queensland coal producers transport coal by rail from each mine site to coal terminals at Abbot Point, Hay Point, Dalrymple Bay and Gladstone (RG Tanna and Barney Point terminals and the proposed Wiggins Island terminal) for export to overseas customers. The logistics chain from the mine gate to the port involves:

- below rail infrastructure (activities associated with the provision and management of rail infrastructure, including the construction, maintenance and renewal of rail infrastructure assets)<sup>3</sup>;
- above rail infrastructure (activities required to provide and operate train services such as rolling stock, train crewing, terminal provision and freight handling)<sup>4</sup>; and
- port infrastructure (activities associated with loading coal onto vessels for export).

### **(b) Below rail infrastructure**

Below rail infrastructure in central Queensland is provided by QR Network. QR Network holds a lease from the Queensland Government over the rail transport infrastructure that

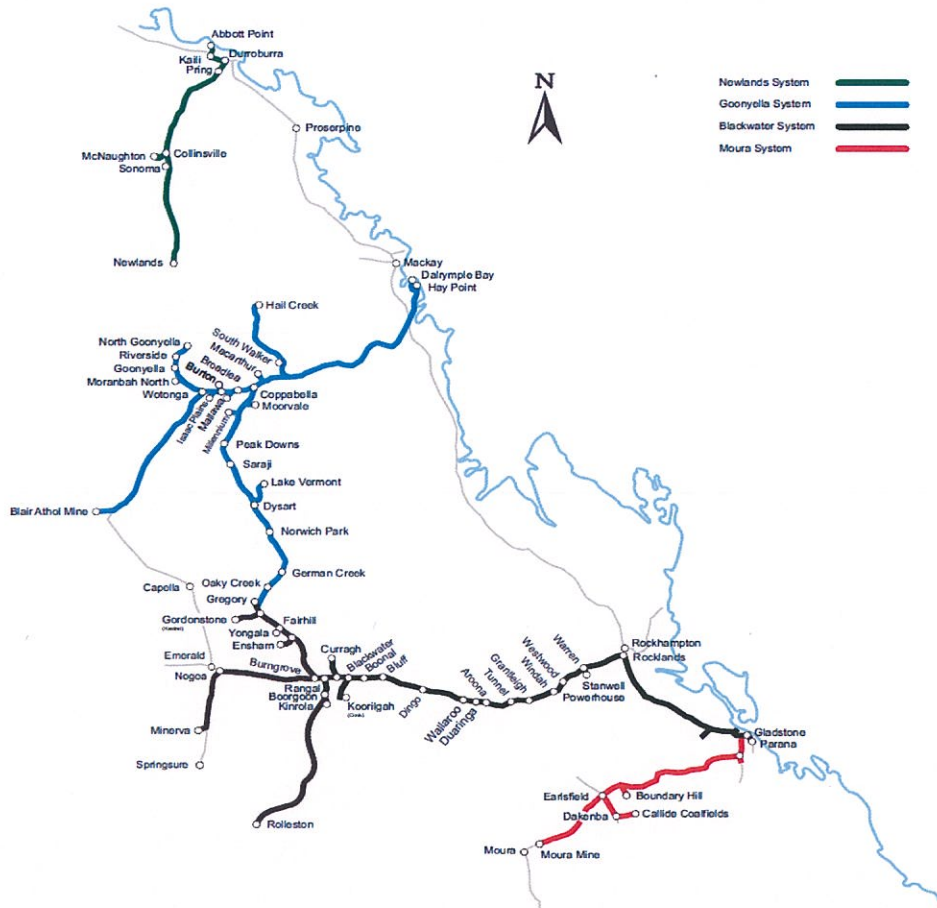
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<sup>3</sup> Refer to definitions section in Queensland Rail – Network Business Quarterly Performance Report (Q2 2010/11), dated 31 December 2010, page 4.

<sup>4</sup> Refer to definitions section in Queensland Rail – Network Business Quarterly Performance Report (Q2 2010/11), dated 31 December 2010, page 4.

it operates<sup>5</sup>. QR Network's rail infrastructure in central Queensland includes the Newlands, Goonyella, Blackwater and Moura coal rail systems.

**Figure: QR Network below rail infrastructure**



Source: Queensland Competition Authority Act 1997 – Schedule 1, Central Queensland coal network rail infrastructure

Schedule 2 contains further detail in relation to these rail networks.

A number of expansion projects are proposed to improve rail capacity in central Queensland. The Goonyella to Abbot Point (**GAP**) expansion project will deliver export capacity for coal producers in the Bowen Basin, increasing from 25 mtpa to 50 mtpa in 2012<sup>6</sup>. The scope of the GAP expansion project includes:

- construction of a 69 km new railway between the Goonyella and Newlands coal rail systems (the **Missing Link**);
- a major upgrade and expansion of the existing Newlands System; and
- related works in the Goonyella system to enable trains to travel north to Abbot Point<sup>7</sup>.

<sup>5</sup> Submission from QR Network, 29 July 2010, page 4, regarding Application for Authorisation lodged by Wiggins Island Coal Terminal Producers dated 7 July 2010.

<sup>6</sup> QR National Fact Sheet, Goonyella to Abbot Point Expansion Project, November 2010, page 1.

<sup>7</sup> QR National Fact Sheet, Goonyella to Abbot Point Expansion Project, November 2010, page 1.

Completion of the Missing Link will result in a more integrated coal rail network. The Newlands, Goonyella, Blackwater and Moura systems will all be linked. This will increase rail transport options for coal producers in central Queensland. It will enable mines currently in the Goonyella and Blackwater systems to transport coal to Abbot Point and will enable mines currently in the Newlands system to transport coal south to ports such as the Port of Hay Point. It is expected that increased transportation options will reduce bottlenecks on QR Network's below rail infrastructure.

The Applicants will seek access to the Below Rail Infrastructure in a heavily regulated environment. QR Network has given an undertaking to the Queensland Competition Authority (QCA) (approved in October 2010) which sets out the terms and conditions on which it will provide access to coal producers (**Undertaking**). Any access agreements between the Applicants and QR Network will be negotiated and entered into pursuant to the Undertaking.

### (c) Port infrastructure

As outlined above, central Queensland coal producers transport coal for export from each mine gate to export coal terminals at Abbot Point, Hay Point, Dalrymple Bay and Gladstone. Coal producers bid for capacity at the ports and rail coal for export in accordance with their allotted capacity.

The Applicants intend to make a separate application for authorisation in relation to negotiations with DPPM for access to Terminal infrastructure.

The focus on export markets means that there have been significant port infrastructure developments over recent years to increase port capacity. These developments include:

- a \$700 million expansion project at Gladstone in 2006-2007<sup>8</sup>;
- a \$1.2B expansion at Dalrymple Bay that became operational in 2009 increased contracted capacity from 54.5 mtpa to 85 mtpa<sup>9</sup>;
- a \$50 million expansion currently underway at Hay Point<sup>10</sup>; and
- significant expansions at Abbot Point, including proposed future expansion of T4-T7 terminals to increase capacity by a further 120 mtpa.

Although there have been a number of port infrastructure developments to increase port capacity in Queensland, the market for access to port infrastructure is still constrained and the development of the Terminal is important for the future expansion of exports.

## 2.3 Dudgeon Point Terminal<sup>11</sup>

### (a) Port of Hay Point

Dudgeon Point is an undeveloped tract of land at the Port of Hay Point, adjacent to Dalrymple Bay. NQBP is the port authority responsible for the Port of Hay Point.

The Port of Hay Point is currently serviced by the Hay Point Coal Terminal and Dalrymple Bay Coal Terminal. Both terminals have purpose-built in-loading facilities, on-shore stockpile yards and off-shore wharves (1.5 km at Hay Point Coal Terminal and 3.8 km at Dalrymple Bay Coal Terminal). Development of a Terminal at Dudgeon Point will have an offshore jetty and wharf structure similar to the existing two coal terminals.

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<sup>8</sup> IBISWorld Industry Report: B1101, Black Coal Mining in Australia, May 2011, page 8.

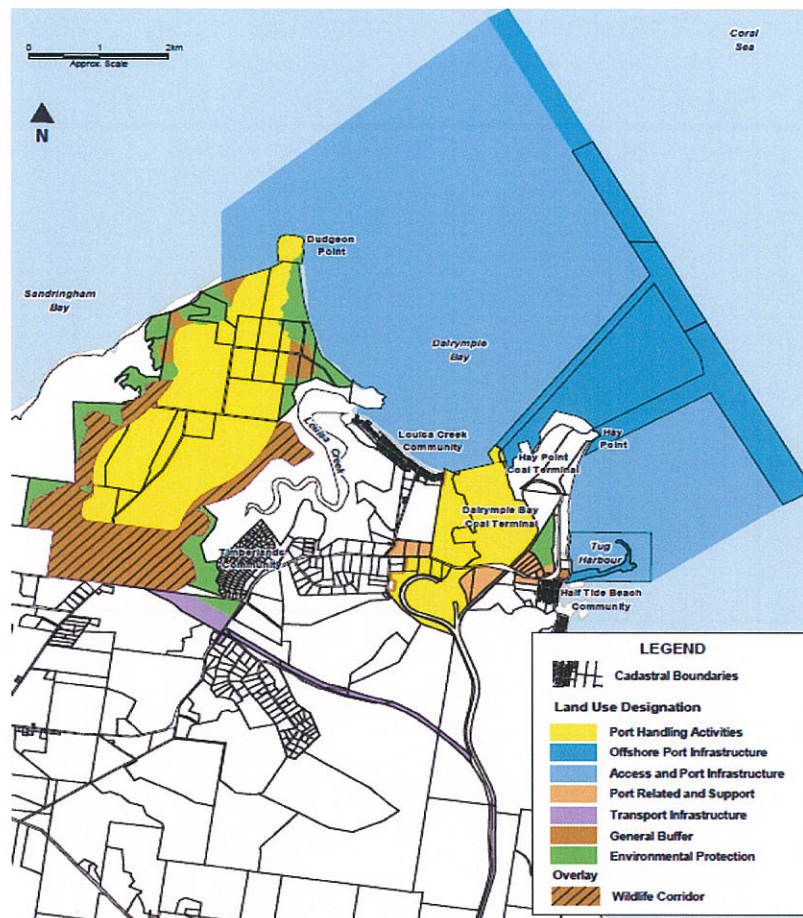
<sup>9</sup> IBISWorld Industry Report: B1101, Black Coal Mining in Australia, May 2011, pages 7 and 8.

<sup>10</sup> BMD Constructions news release, 'BMD Constructions secures works at Hay Point Expansion', dated 21 December 2010.

<sup>11</sup> Hay Point Portal, Issue 1, dated December 2008; Issue 9, Dated April 2011; Issue 10, dated June 2011; NQBP Port of Hay Point Update, dated 23 July 2011.



**Figure: Port at Hay Point**



Source: NQBP Publication, August 2010

**(b) Dudgeon Point development**

Proposed mine expansions in the Bowen Basin require further expansion of the Port of Hay Point. It is estimated that current Goonyella coal export capacity of 129 mtpa will need to double to around 250-300 mtpa over the next 5 to 10 years to meet projected industry demand.

Development of the Terminal at Dudgeon Point will help to satisfy increased demand for capacity. DPPM and Adani Mining have been awarded preferred developer status for Dudgeon Point and have both signed Framework Agreements with NQBP. It is proposed that development of the Terminal will be privately funded by DPPM and Adani Mining in a similar arrangement to Hay Point Coal Terminal and Dalrymple Bay Coal Terminal, which are privately owned or leased.

Adani Mining and DPPM have projected export requirements for the new Terminal development at up to 90 mtpa.

NQBP is preparing a Development Master Plan to guide development of the Port of Hay Point. The Draft Development Master Plan is expected to be available September/October 2011. Development of the Terminal is in a preliminary concept plan phase.

Construction of the Terminal is expected to begin in 2013 if approvals are granted. New or upgraded rail infrastructure needs to be delivered by 2016. First coal will be exported from the Terminal shortly thereafter.

(c) **Rail corridor expansions**

NQBP owns a rail corridor 4.5 km long and approximately 70-90 m wide that runs through the Fenechvale area to Dudgeon Point. This area is zoned as a rail corridor for rail transport in the gazetted Port of Hay Point Land Use Plan.

Recent master planning studies have confirmed that this corridor remains the recommended location for the new rail lines to the proposed Dudgeon Point Terminal.

## **2.4 Previous authorisations**

On 2 December 2010, the ACCC authorised the Wiggins Island Coal Export Terminal producers to engage in collective negotiations with QR Network for the transportation of coal to the Wiggins Island Coal Export Terminal (**WICET Determination**).

On 29 April 2010, the ACCC authorised the North West Iron Ore Alliance to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia (**NWIOA Determination**).

This Application raises similar issues.

## 3 Authorisation sought

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### 3.1 Conduct and scope

#### (a) Conduct

The Applicants seek authorisation under section 88(1A) and section 88(1) of the CCA to:

- (1) collectively discuss and negotiate terms and conditions with QR Network, including price, under which access to Below Rail Infrastructure for the purpose of transporting coal to the Terminal will be acquired from QR Network;
- (2) discuss among themselves matters relating to those discussions and negotiations; and
- (3) enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.

Each Applicant will determine whether to accept the negotiated terms and conditions offered by QR Network following the collective negotiations. Each Applicant remains free to pursue independent negotiations with QR Network on any matter, including in relation to access to the Below Rail Infrastructure.

As outlined in part 1 above, the Below Rail Infrastructure comprises QR Network's Goonyella and Blackwater coal rail systems (to the extent the Applicants use these systems to support the Terminal), including:

- all expansions to these systems;
- access to any other QR Network rail infrastructure necessary to support the Terminal; and
- all services related to such access for the purpose of transporting the Applicants' coal to the Terminal.

The Below Rail Infrastructure is limited to that which is necessary to support the Terminal at any given time.

#### (b) Scope

In this Application, 'Applicants' includes successors, assigns, related bodies corporate, associated entities and joint venture partners of each Applicant. This will ensure that the authorisation properly provides statutory immunity for all relevant parties.

Pursuant to section 88(10) of the CCA, the Applicants request that any authorisation granted by the ACCC be expressed to apply to future producers and users of the Terminal who will similarly need to negotiate Below Rail Infrastructure access with QR Network as the development and expansion of the Terminal progresses.

Participation in the conduct authorised by the ACCC will be voluntary:

- QR Network will not be required to negotiate collectively with the Applicants – authorisation merely provides the opportunity to do so; and
- the Applicants retain complete discretion on whether or not to negotiate collectively with QR Network – authorisation merely provides the opportunity to do so.

### **3.2 Reasons for the conduct**

Development of the Terminal is a significant infrastructure project in Queensland. Development of the Terminal will likely result in significant benefits to the coal industry and to the Queensland and Australian economies. The Proposed Conduct will support timely development of the Terminal.

Substantial public benefits are likely to result from the Proposed Conduct. This is due, in part, to the ability of the Applicants to present a considered and uniform view to QR Network in relation to their rail requirements for the proposed development and the access rights sought.

The Applicants note that QR Network access arrangements are regulated by the Undertaking and other standard form QR Network contracts. The Undertaking requires access to be provided on fair and equitable terms, which do not materially differentiate between access seekers unless particular risk factors exist. Standard form contracts are the default contractual position.

### **3.3 Duration**

The Applicants seek authorisation for a period of 15 years.

A period of 15 years is appropriate because:

- (a) development of the Terminal is proposed to occur over a period of several years and collective negotiations are proposed to occur in line with the development;
- (b) there are long lead times associated with this type of extensive capital investment in infrastructure and a need to deliver long term commercial certainty to the Applicants and QR Network;
- (c) the Applicants propose to enter into not less than 10 year access agreements with QR Network; and
- (d) it is likely to be necessary to conduct ongoing collective negotiations with QR Network during the term of any access agreements regarding any potential price review/reset mechanisms within those agreements or about initiatives to optimise system usage.

A period of 15 years is also consistent with the authorisation granted to coal producers in the WICET Determination and in the NWIOA Determination.

As a result, the Applicants consider that a period of 15 years is appropriate in all the circumstances.

## 4 The test for authorisation

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### 4.1 Weighing public benefits and detriments

Sections 90(5A) and 90(5B) of the CCA require that, before the ACCC authorises a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, it must be satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Section 90(6) sets out the test that must be applied by the ACCC when considering whether to grant authorisation for provisions of proposed contracts, arrangements or understandings which may have the purpose or effect of substantially lessening competition. This test is almost identical to the test in section 90(5A).

### 4.2 The meaning of public benefits and detriments

The term 'public benefit' is not defined in the CCA. The ACCC and the Australian Competition Tribunal (**Tribunal**) have consistently stated that the term 'public benefit' should be given its widest possible meaning<sup>12</sup>. More specifically, the Tribunal has found that this extends to:

*"...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements... the achievement of economic goals of efficiency and progress"<sup>13</sup>.*

The term 'public detriment' is not defined in the CCA. The Tribunal has given the concept of public detriment a wide ambit, including:

*"...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency"<sup>14</sup>.*

### 4.3 The counterfactual

In weighing the public benefits and detriments, the ACCC must apply the 'future with and without' test. That is, the ACCC must compare the likely future if authorisation were granted ('factual') with the likely future where authorisation is not granted ('counterfactual')<sup>15</sup>.

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<sup>12</sup> *Macadamia Processing Company and Suncoast Gold Pty Ltd* (1991) ATPR (Com) 50-109 at 56,101; *Davids Limited* (1996) ATPR 50-224 at 56,458; *Du Pont (Australia) Ltd and Ors* (1996) ATPR (Com) 50-231 at 56,529.

<sup>13</sup> *Re Queensland Cooperative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>14</sup> *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42, 683.

<sup>15</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936 and *Re Media Council of Australia (No. 2)* (1987), ATPR 40-774 at 48,419.

The most likely counterfactual is that, without authorisation, the Applicants or at least some of them would negotiate separately with QR Network for access to Below Rail Infrastructure.

It is possible that smaller producers may not negotiate separately with QR Network. Carabella is a smaller producer with more limited resources and expertise. Carabella may need to reconsider the development of its resources if it cannot engage in the Proposed Conduct. This may result in less or delayed coal production.

The Applicants require certainty that the Proposed Conduct does not contravene the CCA. The introduction of criminal sanctions for cartel conduct make this certainty especially important.

It may be theoretically possible for the Applicants to collectively negotiate with QR Network without authorisation by relying on the collective acquisition exception (s44ZZRV of the CCA). However, commercial and regulatory uncertainty means this is not a viable option for the Applicants. Proceeding without authorisation is not discussed further as a possible counterfactual in this Application.

## 5 Relevant markets

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The Proposed Conduct needs to be assessed in the context of a relevant market.

In the WICET Determination, the ACCC considered the relevant market to be the market for the supply and acquisition of access to below rail infrastructure associated with the Terminal.

As possible secondary markets, the ACCC considered the relevant conduct may have had an impact on:

- the supply and acquisition of above rail haulage services and coal handling services at the Port of Gladstone (or in this case, Abbot Point being the most proximate port to the Port of Hay Point); and
- the global markets for the supply of thermal and metallurgical coal.

For the purposes of this Application, the Applicants adopt the ACCC's previous market definition. That is, the main market in which the Application needs to be assessed is the market for the supply and acquisition of access to Below Rail Infrastructure associated with the Terminal.

Any impact in the secondary markets is likely to be minimal for the reasons outlined in the WICET Determination. These markets are not considered further.

## 6 Significant public benefits

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The Proposed Conduct is likely to result in benefits for all participants within the coal supply chain, including QR Network, the Terminal developers and end customers.

The main public benefit is significantly lower transaction costs and shortened negotiation time. QR Network and the Applicants will enjoy significant cost savings by negotiating collectively.

The Proposed Conduct will also enable smaller producers to leverage off the experience and resources of larger ones, and will improve business efficiency and commercial outcomes when engaging with QR Network.

The Proposed Conduct will also facilitate timely investment (in the Terminal and in QR Network's infrastructure) and improve growth in export markets.

### 6.1 Transaction cost savings

The main benefit of the proposed conduct is transaction cost savings.

The Applicants will be able to collectively negotiate access to Below Rail Infrastructure at significantly lower costs than would be the case if each Applicant were required to negotiate individually.

Transaction cost savings are likely to include:

- decrease in number of hours spent engaging with QR Network;
- decrease in costs involved in briefing external lawyers or experts; and
- efficiencies in pooling limited resources of smaller Applicants.

The ACCC recognised transaction cost savings as a primary benefit in the WICET Determination and in the NWIOA Determination. For the same reasons, significant cost savings are likely to result here, when compared to a situation where the Applicants negotiate individually for below rail access.

### 6.2 Supporting development of Bowen Basin assets

Carabella is a significantly smaller producer than the other Applicants. The Proposed Conduct will help Carabella leverage off the scale and experience of the larger producers among the Applicants.

The Proposed Conduct will enable Carabella to develop its mines in a more timely fashion. This will improve the overall development of the coal asset base in the Bowen Basin. Carabella expects its first mine to come on stream from 2015.

The timely development of new mines will increase the volume of coal exported through the coal supply chain. It will result in larger export volumes more quickly and the realisation of greater export revenue.

### 6.3 Improvement in business efficiency and commercial outcomes

The Proposed Conduct will likely deliver additional commercial certainty to the Applicants by enabling them to secure, on a timelier basis, sufficient rail transport infrastructure required to support their needs and the Terminal. It will also enable the Applicants to have more meaningful collective negotiations with QR Network as soon as possible.

In relation to collective bargaining by the Wiggins Island Coal Terminal producers, QR Network noted in its submission that the collective bargaining arrangements:



*"...may facilitate the development of mutually acceptable access-related terms and conditions with coal mining companies for the Blackwater and Moura systems and the achievement of a net public benefit."<sup>16</sup>*

The Applicants consider that the same public benefit would also apply to the Goonyella coal rail system, which is one of the rail systems over which access is sought.

This is not likely to impact on QR Network in a negative way, particularly in light of the Undertaking. The Proposed Conduct will help to minimise the bargaining imbalance that currently exists between QR Network and each individual Applicant. Correcting this imbalance will assist the Applicants who are smaller producers of coal to be more competitive vis-à-vis the larger established producers.

## **6.4 Facilitating efficient investment in infrastructure**

Substantial public benefits are likely to result from the development of the Terminal.

The Terminal is yet to be developed and is in the concept plan phase. An important aspect of the planning is to ensure that there is sufficient demand for the capacity and efficient allocation of the capacity.

To proceed with their bids for capacity at the Terminal, the Applicants need to understand the charges for rail access. The Proposed Conduct will enable the Applicants to establish rail charges with QR Network in an efficient manner. This will help the Applicants to engage with DPPM in a meaningful and efficient manner when seeking access to the Terminal.

The Applicants will also be able to provide more accurate information to QR Network about the Terminal development and capacity expansions. For example, the Applicants will be able to provide revised estimates of overall demand for access to the Below Rail Infrastructure, based on their allocated capacity at the Terminal.

The proposed conduct will enable the Applicants to present a uniform view, in particular with regards to below rail services, access and other contractual terms. This will provide greater certainty to QR Network with regards to potential infrastructure investment.

If the Applicants were required to individually negotiate with QR Network, there would inevitably be some degree of misalignment between their interests. This would arise through differences in their operations, for example logistical capabilities such as scheduling and stockpiling. Collective negotiations will enable the Applicants to address any misalignment at an early stage and allow them to present a more considered proposal to QR Network.

The Applicants will be able to identify proposals which collectively address their needs, enabling QR Network to consider and respond to a joint and more complete view.

This will provide investment efficiencies in both the short term and the long term. In the short term, QR Network will have accurate information about day to day investment. In the long term, the Applicants will be able to make more accurate investment plans, cost outlines and forecasts regarding any planned future investment or production.

The Proposed Conduct is likely to assist the industry in identifying proposals that seek to satisfy the needs of the relevant parties more fully. The Proposed Conduct will likely contribute to more efficient and timely infrastructure investment along the coal supply chain, compared to a situation where negotiations are conducted on an individual basis. This will result in a benefit to the public.

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<sup>16</sup> Submission from QR Network, 29 July 2010, page 1, regarding Application for Authorisation lodged by Wiggins Island Coal Terminal Producers dated 7 July 2010.

## 6.5 Growth in export markets

Exports are very important for the Queensland and Australian economies. The expansion of mining activities (supported by efficient transportation of coal from the mine gate to the port) is a significant public benefit, as the ACCC has previously recognised.

The Proposed Conduct will support timely and efficient development of the Terminal. Capacity demand at the Terminal is closely connected to below rail capacity. They are both part of the same logistics supply chain. Timely resolution of rail access arrangements and development of the Terminal will ensure that export revenues are realised as soon as possible.

The Proposed Conduct will also support the timely development of Carabella's mines.

The economic benefits to the Mackay region from development of the Terminal will be significant. Total construction cost for the Terminal, offshore jetties and wharfs is estimated at between \$8-10 billion<sup>17</sup>.

The development of the Terminal will result in more coal being transported from central Queensland mines and shipped to overseas customers. This in turn will promote job growth and new export revenue. Additional coal sales will also provide increased royalties and increased tax revenue. The Proposed Conduct will enable the Applicants to minimise any access-based delays, ensuring that any delays in additional export revenue are minimised. This will bring forward infrastructure investment, new export revenue and job growth in the region. Between 3,000 – 5,000 workers will be required during the estimated 3 year construction phase. Once the Terminal is fully operational, around 800 workers will be required on an ongoing basis<sup>18</sup>.

Efficiencies in the logistics chain from the mine gate to the port enable more coal to be exported. In the current economic climate, where customer demand for coal is high, infrastructure is more likely to act as a constraint than customer demand. Presenting information to QR Network from a single efficient source will assist in rail scheduling and avoid bottlenecks at this point in the supply chain. Presenting more complete information in turn to DPPM will assist port logistics including stockpiling, loading and shipping.

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<sup>17</sup> NQBP Port of Hay Point Update, dated 23 July 2011.

<sup>18</sup> NQBP Port of Hay Point Update, dated 23 July 2011.

## 7 Minimal (if any) detriment

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In certain circumstances, collective bargaining arrangements can interfere with market determined price signals and create allocative inefficiencies in the market. The ACCC has recognised that the extent of the detriment and the impact on competition will depend upon the specific circumstances involved.

On the current facts, minimal (if any) anticompetitive detriment will result from collective negotiation with a monopoly service provider. Any potential detriment is further reduced by:

- the voluntary nature of the Proposed Conduct and the absence of any collective boycott activity;
- the limited scope of the coverage and composition of the bargaining group;
- information sharing restrictions;
- the limited scope of the infrastructure proposed to be covered; and
- exclusion of above rail infrastructure and services from the Application.

### 7.1 Voluntary participation

As outlined in part 3.1 above, engaging in the Proposed Conduct will be voluntary.

The Applicants will retain the ability to negotiate individually with QR Network. They will be free to determine for themselves whether to separately enter into the collectively negotiated arrangement.

The Applicants do not propose to engage in collective boycott activity, and do not seek to include boycott activities in the scope of this Application.

QR Network will not be bound to participate in collective negotiations with the Applicants. It will merely be able to do so if it considers it efficient and appropriate.

### 7.2 Coverage and composition of group

The Applicants request that any authorisation granted by the ACCC be expressed to apply to future producers and users of the Terminal who will similarly need to negotiate Below Rail Infrastructure access to the Terminal with QR Network.

In the WICET Determination, the ACCC considered it appropriate to extend the authorisation to future prospective users of the Wiggins Island Coal Export terminal provided the following occurred:

- written notice to the terminal operator of an intention to become a future user of the terminal (of any stage); and
- a request to QR Network for below rail access to its network, and providing the terminal operator written advice of such request.<sup>19</sup>

The Applicants are comfortable with these requirements.

### 7.3 Information sharing restrictions

The Applicants' interactions with each other primarily relate to the Proposed Conduct and the separate application submitted in relation to access to the Terminal. Information will

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<sup>19</sup> Application for Authorisation lodged by Wiggins Island Coal Terminal Producers dated 7 July 2010, page 32.

only be shared to the extent that it is reasonably necessary for, and related to, this purpose.

The Applicants will not share other commercially sensitive information, for example in relation to the identity of downstream customers, pricing and production costs.

The Applicants will continue to compete with each other in relation to the production and supply of coal.

#### **7.4 Infrastructure covered is limited**

The Applicants intend that the authorisation only applies to QR Network below rail infrastructure and related services required to support the Terminal.

This would currently include the Goonyella and Blackwater coal rail systems. The infrastructure to which the Proposed Conduct relates includes any proposed QR Network rail infrastructure to the extent that it is used to transport coal to the Terminal.

The Applicants do not intend to collectively negotiate for the purpose of accessing privately owned rail infrastructure. Any such negotiations do not fall within the scope of this Application.

#### **7.5 Above rail infrastructure excluded**

This Application does not apply to above rail infrastructure or related services.

The Proposed Conduct will not have a detrimental impact on above rail infrastructure.

## 8 Why authorisation should be granted

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The Applicants seek authorisation to:

- collectively discuss and negotiate terms and conditions with QR Network for access to the Below Rail Infrastructure;
- enter into and give effect to contracts, arrangements or understandings with QR Network; and
- discuss related matters amongst themselves.

Authorisation is sought for a period of 15 years.

When compared to the likely counterfactual, the Proposed Conduct is likely to result in substantial public benefits.

The Proposed Conduct has minimal (if any) public detriment. To the extent that any public detriment might exist the Applicants have sought to minimise any concerns.

Public benefits substantially outweigh any detriments and authorisation should be granted.

## Applicants

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### **Carabella Resources Limited**

Carabella Resources Limited (**Carabella**) is an Australian public company that listed on the Australian Stock Exchange in December 2010. Carabella has focused its initial exploration activities at its flagship coking coal tenement in the Bowen Basin, Mabbin Creek. Exploration activities to date have identified a JORC resource of 95 million tonnes of coking coal at the Grosvenor West prospect. Carabella's first mine is likely to be an open cut mine with production capacity coming on stream from 2015.

### **Macarthur Coal Limited**

Macarthur Coal Limited (**Macarthur**) is an Australian public company that listed on the Australian Stock Exchange in July 2001.

Macarthur is the world's largest producer of (seaborne) low volatile pulverised coal injection (**LV PCI**) coal used in steel making. As supplier to the world's leading steel producers, Macarthur exports its entire product around the globe. The company's customers have been located in Asia (Japan, Korea, Taiwan). Macarthur has also recently made its first sales of LV PCI coal to China.

Macarthur has three operating mines in the Bowen Basin, as well as an extensive portfolio of exploration tenements across the Bowen Basin, giving the company and its partners a strong pipeline of metallurgical coal projects.

### **Middlemount Coal Pty Limited**

Middlemount Coal Pty Limited (**Middlemount**) is an incorporated joint venture between Macarthur and Gloucester Coal Ltd. Middlemount owns and operates the Middlemount Mine in the Bowen Basin, which produces low volatile PCI coal and hard coking coal. Production commenced at 1.8 million tonnes per annum in the 2010 calendar year.

### **New Hope Corporation Limited**

New Hope Corporation Limited (**New Hope**) is an Australian public company that listed on the Australian Stock Exchange in September 2003. New Hope focuses on niche marketing of its thermal coal and exports around 80 per cent of coal production to Asia Pacific markets (including Japan, Taiwan, China), and Chile, with the remainder being sold domestically to customers in south-east Queensland. New Hope focuses its exploration in the Bowen Basin and the Clarence-Moreton Basin.

### **Peabody Energy Australia Pty Ltd**

Peabody Energy Australian Pty Ltd (**Peabody**) is a wholly owned subsidiary of US-based Peabody Energy Corporation. Peabody was established in May 2001 and is primarily involved in the exploration, development and mining of coal. The company's products are distributed to the global steel industry, in particular, Japan, Europe, Taiwan, India and South America, as well as electricity generators in Australia and around Asia. In 2010, Peabody Energy achieved total sales of 25 million tonnes primarily to steel producers.

Peabody Energy operates 8 mines in Queensland and New South Wales, which produce a broad range of metallurgical and thermal coals. Coal is exported through ports in Mackay, Brisbane, Newcastle and Wollongong.

Queensland hosts 5 of the mine sites operated by Peabody Energy Australia. Four of these, Burton, North Goonyella, Eaglefield and Millennium span the length of the Bowen Basin coalfield. The Wilkie Creek mine site operates within the Surat Basin.

## QR Network coal rail systems

