

Australian Competition and Consumer  
Commission  
General Manager  
Attn: Dr Richard Chadwick  
[adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)

4 November 2011  
Matter 81893166  
By email

Dear Richard

## **Abbot Point Coal Export Terminal Producers - Authorisation - A91275 Response to submissions of Asciano and NQBP**

We refer to the following submissions made in relation to the Abbot Point Coal Export Terminal Producers - Authorisation - A91275 application:

- submission from Asciano dated 14 October 2011; and
- submission from North Queensland Bulk Ports (NQBP) dated 14 October 2011.

The applicants' responses to the issues raised are outlined below.

### **1 Response to Asciano submission**

#### **1.1 Application only related to below rail infrastructure**

We note Asciano gives in principle support to the application for authorisation on the basis of the types of public benefits identified by the applicants.

However, Asciano expresses some concern regarding the vertically integrated structure of the QR Network and QR National businesses.

The applicants make no comment on the structure of the QR businesses, but note that this structure will be the same with or without the Authorisation.

The applicants have stated in their application and submissions that the Proposed Conduct is limited to access to QR Network's below rail infrastructure and does not apply to above rail infrastructure or related services.

Therefore, any authorisation granted will only enable the applicants to engage in the Proposed Conduct in relation to below rail infrastructure. The ordinary operation of the *Competition and Consumer Act 2010* (Cth) (and any other relevant legislation) will apply in relation to the negotiation of above rail matters.

#### **1.2 Application linked to Abbot Point Coal Terminal**

Asciano has also sought clarification that any authorisation would be limited to below rail infrastructure that supports transportation of coal to the Abbot Point Coal Terminal (**Terminal**).

The applicants confirm that the relevant below rail infrastructure is limited to that required to support transportation of coal to the Terminal.

#### **1.3 Monitoring regime unnecessary**

Finally, Asciano supports the development of a monitoring regime to ensure collective negotiations relating to below rail issues do not transition into negotiations on above rail issues.

Doc 11621630.6

The applicants submit that a monitoring regime is not required. The applicants note that the ACCC did not require a monitoring regime in its final determination for the Wiggins Island Coal Export Terminal producers authorisation (A91241) (**WICET authorisation**).

As noted above, the *Competition and Consumer Act* would apply to any conduct outside the scope of the authorisation.

## **2 Response to NQBP submission**

NQBP notes that it is essential that coal producers will be able to obtain access to the rail capacity required to utilise coal export facilities at the expanded Terminal.

Obtaining this rail access in the most efficient and timely way possible is the basis for both the authorisation application and the associated public benefits likely to arise.

### **2.1 Collective negotiations are voluntary for all parties**

NQBP notes that the authorisation application extends to any coal producers who use the Terminal in the future but queries if coal producers perceive an advantage in collective negotiation, then there could be a risk that participation in the collective process will, in effect, become mandatory.

Engaging in the Proposed Conduct is voluntary for all coal producers. Coal producers are free to undertake their own cost benefit analysis and engage with QR Network in the way that best serves their interests (which might involve collective or individual negotiation or a combination of both).

If coal producers do choose to engage in the Proposed Conduct, it is because they can realise transaction cost savings (in money and time) and other associated commercial benefits (such as more timely development of their mines). These public benefits that would be realised from engaging in the Proposed Conduct are substantial and could result in other coal producers participating in the Proposed Conduct. In circumstances where the detriment is minimal, this is a positive outcome which supports the grant of authorisation.

Open access to the Proposed Conduct does not make it mandatory – it merely provides additional options for coal producers to achieve the most efficient engagement with QR Network possible.

### **2.2 Interaction with access undertaking**

NQBP noted that the authorisation application did not discuss the interaction between QR Network's access undertaking and the applicants' Proposed Conduct.

The applicants note that the Proposed Conduct will enable them to realise transaction cost savings and more efficient commercial outcomes where the access undertaking framework does not apply.

For example, to provide the access sought by the applicants QR Network is undertaking a 'Significant Investment' in excess of \$300 million. As such, QR Network can impose Access Conditions (as defined in the access undertaking) on access seekers which are negotiated terms outside the scope of standard form access agreements. The Proposed Conduct is especially appropriate in this instance – it is an effective mechanism to enable the applicants to negotiate access on timely, fair and equitable terms.

In this way the access undertaking and the Proposed Conduct compliment each other.

The practical implementation of the user funding mechanism in the access undertaking (involving engagement with QR Network in relation to below rail infrastructure upgrades) would also involve appropriate discussion and agreement between the relevant producers. QR Network recognised this in its submissions in the WICET authorisation process. The Proposed Conduct also supports the user funding mechanism, which in turn facilitates the public benefit of efficient investment in valuable infrastructure.

The applicants submit there are substantial benefits that will be realised from the Proposed Conduct. The access undertaking provides a supportive framework for these benefits to be realised and minimises any potential detriment. However, the Proposed

## Freehills

Conduct also enables efficient outcomes and benefits where the access undertaking framework does not apply.

Yours sincerely



**Jay Leary**  
Partner  
Freehills

+61 7 3258 6619  
+61 408 101 028  
jay.leary@freehills.com



**Peter McDonald**  
Partner  
Freehills

+61 3 9288 1597  
+61 422 815 933  
peter.mcdonald@freehills.com