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**SUBMISSION TO**

**THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION**

**IN SUPPORT OF APPLICATION FOR AUTHORISATION FOR COLLECTIVE  
BARGAINING (APPLICATION UNDER SECTIONS 88(1A) AND 88(A) OF THE  
COMPETITION AND CONSUMER ACT 2010 (CTH))**

**BY**

**THE PROPOSED USERS OF THE SURAT BASIN RAIL LINE**

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**22 May 2012**

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<b>"ACCC"</b>		means Australian Competition & Consumer Commission
<b>"Access Policy"</b>		means the draft Access Policy issued by Surat Basin Rail in January 2012
<b>Access Providers</b>		Means Surat Basin Rail, any entity which acquires an interest in the Surat Basin Rail and/or any future owner or operator of any part of the Identified Rail Infrastructure
<b>"Applicants"</b>		includes the Applicants, their successors and assigns, as well as their related bodies corporate, associated entities and joint venture partners (in light of the fact that negotiations for access to rail are not always undertaken by the Applicants directly)
<b>"ATSB"</b>		means Australian Transport Safety Bureau
<b>"Barney Authorisation"</b>	<b>Point</b>	means authorisation A91208 granted by the ACCC to Gladstone Ports Corporation Ltd & Others on 21 April 2010 for the purpose of re-allocating contracted export capacity of Wesfarmers Curragh Pty Ltd and the Dawson Joint Venture, including port terminal services, coal handling services and coal storage facilities, to the Terminal
<b>"Barney Point"</b>		means Barney Point Coal Terminal
<b>"CCA"</b>		means the <i>Competition and Consumer Act 2010</i> (Cth)
<b>"Dawson Joint Venture"</b>		means the joint venture that owns the Dawson coal mine in the Bowen Basin. The joint venture is owned 51% by Anglo Coal (Dawson) Ltd and 49% by Mitsui Moura Investment Pty Ltd, and is operated by Anglo Coal (Dawson Management) Pty Ltd
<b>"Framework Deed"</b>		means the mandate from the Queensland government executed on 11 December 2009 containing the contractual terms for the development of the Terminal
<b>"Identified Rail Infrastructure"</b>		means the Surat Basin Rail Line, as well as any other below-rail infrastructure connected directly or indirectly to the Surat Basin Rail Line (excluding the Moura Rail Line and the Miles to Wandoan Rail Line), whether or not owned by Surat Basin Rail, necessary to support the Terminal, for the purpose of transporting coal to the Terminal for export
<b>"Mt"</b>		means million tonnes
<b>"Mtpa"</b>		means million tonnes per annum
<b>"QCA"</b>		means the Queensland Competition Authority
<b>"QR Network"</b>		means QR Network Pty Ltd
<b>"RG Tanna"</b>		means RG Tanna Coal Terminal
<b>"Services"</b>		means all services associated with providing access to the Identified Rail Infrastructure, for the purpose of transporting coal to the Terminal (as detailed in Annexure 3)
<b>"Surat Basin Rail"</b>		means the Surat Basin Rail Joint Venture (including its joint venture parties ATEC (Dawson Valley Railway) Pty Ltd, Xstrata Coal Surat Basin Rail Pty Ltd and QR Surat Basin Rail Pty Ltd.
<b>"Surat Basin Rail Line"</b>		means the below-rail infrastructure connecting the Western system approximately 7 km from Wandoan with the Moura system near Banana, including all expansions and expansions to this system
<b>"Terminal"</b>		means the Wiggins Island Coal Export Terminal

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**“Tribunal”**

means the Australian Competition Tribunal

**“WICET”**

means Wiggins Island Coal Export Terminal Pty Ltd, the proposed owner of the Terminal

## **1. INTRODUCTION AND EXECUTIVE SUMMARY**

### **1.1 Introduction and purpose of submission**

This submission is made by Cockatoo Coal Ltd and Stanmore Coal Ltd (“**Applicants**”) in support of their application for authorisation under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (Cth) (“**CCA**”) for the purpose of collectively bargaining for access to:

- the Surat Basin Rail Line below-rail infrastructure connecting the Western system near Wandoan with the Moura system near Banana, including all expansions and extensions to this system (“**Surat Basin Rail Line**”); and
- any other below-rail infrastructure connected directly or indirectly to the Surat Basin Rail Line (excluding the Moura Rail Line and the Miles to Wandoan Line) (“**Connecting Infrastructure**”)

as well as all services relating to such access (together, the “**Identified Rail Infrastructure and Services**”)

with

- the Surat Basin Rail Joint Venture (“**Surat Basin Rail**”),
- any entity which acquires an interest in Surat Basin Rail: and/or
- any future owner or operator of any part of the Identified Rail Infrastructure,

(together, the **Access Provider**)

necessary to support the Wiggins Island Coal Terminal (“**Terminal**”), for the purpose of transporting coal to the Terminal for export.

In this submission, a reference to the Applicants includes the Applicants themselves, their successors and assigns, their related bodies corporate, associated entities and joint venture partners. This is on the basis that negotiations for access in respect of the Applicants may from time to time involve the Applicants directly, or may involve their wholly-owned mines or mines in which they have an interest, as well as their joint venture partners in respect of mines operated on a joint venture basis. Accordingly, the authorisation sought in this application is also sought on behalf of those parties.

In addition, as provided under section 88(10) of the CCA, it is requested that any authorisation granted by the ACCC be expressed to apply to future users of the Identified Rail Infrastructure and Services who will similarly need to negotiate below-rail access as the staged development and expansion of the Terminal occurs.

Details in relation to each of the Applicants is provided in **Annexure 1**.

### **1.2 Background to authorisation sought for collective bargaining in relation to the Surat Basin Rail Line in order to connect to the Moura rail line and the Wiggins Island Coal Terminal in Queensland**

#### ***Development of new port infrastructure at Wiggins Island***

Port and rail capacity in Queensland has been constrained over recent years. As a result, and more particularly in light of the anticipated increase in global demand for Australian coal, a group of

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Queensland coal producers are developing the Terminal, in the port of Gladstone, Queensland. Subject to the contractual terms of a mandate from the Queensland government (“**Framework Deed**”) executed on 11 December 2009, the Terminal is currently being developed by Wiggins Island Coal Export Terminal Pty Ltd (“**WICET**”) (a company established and owned by 8 coal producers, listed in **Annexure 2**). WICET also owns and finances the Terminal. The Terminal will be operated by Gladstone Ports Corporation.

Gladstone Ports Corporation owns the land on which the Terminal is being developed and leases the land to WICET, in addition to leasing and/or sub-leasing to WICET the areas necessary for the development and operation of the Terminal.

The Terminal was projected to be built in stages, to match forecasted coal export demand. Mechanical completion of Stage 1 is expected in the first half of 2014. Stage 1 is expected to have a nominal capacity of 25 - 30Mtpa.<sup>1</sup>

After Stage 1 is complete, the Terminal will then be expanded in additional increments (subject to demand) to a total capacity of approximately 85 Mtpa.

In late 2011 WICET accepted capacity commitments in respect of Stage 2 of the expansion of the Terminal. Financial close of Stage 2 is anticipated to occur in mid 2012. Shipments from Stage 2 of the Terminal are anticipated to commence in 2015.<sup>2</sup> Details of the projects expected to be undertaken under Stage 2 are set out in Annexure 7. The Applicants were both selected as producers included in the Stage 2 expansion.

### ***Authorisation of collective bargaining arrangement with QR Network***

On 2 December 2010, the ACCC granted authorisation to various coal producers that would use the Terminal to engage in collective bargaining arrangements with QR Network for the purposes of negotiating terms and conditions, including price, for access to the below rail infrastructure comprising the Blackwater and Moura systems (**the 2010 Wiggins Island Determination**).<sup>3</sup> The authorisation also included all expansions to the systems, access to any other rail infrastructure necessary to support the Terminal operated by QR Network, below rail infrastructure to support the reallocation of capacity from Barney Point to the Terminal and RG Tanna Coal Terminal and all services relating to such access for the purpose of transporting coal to the Terminal.

The Applicants submit that the public benefits arising as a result of the proposed collective bargaining arrangements with the Access Provider will be the same as those which arose in the ACCC's 2010 Wiggins Island Determination referred to above. Accordingly, this submission follows closely the form of the authorisation application and submission in respect of the 2010 Wiggins Island Determination.

### ***Access to the Terminal by rail***

The Surat Basin Rail Line will connect the Western rail system near Wandoan with the Moura rail system near Banana. It is likely that the development of the Surat Basin Rail Line will facilitate a significant increase in demand for rail capacity to the Terminal and other Gladstone ports, for transport of coal mined in the Surat Basin. A key determinant why coal reserves in the Surat Basin have historically not been mined has been the lack of access to rail and a suitable port. However, this will be facilitated by the construction of the Surat Basin Rail Line and the expansion of the Terminal. Construction of the Surat Basin Rail Line is due to commence in 2012.

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<sup>1</sup><http://www.wicet.com.au/assets/files/WICET%20Supplementary%20EOI%20Process%2016%20July%202010.pdf>

<sup>2</sup> <http://suratbasinrail.com.au/wp-content/uploads/Warren-McReight-11-May-2011a.pdf>

<sup>3</sup><http://www.accc.gov.au/content/trimFile.phtml?trimFileTitle=D10+3712322.pdf&trimFileFromVersionId=986116&trimFileName=D10+3712322.pdf>

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A map outlining the proposed development of the Surat Basin Rail Line is attached as **Annexure 3**. The Services are listed in more detail in **Annexure 4**.

### ***Securing access to rail infrastructure to access the Terminal***

On 21 April 2010 Surat Basin Rail issued an Expression of Interest letter seeking non-binding requests for capacity in relation to the Identified Rail Infrastructure for the purposes of transporting coal to the Terminal. In May 2010 Surat Basin Rail issued a Customer Information Memorandum which included a Key Term Sheet for Access Agreements. The Key Term Sheet provided that access to the Identified Rail Infrastructure would be for a period of 20 years commencing not before July 2013. A copy of the Customer Information Memorandum is attached on a confidential basis as **Annexure 5**.

In January 2012, Surat Basin Rail issued a draft Access Policy which provides a framework for managing access to the Surat Basin Rail Line. It is proposed that the collective bargaining by the Applicants with Surat Basin will take place within the framework of the Access Policy.

### ***The Applicants are seeking to collectively negotiate for access to the Identified Rail Infrastructure and Services and consider that this is appropriate in the context of the Terminal project***

In light of the proposed expansion of the Terminal, the Applicants consider that the existing joint arrangements make it more efficient and practical for the producers to be able to negotiate terms and conditions, including price, collectively with the Access Provider for the purpose of securing the necessary rail access to their own terminal.

The ability for the Applicants to collectively negotiate will assist to balance the bargaining power of the Applicants with the Access Provider. While there are only two applicants to the current application, the parties submit that the public benefits arising from the collective bargaining outweigh any public detriments in the same way as if there were a greater number of applicants. In addition, the application envisages that there may be additional producers seeking the benefit of the authorisation in the future.

### ***Ownership changes in relation to the Identified Rail Infrastructure and Services***

The Applicants submit that any determination granted by the ACCC should be made having regard primarily to the subject matter of the negotiations; that is, the provision of access to the Identified Rail Infrastructure and Services necessary for transporting coal to the Terminal, rather than the identity of Surat Basin Rail as the access provider. Alternatively, Surat Basin Rail could be specifically referred to in any determination as “the Provider of access to the Identified Rail Infrastructure and Services or any other provider of access to the Identified Rail Infrastructure and Services from time to time”.

### ***Authorisation is being sought for the purpose of collectively negotiating with the Access Provider***

In this application, the Applicants are seeking authorisation, pursuant to sub-sections 88(1A) and (1) of the CCA to negotiate collectively with the Access Provider for the purpose of seeking access to the Identified Rail Infrastructure and Services. Specifically, the Applicants seek authorisation for all negotiations, and all resultant contracts, arrangements or understandings with the Access Provider for access to the Identified Rail Infrastructure and Services required to transport coal to the Terminal in order to export to international coal customers.

In addition to joint discussions with the Access Provider, the Applicants seek authorisation to allow the Applicants to discuss amongst themselves matters relating to those negotiations, contracts, arrangements or understandings with the Access Provider.



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Authorisation is sought on behalf of the Applicants, their successors and assigns, as well as their related bodies corporate, associated companies and joint venture partners as negotiations for access to rail are not always undertaken by the Applicants directly.

In addition, as provided under section 88(10) of the CCA, it is requested that any authorisation granted by the ACCC be expressed to apply to future users of the Identified Rail Infrastructure and Services who will similarly need to negotiate below-rail access as the staged development and expansion of the Terminal occurs.

Importantly, the arrangements are voluntary. The authorisation will enable the Applicants to collectively discuss issues but will not oblige them to negotiate collectively as a group nor will it bind them to any outcomes or terms which may result from any collective negotiations. Each producer will retain the ability to negotiate individually with the Access Provider at any stage should they choose to do so. Furthermore, authorisation will not oblige or compel the Access Provider to negotiate collectively with the Applicants but will provide the opportunity to do so if it considers that a more efficient negotiation process.

### **1.3 Key reasons why the authorisation is considered necessary**

#### ***The structure of the Terminal Stage 2 expansion project requires collective bargaining with Surat Basin Rail to ensure access to the joint infrastructure***

The Applicants and other coal producers are undertaking the joint expansion of the Terminal, being a significant infrastructure project which will have substantial benefits in terms of the exports of coal from Queensland. An important issue for Stage 2 of the project is that producers who are granted Stage 2 capacity are able to secure rail access to the Terminal in order to ensure that transportation of coal to the Terminal can occur for export of the coal.

Accordingly, on the basis of the joint interest in the Terminal expansion, and to ensure that the project is able to proceed, it is submitted that it is necessary and appropriate for the Applicants to be able to jointly negotiate with Surat Basin Rail in relation to rail access to the Identified Rail Infrastructure.

The Applicants submit that authorisation is appropriate in the circumstances given that the same public benefits will arise as in the case of the collective bargaining arrangements authorised by the ACCC in the 2010 Wiggins Island Determination.

### **1.4 Period for authorisation**

Authorisation is sought for a term of 20 years. This period of authorisation is considered necessary and reasonable in the present circumstances because:

- the access agreements are proposed to run for a term of 20 years, on a take-or-pay basis, therefore, it is contemplated that contracts or arrangements will be in effect for at least 20 years, although potentially longer;<sup>4</sup>
- the development of the Terminal is proposed to occur in stages over a period of several years. As such, certain producers (stage 2 producers) will need to secure rail access at this stage whereas other producers will need to secure rail access at future stages of the development of the Terminal. In addition, Surat Basin Rail will be required to undertake expansions to the Identified Rail Infrastructure, on a staged basis, over a similar period of time which will require staged negotiations with future users selected under the terms of the Access Policy;

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<sup>4</sup> Based on the Customer Information Memorandum dated 5 May 2010.

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- there are long lead times associated with infrastructure investment, extensive capital investment and a need to deliver long term commercial certainty to both the Applicants, Surat Basin Rail and other access providers in the supply chain associated with such infrastructure;
- the impact of this 20 year term of authorisation on competition is expected to be minimal, if any, and there will be no negative impact on the global markets for the supply of coking coal or thermal coal; if anything, a positive impact is likely to occur through additional certainty in long term export; and
- the Customer Information Memorandum issued by Surat Basin Rail proposes a term of 20 years for the access agreements. The initial rail access terms are likely to provide a basis for the further expansions of track and, therefore, there are benefits in allowing a 20 year term of an authorisation to allow this process to occur.

#### **1.5 Request for interim authorisation**

The Applicants seek interim authorisation on the basis that:

- (a) **[Confidential – restriction of Publication Claimed]**
- (b) The parties are also negotiating a Capacity Commitment Deed for WICET (**WICET CCD**) **[Confidential – restriction of Publication Claimed]**
- (c) it will assist Surat Basin Rail (and the Applicants) to substantially reduce the transaction costs associated with the initial complex negotiations which can commence on a collective basis as a result of an interim authorisation being granted. Further reductions in transaction costs will be achieved on a long term basis, in the event that final authorisation is granted;
- (d) the project time frames are being driven by the Terminal expansion process;
- (e) it will facilitate an equality of bargaining power for the Applicants when commencing negotiations for access to the Identified Rail Infrastructure and Services. The Applicants believe that this will be commercially beneficial for the Applicants and the industry as a whole;
- (f) it will allow for an early assessment of the likely costs of the Applicants securing access to the Identified Rail Infrastructure and Services required for the transportation of coal to the Terminal. The Applicants can only proceed with their respective further individual project feasibility studies on the basis of an understanding of the likely costs of obtaining access to the relevant Identified Rail Infrastructure and Services in order to determine whether to proceed with the project;
- (g) it will provide increased certainty in relation to the overall estimated demand for access to the Identified Rail Infrastructure and Services required for the transportation of coal to the Terminal, to enable Surat Basin Rail to identify the extent of investment required to be made in the infrastructure. Surat Basin Rail can only determine the level of investment in rail infrastructure that may be necessary in order to provide sufficient rail capacity to meet the

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demand of each of the Applicants further to the initial stages of negotiations for access to the Identified Rail Infrastructure and Services. Alternatively, a delay in potential infrastructure upgrades and investment may result in avoidable capacity constraints in the coal supply chain.

If interim authorisation is granted and should the ACCC subsequently deny final authorisation, any proposed condition precedent (that a final authorisation be granted) in any executed access agreements will not be fulfilled and those agreements will therefore not have any relevance going forward. Therefore, it is unlikely that any harm will result from the grant of interim authorisation.

### **1.6 There will be no negative impact on competition in the relevant markets as a result of the proposed arrangements**

The Applicants submit that the potential relevant markets which may be impacted by the collective bargaining arrangements are:

- (a) the primary market for the provision of access to below-rail infrastructure facilitating transport of coal to the Terminal;
- (b) the global market for the supply of coking coal, in which the Applicants supply coking coal (as a product transported along the Identified Rail Infrastructure) to export customers; and
- (c) the global market for the supply of thermal coal, in which the Applicants supply thermal coal (as a product transported along the Identified Rail Infrastructure) to export customers.

The Applicants submit that there will be limited, if any, negative impact in relation to the relevant markets, given that:

- (a) the collective bargaining arrangements are voluntary and neither the Applicants, nor the Access Provider are compelled to participate;
- (b) the collective bargaining group is relatively limited; and
- (c) the collective bargaining (and any information exchanges) are limited to relating to the Identified Rail Infrastructure.

In contrast, it is likely that the downstream markets and customers will benefit from the efficiencies generated as a result of the proposed arrangements associated with the Terminal.

### **1.7 The proposed arrangements will result in a net public benefit**

The Applicants submit that the proposed collective bargaining will:

- lower transaction costs for the Applicants and the Access Provider, and lower negotiation risk;
- avoid unnecessary delays in the construction of the Surat Basin Rail Line and the subsequent stages of the Terminal;
- facilitate investment in infrastructure along the coal chain associated with the Terminal by providing greater commercial certainty for the investment in the infrastructure;
- foster business efficiency by ensuring that the Access Provider develops an accurate and uniform view of the Applicants' development and capacity needs in relation to the Identified Rail Infrastructure, resulting in improved commercial outcomes particularly where this results in increased exports and enhanced international competitiveness;

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- result in more timely growth in export markets and the volumes of coal that will be exported by Australian producers to international customers;
- enable the Applicants who are relatively small producers of coal to be more competitive vis-à-vis the larger producers, in particular, by facilitating more equal negotiating positions vis-à-vis Surat Basin Rail;
- benefit the Queensland and Australian economies as a result of increased exports, which will likely lead to increased employment opportunities being created;
- facilitate addressing the lack of contractual alignment which has existed in coal supply chains in recent years by enabling Surat Basin Rail to be informed as to the demand for the Identified Rail Infrastructure and to ensure that parties which are granted capacity in Stage 2 of the Terminal project have sufficient below-rail access; and
- provide a number of environmental and safety benefits associated with contractual alignment which may assist in reducing any vessel queues due to constrained coal supply chains in Queensland.

#### **1.8 Authorisation should be granted**

In light of the minimal, if any, anti-competitive effects and in light of the significant public benefits which are likely to result from the collective bargaining arrangements, the Applicants submit that the authorisation sought for collective bargaining for access to the Identified Rail Infrastructure and Services should be granted.

## **2. BACKGROUND INFORMATION**

### **2.1 The coal industry**

Australia is a major producer of coal and is the largest exporter of seaborne coal globally. Australia's black coal exports account for over 20% of the seaborne trade of thermal coal and more than 60% of the seaborne trade in coking coal.<sup>5</sup>

In particular, Queensland is a key producer of black coal in Australia and rapid expansion of output has occurred in Queensland over recent years. Approximately 84% of Queensland's coal production is exported.

Infrastructure constraints, particularly at ports, have constrained the industry's ability to expand exports to a greater extent in recent years.

The domestic black coal mining industry was forecast to generate revenue of \$205 billion in 2011/12,<sup>6</sup> compared with \$138.8 billion in 2006/07. Revenue is expected to grow by 7.2% in 2011/12. Approximately 365 Mt of saleable black coal was produced domestically in 2010,<sup>7</sup> up from about 305 Mt in 2004/05, with approximately 263 Mt being exported to Japan, South Korea and the European Union.<sup>8</sup>

Australia's coal production is expected to grow rapidly through to 2014/15, at which point it is expected that the Australian industry will be producing about 409 Mt of coal, with about 328 Mt destined for export markets.<sup>9</sup> While the industry is currently a major employer, with about 243,152 employees in 2011/12,<sup>10</sup> the anticipated growth will likely result in the creation of additional local employment opportunities.

Against this background, and as a result of the anticipated growth in export demand, it is important that supply chain infrastructure expands accordingly, and on a co-ordinated basis, in order to support the increased demand for exports of coal. As such, appropriate and efficient investment in infrastructure is required. A delay in infrastructure upgrades and investment may result in unavoidable capacity constraints in the coal supply chain.

### **2.2 Industry-funded investment in port infrastructure in Queensland - WICET**

Port capacity in Queensland has been constrained over recent years and has resulted in, amongst other things, significant financial losses to the industry in the form of demurrage costs incurred in relation to significant off-shore vessel queues waiting to load coal destined for export markets. In light of this and more particularly in light of the anticipated increase in global demand for Australian coal, a group of Queensland coal producers made a submission to the Queensland Government, proposing to develop the new Terminal in Gladstone, Queensland.

The WICET group (which consists of WICET and WICET Holdings together) was granted preferred proponent status for the development of the Terminal in October 2008. The grant of preferred proponent status was based on an industry-owned and financed, Gladstone Ports Corporation-operated, commercial model for the Terminal.

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<sup>5</sup> Black Coal Mining in Australia: B1101, IBISWorld Pty Ltd, March 2010, page 4

<sup>6</sup> Mining Market Research Report: ANZSIC B, IBISWorld Pty Ltd, February 2012

<sup>7</sup> [http://www.australianminesatlas.gov.au/aimr/commodity/black\\_coal.html](http://www.australianminesatlas.gov.au/aimr/commodity/black_coal.html)

<sup>8</sup> Black Coal Mining in Australia: B1101, IBISWorld Pty Ltd, March 2010, page 4

<sup>9</sup> Ibid

<sup>10</sup> Mining Market Research Report: ANZSIC B, IBISWorld Pty Ltd, February 2012

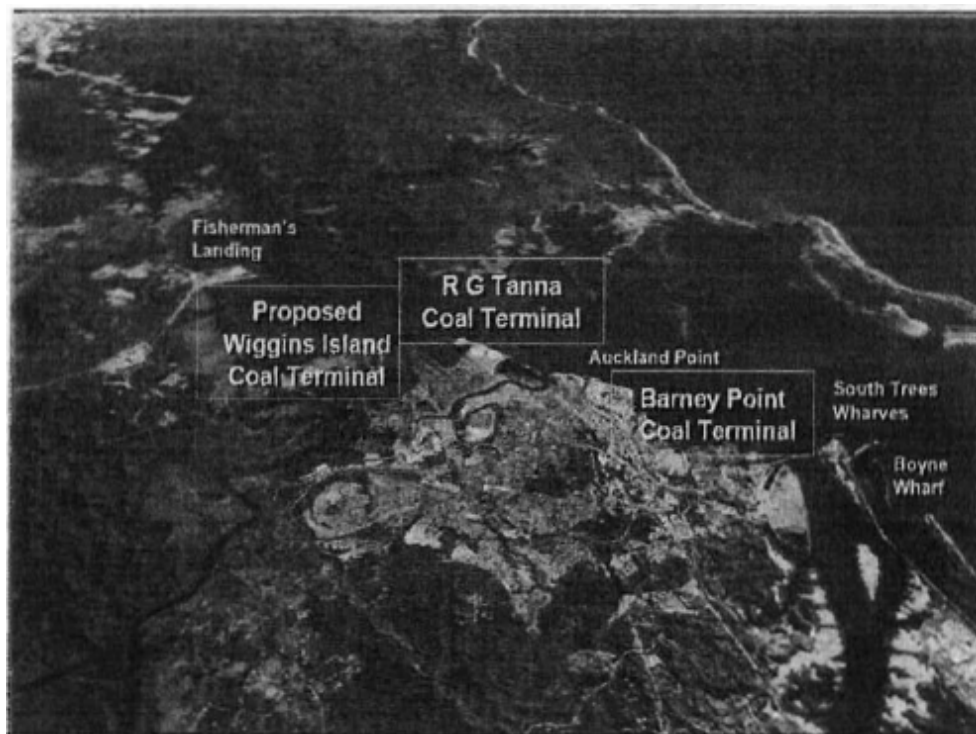
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Under the Framework Deed executed on 11 December 2009, the Terminal is owned and is being developed and financed by WICET, a company established and owned by 8 coal producers, each with current or potential coal production through the Port of Gladstone (as listed in **Annexure 2**), and a wholly-owned subsidiary of WICET Holdings. The Terminal will be operated by Gladstone Ports Corporation. Being directly owned by industry users rather than third party investors is intended to ensure that the Terminal can optimally meet its users' requirements.

Gladstone Ports Corporation owns the land on which the Terminal is being developed and expanded and will lease the land to WICET, in addition to leasing and/or sub-leasing to WICET the areas necessary for the development and operation of the Terminal.

The Terminal is located at Golding Point (near Wiggins Island) in the Port of Gladstone, to the west and directly across the Calliope River from the RG Tanna Coal Terminal (as shown in Figure 1 below).

**Figure 1: Aerial map of the Port of Gladstone**



The Terminal is projected to be built in stages, to match forecasted coal export demand. Stage 1 of the construction commenced in 2011 and shipments from stage 1 of the Terminal are expected to commence in 2014. The Terminal will now be expanded (subject to demand) in additional increments to a capacity of approximately 85 Mtpa, with an option of further expansion if there is excess demand for capacity from coal producers. The projects to be undertaken under Stage 2 of the expansion are set out in **Annexure 7**.

The main components of the fully developed Terminal will be:

- 4 dump stations and 4 inloading conveyor streams to the stockyard;
- coal export stockyard and materials handling systems; and
- 4 shiploading conveyor streams serving 4 shiploaders across 4 berths, and an additional 2 berths for other purposes (6 berths in total).



Access to the Terminal facilities is governed by an Access Policy which is administered by WICET.

The industry-funded terminal will boost existing and future coal export capacity for Queensland's coal producers in both the Bowen and Surat Basins. Further information about the Terminal is available at <http://www.wicet.com.au>.

### **2.3 Transportation of coal**

The bulk of coal produced in Queensland is transported to export terminals by rail. The Identified Rail Infrastructure is to be constructed and owned by Surat Basin Rail. The below-rail infrastructure surrounding the Identified Rail Infrastructure, including the Blackwater Rail System, the Moura Rail System and the Western Rail System, is currently owned by QR Network.

On 2 December 2010, the ACCC granted authorisation to various coal producers that would use the Terminal to engage in collective bargaining arrangements with QR Network for the purposes of negotiating terms and conditions, including price, for access to the below rail infrastructure comprising the Blackwater and Moura systems. Authorisation also included all expansions to the systems, access to any other rail infrastructure necessary to support the Terminal, and all services relating to such access for the purpose of transporting coal to the Terminal.

An important issue for the producers that are awarded capacity in Stage 2 of the Terminal is securing rail access to the Terminal in order to ensure that they are able to transport their coal to the Terminal. Apart from commercial certainty for the producers, demonstrating certainty in this regard is one of the conditions precedent in the Framework Deed for the Terminal project, which determines whether development of the Terminal infrastructure will proceed.

### **2.4 The Surat Basin Rail project**

Surat Basin Rail is a joint venture between ATEC (Dawson Valley Railway) Pty Ltd, QR Surat Basin Rail Pty Ltd and Xstrata Coal Surat Basin Rail Pty Ltd established for the purposes of constructing the below-rail infrastructure comprising the Surat Basin Rail Line which will facilitate access to the Moura System from the Surat Basin region, (colloquially known as the 'Missing Southern Link'). An unconditional exclusive mandate for the development of an open access multi-user rail line was awarded to Surat Basin Rail by the Queensland Government on 12 July 2007.

The Surat Basin Rail line will comprise 214 kilometres of new rail infrastructure. The infrastructure will connect the Western Railway System, near Wandoan in the Surat Basin region, to the Moura Railway System. The rail infrastructure will include a single narrow gauge track with up to eight passing loops, capable of accommodating trains up to 2.5 kilometres in length, providing open access arrangements to multi-users. Most of the rail infrastructure corridor will be approximately 60 metres wide, with wider sections at passing loops and at significant cuttings and embankments.<sup>11</sup>

The project will deliver a transport solution from the Surat Basin region through to the Terminal at the Port of Gladstone, unlocking approximately 6.3 billion tonnes of coal reserves in the Surat Basin.<sup>12</sup>

On 21 April 2010 Surat Basin Rail issued an Expression of Interest letter seeking non-binding requests for capacity in relation to the Identified Rail Infrastructure for the purposes of transporting coal to the Terminal. **[Confidential – Restriction of Publication Claimed]**

The process for negotiations with Surat Basin Rail in relation to access to the Identified Rail Infrastructure is set out in section 2.5 below. After executing all relevant agreements with Surat Basin

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<sup>11</sup> <http://www.deedi.qld.gov.au/cg/resources/project/surat-rail/surat-cg-report.pdf>

<sup>12</sup> [www.suratbasinrail.com.au](http://www.suratbasinrail.com.au)

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Rail, it is anticipated that users of the Identified Rail Infrastructure will then be able to execute access agreements in respect of Stage 2 of WICET.<sup>13</sup>

Attached as **Annexure 6** is a copy of a powerpoint presentation by Surat Basin Rail titled '4th Surat Basin Rail Coal and Energy Conference – Buckle Up' dated 11 May 2011 which provides an overview of the progress of the Surat Basin Rail Line project.

To date, Surat Basin Rail has achieved the following project milestones:

- Issue of Coordinator-General's report evaluating the complete Environmental Impact Statement and decision on Surat Basin Rail's approval;
- Appointment of a Principal Engineer;
- Commencement of the next phase of the customer commitment process;
- Issue of Request for Proposal to contractors;
- Appointment of Early Contractor Involvement consortiums;
- Declaration of a State Development Area; and
- Commencement of Notice of Intention to Resume process.

Surat Basin Rail expects construction of the rail line to commence in the 2011-12 financial year and be completed in the 2014-15 financial year. This would be subject to achieving financial close and obtaining the necessary approvals to construct and operate the rail infrastructure.<sup>14</sup>

The project will consist of the construction and operation of rail infrastructure and associated works, such as:

- vehicle access and construction tracks;
- passing loops, culverts and bridges;
- borrow pits;
- signalling and communications; and
- track maintenance depot.<sup>15</sup>

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<sup>13</sup> <http://suratbasinrail.com.au/wp-content/uploads/Warren-McReight-11-May-2011a.pdf>

<sup>14</sup> <http://www.deedi.qld.gov.au/cg/resources/project/surat-rail/surat-cg-report.pdf>

<sup>15</sup> <http://www.deedi.qld.gov.au/cg/resources/project/surat-rail/surat-cg-report.pdf>



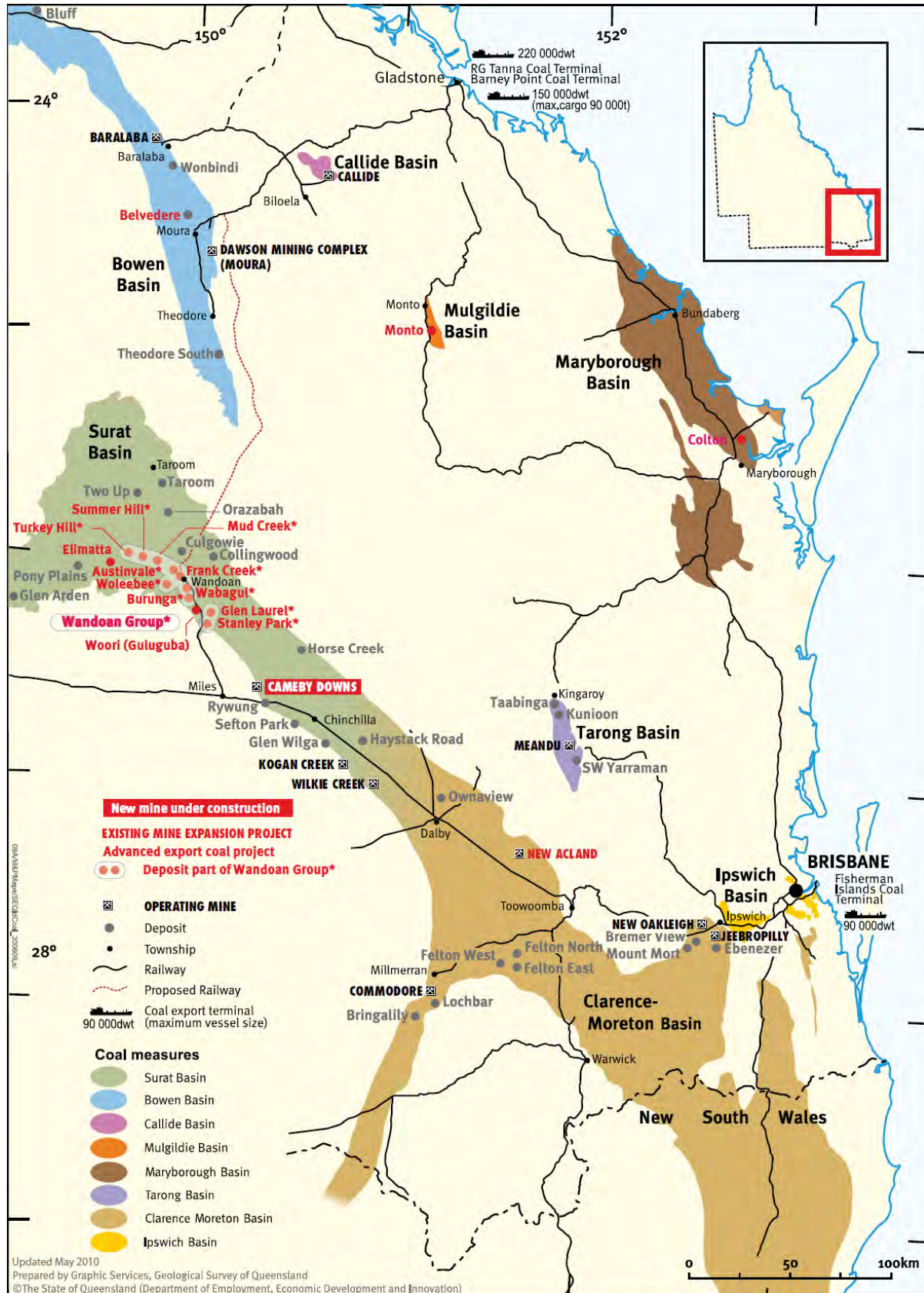
**Figure 2: Map showing the Surat Basin Rail Line connection between the Moura and Western rail systems**



A more detailed map is contained in Annexure 3.

It is likely that this project will facilitate a significant increase in demand for rail capacity to the Terminal and other Gladstone ports, for transport of coal mined in the Surat Basin. A key determinant for the fact that thermal coal reserves in the Surat Basin have historically not been mined has been the lack of access to rail and a suitable port. However, this will be facilitated by the construction of the Surat Basin Rail Line and the expansion of the Terminal.

Figure 3: Map showing existing and developing coal mines which would be likely to use the Surat Basin Rail Line



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The Surat Basin Rail Line will facilitate access to the Terminal for several coal producers operating in the Surat Basin Region. Annexure 8 contains a list of mines (either already existing or being developed or expanded) located in the Surat Basin Region, in respect of which the Applicants submit that the relevant operators would likely require access to the Surat Basin Rail line in order to access the Terminal.

### **2.5 Negotiation of access rights to the Identified Rail Infrastructure under Surat Basin Rail's Access Policy**

In January 2012 Surat Basin Rail issued a draft Access Policy which aims to ensure that access to the Surat Basin Rail Line is consistently applied to all parties who become access holders under the Access Policy. **[Confidential – Restriction of Publication Claimed]**

The Access Policy is not an approved access undertaking for the purposes of part 5 of the *Queensland Competition Authority Act 1997* (Qld) and is still in draft form. **[Confidential – Restriction of Publication Claimed]**

The Access Policy governs the provision of open access to the Surat Basin Rail Line, including through the provision of access to the Surat Basin Rail Line itself; the provision of access to connecting lines between source mines and the Surat Basin Rail Line; and the provision of other services by Surat Basin Rail at the request of an access holder.

The Access Policy outlines the processes through which parties can apply for access rights to the Surat Basin Rail Line. In addition, the Access Policy governs the way in which Surat Basin Rail will negotiate the terms for and grant access to rights to operate train services and connection services and to develop expansions of the Surat Basin Rail Line.

A party seeking access to the Surat Basin Rail Line may negotiate access rights either in respect of available capacity or as a participant in an expansion of the Surat Basin Rail Line. It is proposed that the collective bargaining would occur while still following the negotiation framework of the Access Policy.

#### ***Process for negotiation of available capacity***

Under the Access Policy, parties seeking access to available capacity are required to submit an application for available capacity access, which will then be assessed by Surat Basin Rail in order to determine the validity of the application. If the application is valid, Surat Basin Rail is required to provide the party with notice that the application has been assessed as valid, together with an indicative access proposal, stating the extent of capacity available to accommodate the access rights sought by the party. From the date on which Surat Basin Rail provides the party with notice that the application is valid, Surat Basin Rail and the parties will commence an access rights negotiation period lasting **[Confidential – Restriction of Publication Claimed]** days.

Any available capacity is subject to the pre-emptive right of foundation customers (foundation customers are customers who sign a Capacity Commitment Deed and Take or Pay Access Agreement prior to Surat Basin Rail making the final investment decision to allow construction to begin) with a current access agreement in place in respect of any initial development available capacity.

Surat Basin Rail is scheduled to make its final investment decision, and commence construction, in 2012, pending commercial agreements with foundation customers. It is anticipated that potential foundation customers will include the Applicants and **[Confidential – Restriction of Publication Claimed]**.

If there is sufficient capacity, Surat Basin Rail will negotiate an Access Agreement with the party seeking access.

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If there are two or more parties seeking access and insufficient capacity to accommodate the access rights sought by all parties, Surat Basin Rail will maintain a queue. Surat Basin Rail will negotiate with all parties in the queue but will not enter into an Access Agreement if it will not accommodate the rights of parties higher in priority.

#### ***Process for expansion and financing of expansions to the Surat Basin Rail Line under the Access Policy***

In the event of expansions to the Surat Basin Rail Line, Surat Basin Rail will issue a request for expressions of interest. After receiving expressions of interest, Surat Basin Rail will undertake an assessment of the feasibility of the expansion. Interested parties would then make an application for access. After determining the validity of the application, Surat Basin Rail will negotiate terms of access with the party and a conditional Access Agreement may be provided.

Surat Basin Rail may either negotiate user funding agreements with parties or elect to seek its own financing.

Expansions to the Surat Basin Rail Line will then be undertaken and unconditional access agreements entered into.

#### ***Agreements to be entered into by access holders under the Access Policy***

Under the Access Policy, the primary document for negotiation between Surat Basin Rail and access holders is the Access Agreement: an agreement between Surat Basin Rail and a party under which the party obtains rights of access for the train services to be operated on the Surat Basin Rail Line, and accordingly becomes an access holder. In addition to the Access Agreement, Surat Basin Rail will negotiate the following agreements:

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The Applicants propose to jointly negotiate the terms of the Access Agreement, including in particular price and capacity allocation. In addition to the Access Agreement, the Applicants intend to jointly negotiate the agreements referred above.

### **3. THE AUTHORISATION SOUGHT AND THE CONDUCT TO BE AUTHORISED**

#### **3.1 Introduction**

This application for authorisation is made by the Applicants, pursuant to subsections 88(1A) and (1) of the CCA, and is made for the reason that the contemplated collective bargaining arrangement may have the potential to contravene a provision or provisions of Part IV of the CCA.

Authorisation is sought by the Applicants to negotiate and bargain collectively with the Access Provider and to agree on terms and conditions for access to the Identified Rail Infrastructure and Services.

#### **3.2 Authorisation sought**

(a) The Applicants seek authorisation pursuant to section 88(1A) and section 88(1) of the CCA for them to engage in the following conduct:

- (i) to collectively discuss and negotiate terms and conditions, including price, under which access to the Identified Rail Infrastructure and Services for the purpose of transporting coal to the Terminal, will be acquired from the Access Provider;
- (ii) to enter into and give effect to contracts, arrangements or understandings between the Access Provider (or any successor entity as part of the process referred to in 3.2(a)(i) above and the Applicants, containing terms and conditions, including price, upon which access to the Identified Rail Infrastructure and Services will be acquired, and which terms may contain a provision that might be a cartel provision within the meaning of Division 1 Part IV of the CCA.

Each Applicant will determine whether to accept the negotiated terms and conditions offered by the Access Provider as a result of the collective negotiations.

The authorisation will need to allow the Applicants to discuss amongst themselves matters relating to those negotiations, contracts, arrangements or understandings.

The application covers all contracts, arrangements or understandings and proposed contracts, arrangements or understandings that may result from collective negotiations between the Applicants and the Access Provider in relation to access to the Identified Rail Infrastructure and Services pursuant to subsection 88(13) of the CCA.

In addition, as provided under section 88(10) of the CCA, it is requested that any authorisation granted by the ACCC be expressed to apply to producers at other stages and future users of the Terminal who will similarly need to negotiate below-rail access as the staged expansion of the Terminal occurs.

(b) Authorisation will be subject to the following provisions:

- (i) none of the Applicants will be bound to any terms and conditions of access to the Services, as negotiated with the Access Provider and will retain the ability to negotiate individually with Surat Basin Rail at any stage; and
- (ii) there will be no collective boycotts organised by the Applicants in relation to access to the Services.



### **3.3 Coverage of authorisation**

The Applicants consider that authorisation should cover negotiation for access to the Identified Rail Infrastructure and Services required by the Applicants to transport coal to the Terminal. An outline of the core of the Services is listed in **Annexure 4**.

The Applicants submit that any determination granted by the ACCC should make provision for negotiations between the Applicant and Surat Basin Rail (and/or any future owner of the Surat Basin Rail Line or other infrastructure directly or indirectly connected to the Surat Basin Rail Line or any entity which acquires an interest in the Surat Basin Rail). Alternatively, Surat Basin Rail could be specifically referred to in any determination as “the Provider of access to the Identified Rail Infrastructure and Services or any other provider of access to the Identified Rail Infrastructure and Services from time to time”. This will provide the necessary flexibility under the authorisation of the collective bargaining activities to negotiate collectively with parties not already identified in this application, but who may potentially become providers of the Services in the future.

### **3.4 Scope of negotiations and agreements**

Without purporting to be exhaustive, the issues to be covered in the proposed negotiations would generally include:

- the Services to be provided, as defined in **Annexure 4** ;
- service levels (including capacity of services and facilities);
- responsibilities the Access Provider;
- responsibilities of the Applicants;
- interface co-ordination;
- loading and unloading facilities;
- rail spurs and connection points;
- pricing principles;
- fees and charges;
- capacity allocation where there is excess demand for rail infrastructure;
- capital expenditure;
- liability and indemnity;
- termination;
- any statutory authorisations; and
- dispute resolution.

It is not considered necessary or practical to individually identify every form of service which is likely to be provided.

The Applicants submit that the authorisation should cover all services, facilities and contractual provisions necessary or desirable for the purposes of seeking access to the Identified Rail Infrastructure and Services.

### **3.5 Length of Authorisation**

Authorisation is sought for a term of 20 years. This period of authorisation is considered necessary and reasonable in the present circumstances because:

- the access agreements are proposed to run for a term of 20 years, on a take-or-pay basis, therefore, it is contemplated that contracts or arrangements will be in effect for at least 20 years, although potentially longer;<sup>16</sup>
- the development of the Terminal is proposed to occur in stages over a period of several years. As such, certain producers (stage 2 producers) will need to secure rail access at this stage whereas other producers will need to secure rail access at future stages of the development of the Terminal. In addition, Surat Basin Rail will be required to undertake expansions to the Identified Rail Infrastructure, on a staged basis, over a similar period of time which will require staged negotiations with future users selected under the terms of the Access Policy;
- there are long lead times associated with infrastructure investment, extensive capital investment and a need to deliver long term commercial certainty to both the Applicants, Surat Basin Rail and other access providers in the supply chain associated with such infrastructure;
- the impact of this 20 year term of authorisation on competition is expected to be minimal, if any, and there will be no negative impact on the global markets for the supply of coking coal or thermal coal; if anything, a positive impact is likely to occur through additional certainty in long term export; and
- the Customer Information Memorandum issued by Surat Basin Rail proposes a term of 20 years for the access agreements. The initial rail access terms are likely to provide a basis for the further expansions of track and, therefore, there are benefits in allowing a 20 year term of an authorisation to allow this process to occur.

### **3.6 Key reasons why the authorisation is considered necessary**

#### ***The Terminal project structure requires collective bargaining to ensure access to the joint infrastructure***

The Applicants and other coal producers are undertaking the joint expansion of the Terminal, being a significant infrastructure project which has substantial benefits in terms of the exports of coal from Queensland. An important issue for the project is that the producers/users are able to secure rail access to the Terminal in order to ensure that transportation of coal to the Terminal can occur for export purposes.

On the basis of the joint interest in the Terminal development, it is submitted that it is necessary and appropriate for the Applicants to be able to jointly negotiate with the Access Provider in relation to rail access to the Terminal.

#### ***Contractual alignment may be facilitated by collective bargaining***

In addition to the significant public benefits anticipated as a result of the proposed arrangements, an important benefit is that collective bargaining is likely to facilitate the alignment of contracted

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<sup>16</sup> Based on the Customer Information Memorandum dated 5 May 2010.

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volumes along the coal supply chain by enabling Surat Basin Rail to be informed as to the demand for the Identified Rail Infrastructure and to ensure that parties which are granted capacity in Stage 2 of the Terminal project have sufficient below-rail access. As the ACCC will be aware from previous authorisation applications in relation to the export coal terminal in Newcastle, contractual alignment is an important element in preventing unnecessary capacity constraints which have in the past resulted from lack of coordinated investment in the supply chain.

As indicated above, in relation to the Terminal project specifically, WICET has committed to seeking contractual alignment of the supply chain. The Terminal Access Policy envisages WICET working closely with stakeholders and service providers, including Surat Basin Rail, to develop mechanisms to achieve contractual certainty.

The Applicants accordingly consider that, through the proposed collective bargaining process, alignment of the contracted volumes along the Identified Rail Infrastructure may be more easily achieved, resulting in a coordinated view of the supply chain which will facilitate coordinated and timely investment in necessary supply chain infrastructure.

### **3.7 Interim authorisation**

The Applicants seek interim authorisation on the basis that:

- (a) it will enable more meaningful negotiations with Surat Basin Rail to commence on a collective basis as soon as possible. In May 2010 Surat Basin Rail issued a Customer Information Memorandum seeking non-binding requests for capacity in relation to the Identified Rail Infrastructure for the purposes of transporting coal to the Terminal for a period of 20 years commencing not before July 2013. This was the first stage in a multi-staged process for negotiating access to rail capacity, which must proceed on a sequential basis beginning with responses to the Customer Information Memorandum, and includes:

- determining the level of demand for access to rail capacity;
- identifying counterparties to negotiations for access;
- assessing what, if any, investments in rail infrastructure are required to meet demand; and
- undertaking detailed negotiations with the Applicants for the provision of access to rail capacity for a specified period.

- (b) **[Confidential – restriction of Publication Claimed]**

- (c) The parties are also negotiating the WICET CCD **[Confidential – Restriction of Publication Claimed]**

- (d) it will assist Surat Basin Rail (and the Applicants) to substantially reduce the transaction costs associated with the initial complex negotiations which can commence on a collective basis as



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a result of an interim authorisation being granted. Further reductions in transaction costs will be achieved on a long term basis, in the event that final authorisation is granted.

- (e) the project time frames are being driven by the Queensland Government's mandate;
- (f) it will facilitate an equality of bargaining power for the Applicants when commencing negotiations for access to the Identified Rail Infrastructure and Services. The Applicants believe that this will be commercially beneficial for the Applicants and the industry as a whole;
- (g) it will allow for an early assessment of the likely costs of the Applicants securing access to the Identified Rail Infrastructure and Services required for the transportation of coal to the Terminal. The Applicants can only proceed with their respective further individual project feasibility studies on the basis of an understanding of the likely costs of obtaining access to the relevant Identified Rail Infrastructure and Services in order to determine whether to proceed with the project;
- (h) it will provide increased commercial certainty in relation to the estimated demand for access to the Identified Rail Infrastructure and Services required for the transportation of coal to the Terminal, to enable Surat Basin Rail to consider at an early stage the extent of investment required to be made in infrastructure. If interim authorisation is granted, it will facilitate an understanding of what, if any, infrastructure investments are required. Alternatively, a delay in potential infrastructure upgrade and investment may result in avoidable capacity constraints in the coal supply chain to the Terminal; and
- (i) the expansion of the Terminal and associated mine infrastructure will likely facilitate increased exports of coal from Australia which is inherently a benefit to the public;

If interim authorisation is granted and should the ACCC subsequently deny final authorisation, any proposed condition precedent (that a final authorisation be granted) in any executed access agreements will not be fulfilled and those agreements will therefore not have any relevance going forward. Therefore, it is unlikely that any harm will result from the grant of interim authorisation.

### **3.8 The "collective acquisition" exception**

As indicated in section 4 below, it is beneficial for the Applicants to collectively bargain with Surat Basin Rail for access to the Identified Rail Infrastructure and Services despite the fact that the Applicants may be competitors in relation to the acquisition of access to these Services.

To the extent that it may be contended that the proposed collective bargaining arrangements amount to fixing the price at which the Services are to be acquired by the Applicants, in potential breach of section 44ZZRD(2), the Applicants submit that any such cartel provision would relate to the price of services to be collectively acquired by the Applicants (and/or their related bodies corporate), such as to fall within the collective acquisition exception in section 44ZZRV of the CCA.

### **3.9 Potential application of other provisions of the CCA**

While the Applicants submit that their proposed conduct in fact has a pro-competitive purpose and is, therefore, unlikely to contravene these statutory provisions, they make this application due to:

- the technical nature of the provisions, (which have yet to benefit from any judicial interpretation) arising under sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45 of the CCA;
- the criminal sanctions and severe penalties that arise in relation to any breach;

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- the negotiations that the Applicants propose to enter into with Surat Basin Rail for securing access to the Identified Rail Infrastructure and Services; and
- the substantial public benefits which are likely to result from the collective negotiations.

### **3.10 Authorisation criteria**

Under subsections 90(5A) or 90(5B) of the CCA, the ACCC must not grant authorisation in respect of a provision that would or might be a cartel provision unless the ACCC is satisfied in all the circumstances that:

- the provision would result, or be likely to result, in a benefit to the public; and
- the benefit would outweigh the detriment to the public constituted by any lessening of competition.

### **3.11 Market definition**

The Applicants submit that the potential relevant markets are:

- (a) the primary market for the supply and acquisition of access to below-rail infrastructure providing rail access to the Terminal;
- (b) the global market for the supply of coking coal, in which the Applicants supply coking coal (as a product transported along the Identified Rail Infrastructure) to export customers; and
- (c) the global market for the supply of thermal coal, in which the Applicants supply thermal coal (as a product transported along the Identified Rail Infrastructure) to export customers.

Detail in relation to the impact on these markets as a result of the proposed collective bargaining arrangements is provided in section 4.2 below.

### **3.12 Public benefit and detriment**

The phrase ‘public benefit’ has not been defined in the CCA. However, the Tribunal has stated that the phrase should be interpreted broadly. In particular, it includes:

“...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 the economic goals of efficiency and progress.”

Similarly, public detriment is not defined in the CCA but the Tribunal has similarly given the concept a wide ambit. It has stated that detriment to the public includes:

“...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.”

On the topic of collective bargaining, the Dawson Committee made the following opening observation:

“In some industries a number of competing small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together and bargain collectively, thereby exercising a degree of countervailing power to that of big business. Collective bargaining at one level may lessen competition but, at another

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level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.”<sup>17</sup>

While it is generally smaller businesses that join together to negotiate collectively in order to seek efficiencies and public benefits, the Applicants submit that it has also been recognised<sup>18</sup> that larger businesses can achieve significant efficiencies and public benefits through collective negotiations with a monopoly service provider, as collective negotiations tend to balance the bargaining positions and constrain a monopoly service provider from attempting to extract more favourable terms than would otherwise be possible in a competitive environment.

The Applicants submit further that while collaboration may eliminate independent entities striving for efficiencies, it may offer superior joint efficiencies by the combination of their resources and skills. This may result in even lower prices and improved quality, services and innovation over a single firm result. Collaboration-led efficiencies may enhance competition by permitting some higher cost firms to become more effective lower cost rivals.

Furthermore, the Applicants submit that where parties jointly develop infrastructure, such as the Terminal, circumstances require collective bargaining by virtue of the nature of the joint arrangements themselves. Joint infrastructure development projects by their nature result in economic efficiencies and benefits which are unable to be realised by a single firm, in the absence of the particular joint arrangements.

Therefore, the Applicants believe that:

- there are few or no anti-competitive effects;
- without the capacity for collective negotiation, any constraint on the market position of Surat Basin Rail in respect of the provision of access to below-rail infrastructure within the Central Queensland Coal region and particularly the Identified Rail Infrastructure and Services (which is very substantial) will be eliminated;
- with collective negotiation, competition is enhanced with significant public benefit, including more efficient capital, price and service quality outcomes;
- with collective negotiation, competition is enhanced, as individual and/or smaller coal producers seeking access are better able to negotiate with Surat Basin Rail;
- there are other demonstrable benefits to the public from collective negotiation which would outweigh any anti-competitive detriment (assuming such detriment could even be established); and
- there will continue to be benefits to the public in granting authorisation: primarily the conduct authorised will benefit international exports of coking and thermal coal, resulting in increased domestic employment opportunities and greater royalties and taxes payable to the Government.

Authorisation will ensure that the practice of collective negotiation, with its inherent public benefits, does not contravene the CCA. More detail in relation to the particular public benefits likely to result from the proposed arrangements is set out in section 4.3 below.

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<sup>17</sup> Committee of Inquiry for the Review of the Trade Practices Act, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) 115.

<sup>18</sup> Authorisation for collective bargaining by the Board of Airline Representatives of Australia Inc. which was approved by the Commission under application A91200 on 24 March 2010.

### **3.13 Preliminary considerations**

The Applicants note the following important preliminary considerations:

#### ***Voluntary nature of negotiation***

The underlying principle of this authorisation application is that it is strictly voluntary in nature in relation to both the Applicants' and Surat Basin Rail's participation. Participation in collective negotiation is voluntary and, in particular:

- there is no requirement or obligation on Surat Basin Rail to negotiate with the Applicants on a collective basis - authorisation simply provides the opportunity to do so; and
- the Applicants retain complete discretion to negotiate collectively or individually with Surat Basin Rail – authorisation will enable the Applicants to collectively discuss issues but does not oblige them to negotiate collectively as a group nor does it bind them to any outcomes or terms which may result from any collective negotiations.

#### ***No boycott activities***

There have been and will in the future be no boycott activities organised by the Applicants in relation to the Services. Accordingly, this application does not extend to boycott activities and no authorisation is sought for any such activities.

### **3.14 The Applicants' proposed negotiations with Surat Basin Rail**

The Applicants are relatively small producers of coal with minimal resources available for engaging in negotiations with service providers such as Surat Basin Rail. On a collective basis, by pooling aggregate negotiation skills and experience, the Applicants believe they will be able to secure more competitive terms which will enable them to ultimately become more competitive vis-à-vis the larger players who are already established in the market.

#### ***The proposed negotiation process***

It is anticipated that the basic process will be for the Applicants to obtain the necessary information (eg a pricing model containing proposed costs, capacity volumes, rates of return, etc and non-price terms and conditions) from Surat Basin Rail on which to assess its particular pricing and service offer. The detailed information will be reviewed by the Applicants acting through a representative sub-committee.

The Applicants anticipate that the representative sub-committee will be comprised of one representative from each of the Applicants initially. In the medium term the structure of the sub-committee will be further developed to include representatives of any future parties to the collective negotiations.

The confidentiality of the commercially sensitive information obtained from Surat Basin Rail will be preserved by way of confidentiality agreements executed by all Applicants' personnel who receive the information.

The Applicants will then jointly conduct commercial negotiations based on the information provided, reporting outcomes and seeking input from each Applicant, again through a representative sub-committee. Each Applicant would be free to obtain independent legal or other expert advice throughout the negotiation phase should they choose to. At the conclusion of negotiations, the Committee will advise each Applicant that the agreement with Surat Basin Rail is in a form that that

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can be recommended to each Applicant for its consideration. Each Applicant will then independently determine whether the terms of the agreement are acceptable for its own coal operations.

While the negotiations will be undertaken for the collective benefit of all Applicants, the Applicants acknowledge that if an individual Applicant wishes to accept the terms, that Applicant will enter into a bilateral contract with Surat Basin Rail. These individual bilateral contracts will facilitate any amendments that may need to be agreed between the relevant parties to accommodate the specific circumstances or requirements of that Applicant.

It should be noted that the negotiation process undertaken by the Applicants does not involve the Applicants discussing commercially sensitive information relevant to each of the Applicants.

If an individual Applicant considers that it could improve its commercial outcomes given its specific circumstances, then this is a matter for the particular Applicant to pursue further with Surat Basin Rail directly. The remaining Applicants would not have any involvement in individual negotiations or knowledge of the outcomes of any such negotiations.

## **4. COMPETITION ANALYSIS AND EXPLANATION OF THE NET PUBLIC BENEFIT OF AUTHORISATION FOR THE PROPOSED COLLECTIVE BARGAINING**

### **4.1 Introduction**

In order to identify and assess the public benefit and the potential anti-competitive detriment generated by the proposed collective bargaining arrangements, the Tribunal has established that a “future with and without” test is appropriate. This requires a comparison of the public benefits and potential public detriments that the proposed arrangements would generate in the future if the authorisation is granted as opposed to the counterfactual position if it is not granted.

The counterfactual which the Applicants submit should be employed in order to assess the proposed arrangements is one where, in the absence of authorisation, the Applicants:

- (a) cannot, or can only in a restricted manner because of certain provisions in the CCA, negotiate collectively - the Applicants wish to do so in compliance with the CCA;
- (b) as a result of being unable to collectively negotiate, negotiating access to the Identified Rail Infrastructure and Services would be a far less efficient, more costly and likely lengthier process subject to information separation; and
- (c) would be less efficient in gauging overall capacity requirements leading to some of the contracted capacity misalignments in the export coal chain that have arisen in other coal export supply chains.

### **4.2 Market definition**

There are three separate but related markets affected by the authorisation. The primary market and down-stream markets are briefly described below.

***The primary market - the provision of access to the Surat Basin Rail below-rail infrastructure connecting with the Moura system which in turn connects to the Terminal in Queensland***

The primary market is the market for the supply of below-rail infrastructure services to the Terminal, in which Surat Basin Rail and QR Network are the only providers of these services. However, Surat Basin Rail is the sole provider connecting the Western rail system near Wandoan to the Moura rail system near Banana and QR Network is the sole provider of the remainder to the Queensland Coal network. Accordingly, Surat Basin Rail has a substantial market position in relation to the Identified Rail Infrastructure.

It is anticipated that the collective bargaining arrangements will provide the Applicants with a more balanced position when negotiating with Surat Basin Rail. The arrangements are also likely to ensure a less time consuming and less costly negotiation process for the Applicants, and potentially for Surat Basin Rail. The arrangements will similarly prevent Surat Basin Rail from attempting to delay and stall access by arguing that it is required to negotiate with numerous individual access seekers. It is also likely to lead to more efficient outcomes in the coal supply chain due to the ability of the Applicants to attempt to seek alignment of contracted volumes at all points in the supply chain.

Accordingly, the public detriment ordinarily associated with a lessening of competition between competitors who engage in a collective bargaining process is not material, having regard to the following factors:

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- (i) the collective bargaining process is necessary to reduce the imbalance in bargaining power between the smaller producers and Surat Basin Rail;
- (ii) the efficiency of the coal supply chain will be enhanced by seeking contractual alignment amongst all service providers, which will result in more efficient infrastructure investment; and
- (iii) Stage 2 of the Terminal is being jointly developed by the Applicants and other coal producers and, accordingly, these parties all need to secure below-rail access to the Terminal in order to export their coal. These producers need certainty of rail access in order to develop Stage 2 of the Terminal. As a result of the joint arrangements for expansion of the Terminal, there is limited competitive rivalry between these producers in relation to access to the below-rail infrastructure.

#### ***The downstream market for the global supply of coking coal***

In the BHP/Rio Tinto Merger review<sup>19</sup>, the ACCC found that, globally, there is intense competition in relation to coking coal between a large number of substantial competitors with access to substantial reserves and export infrastructure and, in particular, that the merged firm “*would continue to face competition from significant alternative suppliers with access to transport infrastructure, both in Australia and overseas*”. In addition, the ACCC found that the majority of Australia’s coking coal is exported and is a globally traded commodity.

The largest customers of seaborne coking coal include Japanese steel mills and steel mills in Europe, Brazil and India. With steel production forecast to increase significantly, demand for coking coal is forecast to increase, particularly demand for coal from Australia.

The Applicants, therefore, submit that the proposed collective arrangements will facilitate greater ability for Australian coal to be exported to global customers which may enhance competition in the global supply of coking coal.

The potential for lost efficiencies resulting from collaboration are low because:

- (i) participation is voluntary;
- (ii) not all domestic producers of coal will be party to the arrangements; and
- (iii) there is no boycott activity in relation to the Services.

#### ***The downstream market for the global supply of thermal coal***

In the BHPB/Rio Tinto Merger review, the ACCC found that there is intense global competition in the global seaborne market for thermal coal between a large number of substantial competitors with access to substantial reserves and export infrastructure and, in particular, that “*significant alternative suppliers are likely to constrain the merged firm*”. In addition, the ACCC found that the majority of Australia’s thermal coal is exported and is a globally traded commodity.

The Applicants submit that the proposed collective arrangements will facilitate greater ability for Australian coal to be exported to global customers which may enhance competition in the global supply of thermal coal.

The potential for lost efficiencies resulting from collaboration are low because:

- (i) participation is voluntary;

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<sup>19</sup> Public Competition Assessment dated 1 October 2008.



### For Public Register

- (ii) not all domestic producers of coal will be party to the arrangements; and
- (iii) there is no boycott activity in relation to the Services.

Authorisation of the proposed collective bargaining arrangements does not increase the potential for collective activity beyond that which will be authorised. The Applicants will continue to compete vigorously and will operate their businesses individually in all other respects.

Accordingly, the potential negative impact (if any) on competition in the relevant markets is minimal.

#### 4.3 Public benefits

The ACCC has in the past indicated that an application for authorisation that relates solely to exports inherently involves benefits and detriments that are of a public nature.<sup>20</sup>

Furthermore, the Applicants submit that it is anticipated that the proposed collective bargaining arrangements are likely to generate meaningful improvements in commercial outcomes (including price), lower transaction costs and more efficient investment in infrastructure. Importantly, the arrangements may assist in facilitating contractual alignment within the coal supply chain which will benefit the coal industry as a whole.

In addition, the expansion of mining activities and more efficient transportation of coal, will facilitate greater exports of coal by the Applicants which will have broader economic benefits for the Queensland and Australian economies through increased royalties on revenue generated and taxes payable to the Government, as well as increased job creation which are all substantial public benefits.

The public benefits of collective bargaining include:

- facilitating investment in infrastructure along the coal chain associated with the Terminal by providing greater commercial certainty for the investment in the infrastructure;
- fostering business efficiency in understanding likely demand and timing requirements by coal producers using the Terminal, resulting in improved commercial outcomes particularly where this results in increased exports and enhanced international competitiveness;
- lowering transaction costs for the Applicants as well as Surat Basin Rail, and lowering negotiation risk;
- growth in export markets and the volumes of coal that will be exported by Australian producers to international customers;
- enabling some of the Applicants who are smaller producers of coal to be more competitive vis-à-vis the larger producers, in particular, by facilitating more equal negotiating positions vis-à-vis Surat Basin Rail. While there are only two applicants to the current application, the parties submit that the public benefits arising from the collective bargaining outweigh any public detriments in the same way as if there were a greater number of applicants. In addition, the application envisages that there may be additional producers seeking the benefit of the authorisation in the future.;
- benefitting the Queensland and Australian economies as a result of increased exports, which will likely lead to increased employment opportunities being created;

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<sup>20</sup> Commission Final Determination, Applications for Authorisation A90906, A90907, A90908 lodged by Port Waratah Coal Services Pty Ltd (9 July 2004), p.62.



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- facilitating addressing the lack of contractual alignment which has existed in coal supply chains in recent years by enabling Surat Basin Rail to be informed as to the demand for the Identified Rail Infrastructure and to ensure that parties which are granted capacity in Stage 2 of the Terminal project have sufficient below-rail access;
- providing a number of environmental and safety benefits associated with contractual alignment which may assist in reducing any vessel queues due to constrained coal supply chains in Queensland (including greater protection of the Great Barrier Reef than would otherwise be the case).

In the “future without authorisation”, these public benefits may be completely forgone, delayed or significantly diminished, and an important opportunity to encourage increased exports to the global coal markets may be significantly burdened, delayed or compromised.

Accordingly, the Applicants submit that the likely benefits to the public outweigh any potential detriment to the public and that the public benefits are such that the collective bargaining, and the resultant agreements or arrangements, should be allowed to proceed.

In this regard we note the recent comments by the Honourable Justice Mansfield AM in his paper prepared for the 2012 Competition Law Conference<sup>21</sup>. In that paper he noted that, in respect of the meaning of public benefit:

*'That term is, of course, conceptual rather than specific'*

and

*'Before turning to the terms of the [Competition & Consumer Act], it is relevant to note that the term 'public benefit' is capable of being many things.'*

More detail on the likely public benefits is provided below.

#### **4.4 Benefit: more efficient infrastructure investment**

If Surat Basin Rail were to deal with each individual Applicant, it would be inevitable that expectations about prices, services to be offered, access conditions to be imposed and other contractual terms would be individualised, may be contradictory and be subject to misalignment with Terminal capacity and staged expansions. The proposed collective bargaining arrangement would allow and would convey a joint industry view, for example in relation to the investment which industry considers necessary, to which Surat Basin Rail could then respond. In the absence of this arrangement, it is likely to conceive of situations where Surat Basin Rail's response to the aggregate requests of producers would lead to inefficient or inadequate infrastructure investment and provision.

It is submitted that collective bargaining would allow the Applicants the ability to present a considered view of their own infrastructure needs, having regard to the aggregate requirements of the Applicants for any new infrastructure which is sought. Infrastructure plans satisfying the needs of a greater proportion of the industry could then be developed. Surat Basin Rail would then also have more certainty regarding potential infrastructure investment.

With a greater ability to predict annual costs and revenue, Surat Basin Rail and the Applicants are likely to be better placed to make long-term plans and decisions, particularly with respect to production and investment. This in turn may enable Surat Basin Rail to operate more efficiently and

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<sup>21</sup> Justice John Mansfield, 2012 Competition Law Conference, Sydney, 5 May 2012 paper prepared for the session titled "

invest in appropriate system upgrades and allow the Applicants to consider future investment in new mines.

#### **4.5 Benefit: meaningful improvement in business efficiency and commercial outcomes**

The Applicants consider that the collective bargaining arrangements may seek to improve the individual Applicant's negotiating position with Surat Basin Rail and, therefore, somewhat balance the position held by Surat Basin Rail (which is comprised of ATEC (Dawson Valley Railway) Pty Ltd, Xstrata Coal Surat Basin Rail Pty Ltd and QR Surat Basin Rail Pty Ltd) by increasing the quality, preparedness and rigour which may be applied to commercial negotiations on behalf of the Applicants.

Through collective bargaining arrangements, the Applicants' ability to improve the bargaining process may be achieved in a number of ways, including the provision of a single set of information is subject to rigorous analysis, and analysis and views in respect terms and service offering can be exchanged amongst the Applicants, with the potential for a more focused response to Surat Basin Rail.

#### **4.6 Benefit: transaction cost savings**

On an aggregated basis, transaction costs incurred by the Applicants on the basis of individual negotiation with Surat Basin Rail are undoubtedly greater than would be the case if collective negotiations were to occur. In particular, it is anticipated that there would be a saving in regard to the number of hours that would be required to be spent by members of senior management of the Applicants in engaging in lengthy negotiations with Surat Basin Rail, as well as the costs involved in each Applicant briefing external lawyers or expert consultants from time to time. In the absence of collective negotiating and allowing the Applicants to pool their resources, these costs are likely to be incurred as part of the Applicants' respective cost bases and could ultimately manifest in higher prices or charges to customers.

In seeking to be competitive, the Applicants operate streamlined businesses and have relatively limited resources. Collective bargaining would likely result in avoiding incurring significant management time attending to lengthy individual negotiations which would allow the Applicants to spend more time attending to their core production activities and business operations which has a direct impact on downstream markets. The ability of the Applicants, who may be smaller participants in the mining industry, to pool their relatively limited resources for purposes of protracted negotiations is a more efficient alternative.

The collective bargaining arrangements will enable the Applicants to participate in negotiations for access to the Identified Rail Infrastructure and Services at significantly lower cost to each Applicant, and to the industry in general, than each Applicant would incur if it had to pursue negotiations individually.

As the resources of Surat Basin Rail may also be relatively limited, collective negotiation may assist in facilitating quicker and more cost effective negotiation of access terms than protracted individual negotiations.

These overall cost savings may be substantial for the industry in general.

#### **4.7 Benefit: alignment of contracted volumes**

The Applicants consider that collective bargaining with Surat Basin Rail will contribute to the streamlining of negotiations for access and thereby assist in facilitating the alignment of individual producers' contractual commitments across the coal supply chain. The Applicants submit that this constitutes an important public benefit as it seeks to remove a number of inefficient distortions in the

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use of the coal chain, enabling Surat Basin Rail to be informed as to the demand for the Identified Rail Infrastructure and to ensure in a timely manner that parties which are granted capacity in Stage 2 of the Terminal project have sufficient below-rail access.

Facilitating streamlined negotiations which contribute to the alignment of individual contracted capacity commitments (backed by take or pay obligations) will result in a more sustainable long term outlook for the supply chain and will assist in growth of coal exports from Australia, which may result in increased quantities of high quality coal from the Bowen Basin region to be supplied to Australia's growing coal export markets, particularly in Asia. Furthermore, it may facilitate the development of mines and infrastructure in the Surat Basin.

We note that the ACCC has previously rejected the proposition that collective bargaining would contribute significantly to the achievement of contractual alignment. The ACCC has however concluded that achieving contractual alignment is dependent on:

- parties being able to enter into long term contracts to underpin investment; and
- service providers contracting on the basis of the capacity of the supply chain as a whole, rather than contracting based on assessment of individual capacity.

The ACCC concluded that these conditions would be achieved regardless of the collective bargaining notification.

The Applicants agree that these conditions are necessary for contractual alignment to be achieved. However, we submit that collective negotiations to which this authorisation application relates are likely to facilitate these conditions by:

- assisting the Applicants to reach satisfactory commercial terms for access to the Identified Rail Infrastructure, thereby facilitating the formation of long term contracts to underpin investment; and
- making the negotiation process more efficient and informing the service provider, Surat Basin Rail, of the likely demand for the infrastructure so that it may better plan investment which in turn will form part of a whole of coal chain solution.

#### **4.8 Benefit: maintaining Australia's international reputation in relation to the exports of coal**

The Applicants consider that the collective bargaining arrangements will assist in achieving contractual alignment in the coal supply chain and as a result will facilitate more efficient transportation of coal from the mines to the Terminal which will result in coal exports meeting international customers' anticipated delivery times. This will maintain or may enhance Australia's reputation internationally as a reliable supplier of coal.

#### **4.9 Benefit: increased taxes and royalties payable to the Queensland and Australian Governments and increased employment opportunities**

The expansion of mining activities and more efficient transportation of coal, will facilitate greater exports of coal by the Applicants which will have broader economic benefits for the Queensland and Australian economies through increased royalties on revenue generated and taxes payable to the Government, as well as increased job creation which are all substantial public benefits.

In particular, based on the results of an independent report commissioned by Gladstone Ports Corporation in 2008, the development of the Terminal was forecast to have the following beneficial economic impacts:

- demand for a peak construction workforce of approximately 500 employees for Stage 1, 600 employees for Stage 2 and 480 employees for Stage 3, and to create an estimated additional 1,200 jobs elsewhere in Queensland, providing inputs and services to support the construction activity at the Terminal;
- coal production and exporting will increase gross state product by an estimated aggregate total of \$183 billion to 2040 over base level projections once the Terminal is fully developed;
- the estimated level of economic activity that will be directly attributed to coal production and exports will be between \$6.4 billion and \$8.3 billion annually through to 2040 once the Terminal reaches full capacity in 2021. This represents an upper annual increase of 2.6% in gross state product from 2021 to 2040 over base level projections; and
- an average net annual addition to the Gross State Product of Queensland of 1.8% and an average net annual addition to the Gross Domestic Product of Australia of 0.2% over 2007 to 2040.<sup>22</sup>

#### **4.10 Benefit: environment and safety**

The Terminal is situated close to the Great Barrier Reef. The Great Barrier Reef clearly has enormous environmental and cultural importance to Australia and the world, as well as flow on economic benefits for Queensland and Australia in tourism and other industries.

While the environmental risk associated with bulk cargo vessels can be managed, exporting volumes through the Terminal may assist in easing vessel queues in relation to other Queensland export terminals such as Dalrymple Bay Coal Terminal.

The significance of this public benefit is highlighted by incidents occurring in the Great Barrier Reef in recent times, including the grounding of the Pasha Bulker at Nobbys Beach, Newcastle in June 2007. In its report following the Pasha Bulker incident, the Australian Transport Safety Bureau (“ATSB”) identified port congestion as a factor which increases the likelihood of ships anchoring in close proximity to each other which, in turn, results in less time to take action if their anchors drag and therefore creating a higher risk of collision. The ATSB specifically identified a “*potential for major pollution or the blockage of the port resulting in enormous financial costs*”<sup>23</sup>. More recently, in 2010 a 230m long coal ship which ran aground 70km East of Great Keppel Island in the Great Barrier Reef.<sup>24</sup>

#### **4.11 The counterfactual - “future without authorisation”**

In the “future without authorisation”, the public benefits indicated above may be completely forgone, delayed or significantly diminished. As such, an important opportunity to encourage increased exports to the global coal markets may be significantly burdened, delayed or compromised.

In particular, without the authorisation to collectively negotiate, it is submitted that:

- (a) the process for negotiating access to below-rail infrastructure to support the Terminal would be far less efficient from a time perspective, resulting in protracted individual negotiations as opposed to streamlined group discussions;

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<sup>22</sup> Gladstone Ports Corporation Ltd & Others, Application for Authorisation A91208. Supporting Submission (Public version), page 32.

<sup>23</sup> ATSB Transport Safety Investigation Report, Marine Occurrence Investigation No 243 “Independent investigation into the grounding of the Panamanian registered bulk carrier Pasha Bulker” [www.atsb.gov.au/publications/investigation\\_reports/2007/MAIR/pdf/mair243\\_001.pdf](http://www.atsb.gov.au/publications/investigation_reports/2007/MAIR/pdf/mair243_001.pdf).

<sup>24</sup> <http://www.theaustralian.com.au/news/chinese-coal-ship-runs-aground-on-great-barrier-reef/story-e6frg6n6-1225849510768>

### **For Public Register**

- (b) the process for negotiating access to below-rail infrastructure to support the Terminal would be far less efficient from a resources perspective - this is particularly the case in relation to smaller aspiring producers who may not have the human resources capability to devote to lengthy negotiation processes, and would benefit from collective negotiation, enabling them to focus their attention on their core mining activities;
- (c) the opportunity to address any misalignment which exists or which may be perpetuated in the relevant coal supply chain, will be lost because the Applicants will not be able to collectively ensure that the infrastructure supporting the Terminal project will have sufficient capacity to match the capacity anticipated to be delivered by the Terminal - this may consequently result in a lost opportunity to grow exports of coal from Queensland;
- (d) the opportunity to ensure delivery of required capacity in a coordinated manner with the staged development of the Terminal, will be foregone;
- (e) the opportunity for achieving transaction cost savings will be foregone which removes the possibility of the Applicants being able to pass through these cost savings and which may enable some of the aspiring producers to become more competitive as a result; and
- (f) the potential for increased employment as a result of potential growth in exports, will be diminished which would effectively amount to a significant public detriment.

Accordingly, it is submitted that the counterfactual position results in significant lost opportunities to optimise Queensland's coal resources.

#### **4.12 Weighing public benefits against any anti-competitive detriment**

The Applicants' collective bargaining activities will likely result in benefits for all participants within the coal supply chain, including end-customers. In contrast, the Applicants submit that there are no identifiable negative impacts on competitive outcomes in any market, given that:

- the collective bargaining arrangements are voluntary and neither the Applicants, nor Surat Basin Rail are compelled to participate;
- the collective bargaining group is relatively limited; and
- the collective bargaining and (any information exchanges) are limited to relating to the Identified Rail Infrastructure.

In particular, the Applicants note that

- Surat Basin Rail is a monopoly provider of the Services and the Identified Infrastructure and Services are not regulated by the QR Network undertaking, reducing the probability that the collective bargaining Applicants will achieve inefficiently low prices;
- participation in the collective bargaining arrangement is voluntary. The Applicants and other users of the Surat Basin Rail Line will retain the ability to negotiate individually with Surat Basin Rail or enter into the collective bargaining arrangements.
- there are restrictions on the coverage, composition and representation of the bargaining group. The Applicants seek authorisation to extend only to current and future producers and users of the Surat Basin Rail Line who will similarly need to negotiate with Surat Basin Rail for access to the Identified Rail Infrastructure. In the Wiggins Island Determination, the ACCC allowed authorisation to extend to future users of the terminal affected by the collective bargaining.

### **For Public Register**

- there is no proposed boycott activity, which means that the arrangement is also voluntary from the view of Surat Basin Rail.
- information will only be shared between the Applicants to the extent that it is related to the Identified Rail Infrastructure. The Applicants will not share information and will continue to compete with each other in relation to the production and supply of coal to customers in overseas markets and for access to above rail infrastructure.

If anything, it is considered that collective bargaining has a pro-competitive impact in both the primary market for the provision of below-rail services and the downstream markets for the supply of coking and thermal coal.

#### **4.13 Impact on Surat Basin Rail**

The Applicants submit that there will be no detriment or negative impact on Surat Basin Rail, which as the below rail service provider has a significant market position. As indicated above, it is likely that the collective bargaining arrangements may in fact result in time and cost savings for Surat Basin Rail in being able to negotiate collectively as opposed to protracted individual negotiations with producers.

#### **4.14 Impact on downstream customers**

The Applicants submit that their coal customers in the global market for the supply of coking or thermal coal should benefit from the proposed collective bargaining arrangements as the Applicants individually will benefit from lower costs which should result in cost savings being able to be passed on to consumers, potentially in the form of higher output at lower prices. This is likely to occur in the absence of illegal collusion, merger or any further collaboration.

The effect of collective bargaining on competition in Australia is likely to be minimal.

#### **4.15 Conclusion - a net public benefit will likely result**

Accordingly, the Applicants consider that the authorisation should be granted on the basis that the Applicants' proposed collective bargaining arrangements will result in a net public benefit.

## **5. CONCLUSION**

The Applicants submit that the proposed collective bargaining will:

- facilitate investment in infrastructure along the coal chain associated with the Terminal by providing greater commercial certainty for the investment in the infrastructure;
- foster business efficiency in understanding likely demand and timing requirements by coal producers using the Terminal, resulting in improved commercial outcomes particularly where this results in increased exports and enhanced international competitiveness;
- not have an adverse impact on competition in any relevant market;
- not reduce the total amount of coal that is able to be exported through the Terminal;
- lower transaction costs for the Applicants and Surat Basin Rail, and lower negotiation risk;
- result in more timely growth in export markets and the volumes of coal that will be exported by Australian producers to international customers;
- assist in addressing the lack of contractual alignment in coal supply chains which has existed in recent years;
- enable the Applicants who are smaller producers of coal to be more competitive vis-à-vis the larger producers, in particular, by facilitating more equal negotiating positions in relation to Surat Basin Rail;
- benefit the Queensland and Australian economies as a result of increased exports, which will likely lead to increased employment opportunities being created; and
- provide a number of environmental and safety benefits associated with contractual alignment which may assist in reducing any vessel queues due to constrained coal supply chains in Queensland.

The substantial public benefits likely to arise from the proposed arrangements, therefore, outweigh any public detriment which may arise. The Applicants accordingly submit that the statutory test for authorisation under the CCA is satisfied and that the ACCC should grant the authorisation to allow the realisation of the net public benefits.

The Applicants therefore request that the ACCC grants the authorisation sought.

If the ACCC has any questions, or would like any further information, the Applicants would be pleased to assist.

**22 May 2012**



## Annexure 1 - The Applicants

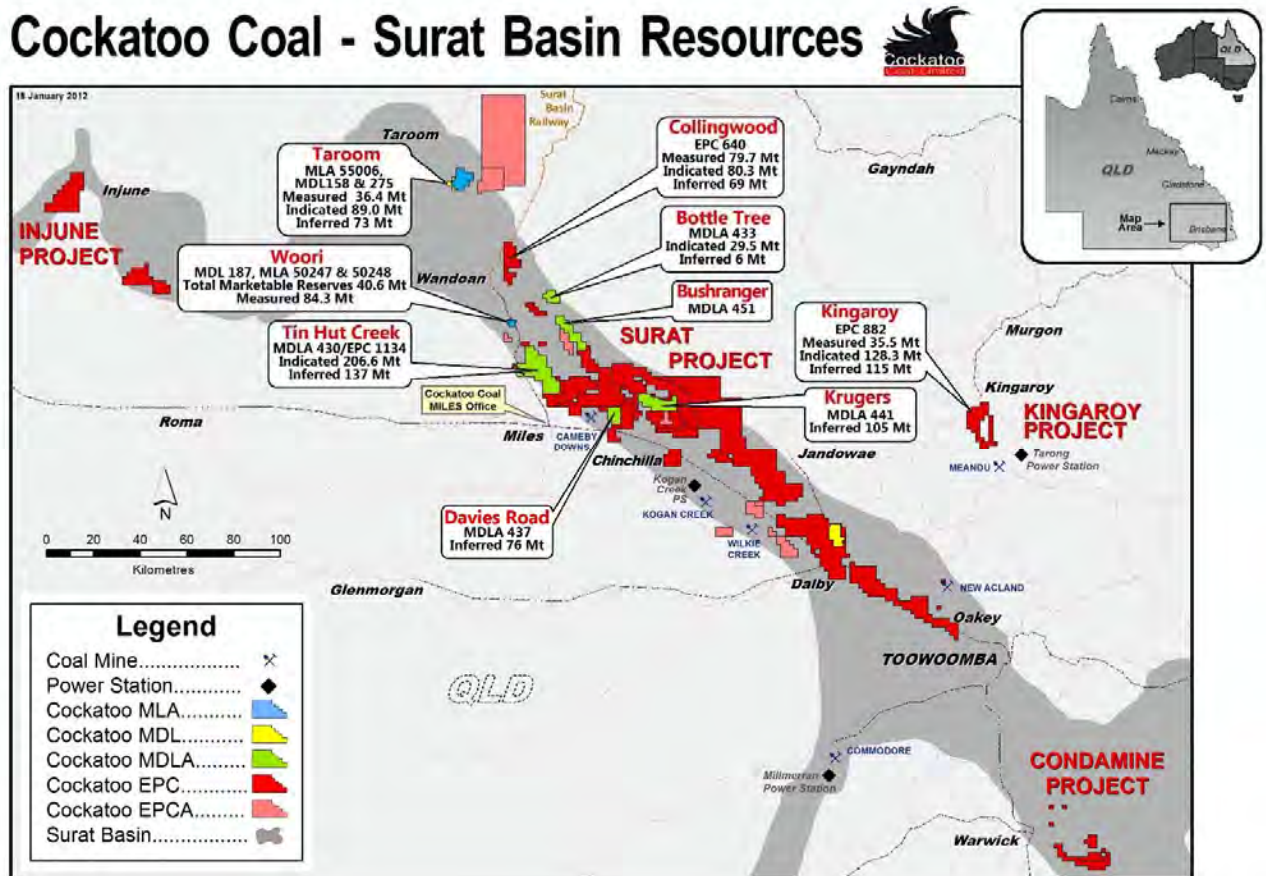
### 1 Cockatoo Coal Ltd (“Cockatoo”)

Cockatoo is listed on the ASX. Cockatoo exports PCI metallurgical and thermal coal from the Baralaba mine in the Bowen Basin, Queensland.

In addition to Baralaba, Cockatoo is developing a portfolio of advanced projects in the Surat Basin, Queensland. The Surat exploration portfolio encompasses more than 3,800 square kilometres of tenements.

Cockatoo currently plans to mobilise its assets to expand production from 500,000 tpa in 2009/10, to 750,000 tonnes in the 2012 year and to in excess of 9 mtpa from 2015/2016.

Cockatoo has an allocation of 3 million tonnes per year at the Terminal commencing from 2014.



#### Contact details

Cockatoo Coal Limited  
Level 2, 66 Hunter Street  
Sydney, NSW, 2000  
Tel: (61 2) 9300 3333  
Fax: (612) 9221 6333





## **Annexure 2- List of coal companies comprising the shareholders of Wiggins Island Coal Export Terminal Pty Ltd**

### **Stage One Owners**

1. Aquila Resources
2. Bandanna Energy
3. Caledon Coal Ltd
4. Cockatoo Coal
5. Northern Energy Corporation
6. Wesfarmers Curragh
7. Yancoal
8. Xstrata Coal

### Annexure 3 - Surat Basin Rail map outlining the proposed development of the Surat Basin Rail line



## **Annexure 4 - Services to be acquired in association with access to the below-rail infrastructure**

1. provision of access to the Surat Basin Rail Line;
2. provision of access to infrastructure which connects a spur line to the Surat Basin Rail Line;
3. provision of train control services;
4. provision of incidental access to land owned, leased or licensed to Surat Basin Rail or land to which Surat Basin Rail otherwise has rights of access; and
5. such additional services as may be agreed from time to time.

**Annexure 5 – [Confidential – Restriction of Publication Claimed]**

**Annexure 6 – Presentation by Surat Basin Rail dated 11 May 2011: '4th Surat Basin Rail Coal and Energy Conference – Buckle Up '**



## 4<sup>th</sup> Surat Basin Rail Coal and Energy Conference

# Buckle up

For Public Register

**Warren McReight**  
**Project Director**  
**Surat Basin Rail Pty Ltd**



# Topics to cover

1. Progress made
2. 2011 developments
3. Securing customers
4. Engaging the construction industry
5. Complexities of the coal chain
6. Reaching a final investment decision

For Public Register

# Progress made in the past year

- Environmental approval to proceed
- Customer commitment process underway
- Interface agreements progressed with landowners
- DCM model approved as the delivery strategy
- Procurement contracts advanced
- Greater understanding of WICET Stage 2 timing
- Alignment and design post 2010/2011 Flood Event

## Appointed:

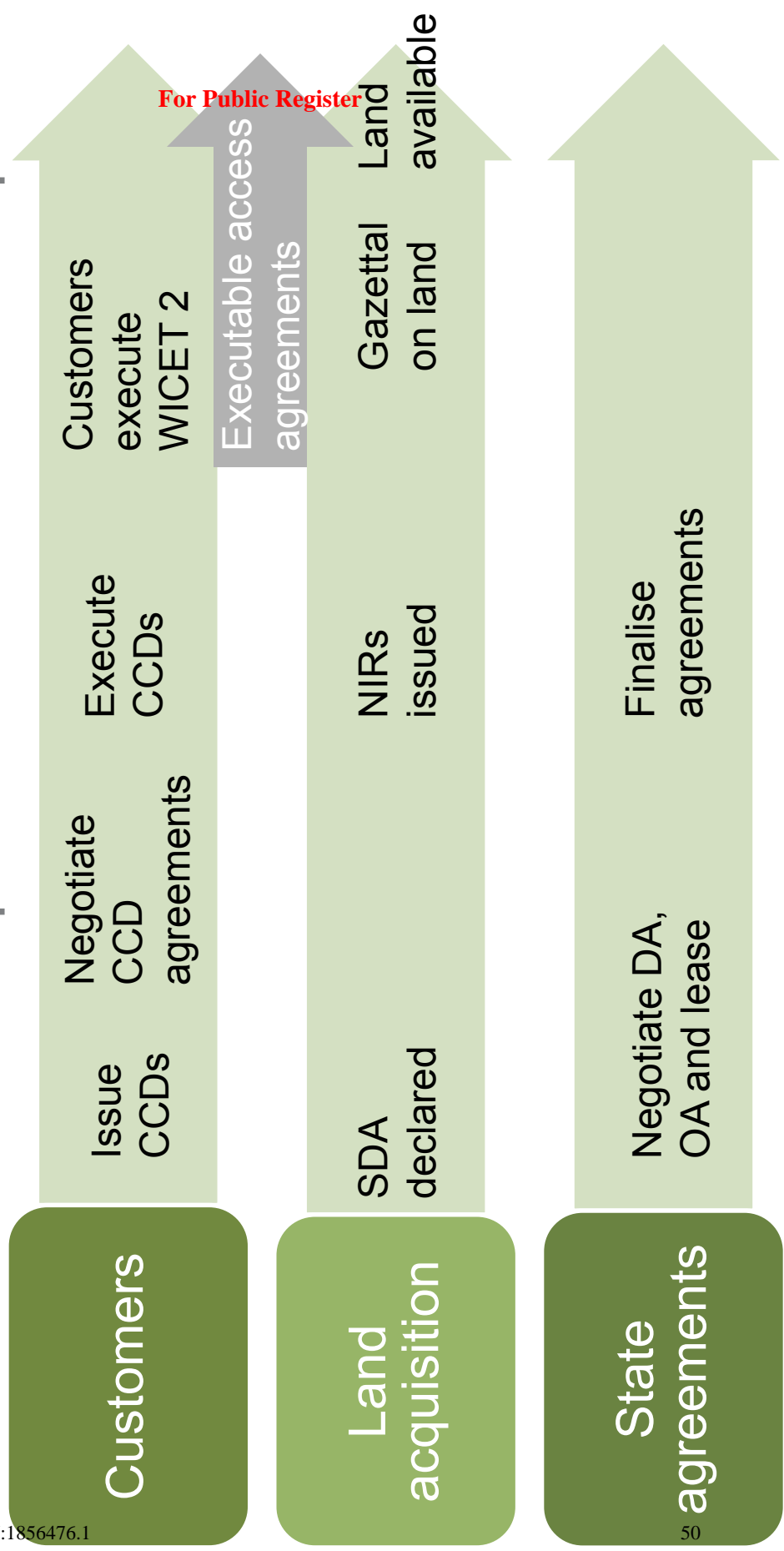
- AECOM as our Principal Engineer
- Investec to provide financing and structuring advice
- PWC engaged to provide tax advice
- Blake Dawson to provide legal support.

# A number of elements have impacted our progress and milestone deadlines

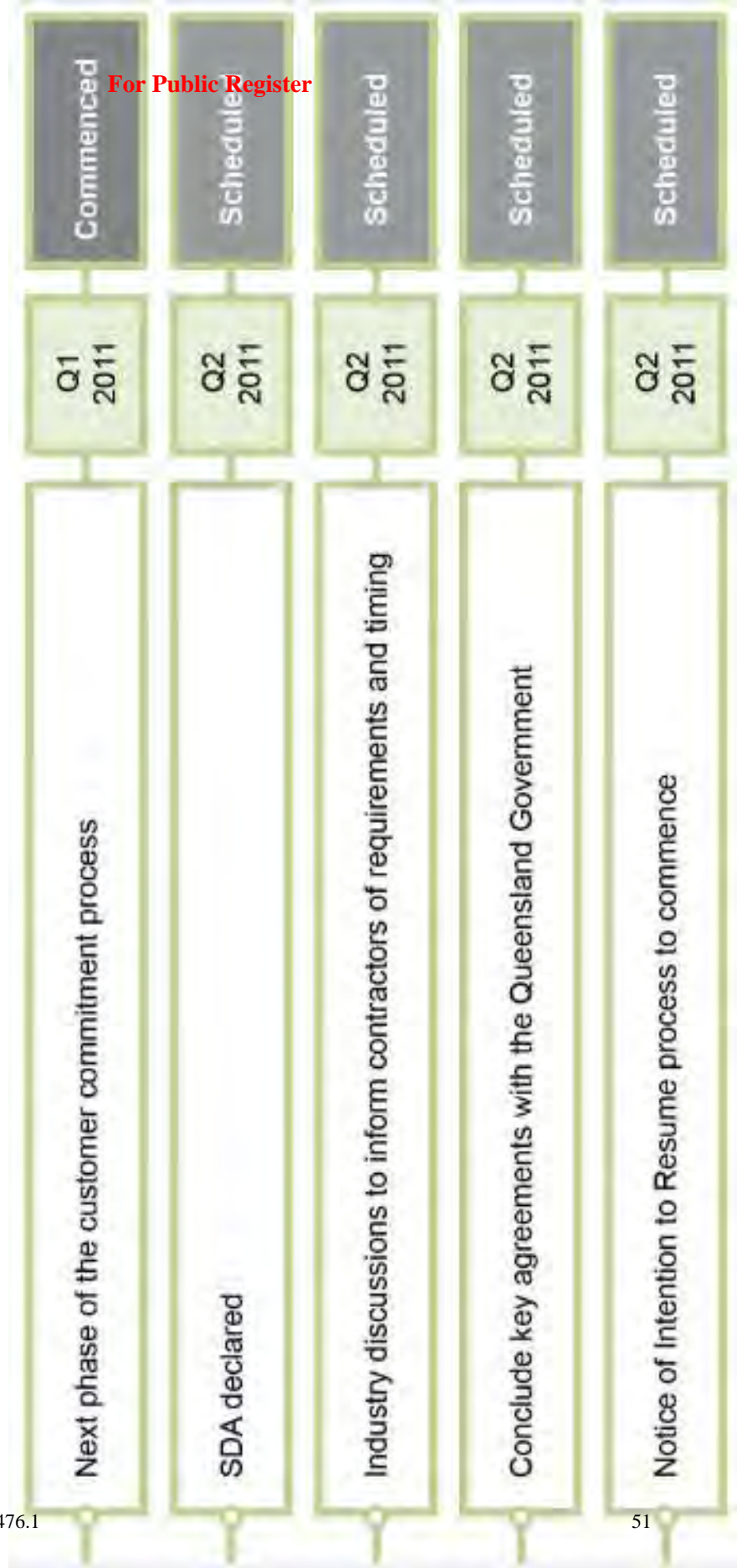
For Public Register

- Coal Chain alignment
- Coordinator-General's report
- Key agreement negotiations with the State
- SDA declaration
- Contractor procurement progression

# Surat Basin Rail process interrelationships



# 2011 will yield further exciting developments





# Securing customers

- EOI letter sent out 21 April 2011
- Responses by 13 May 2011
- Due Diligence Report produced by external consultants due by 17 June 2011

For Public Register



# Constructing the railway

Competitive ECI commences 2011

Final investment decision early 2012 in line with other coal chain projects

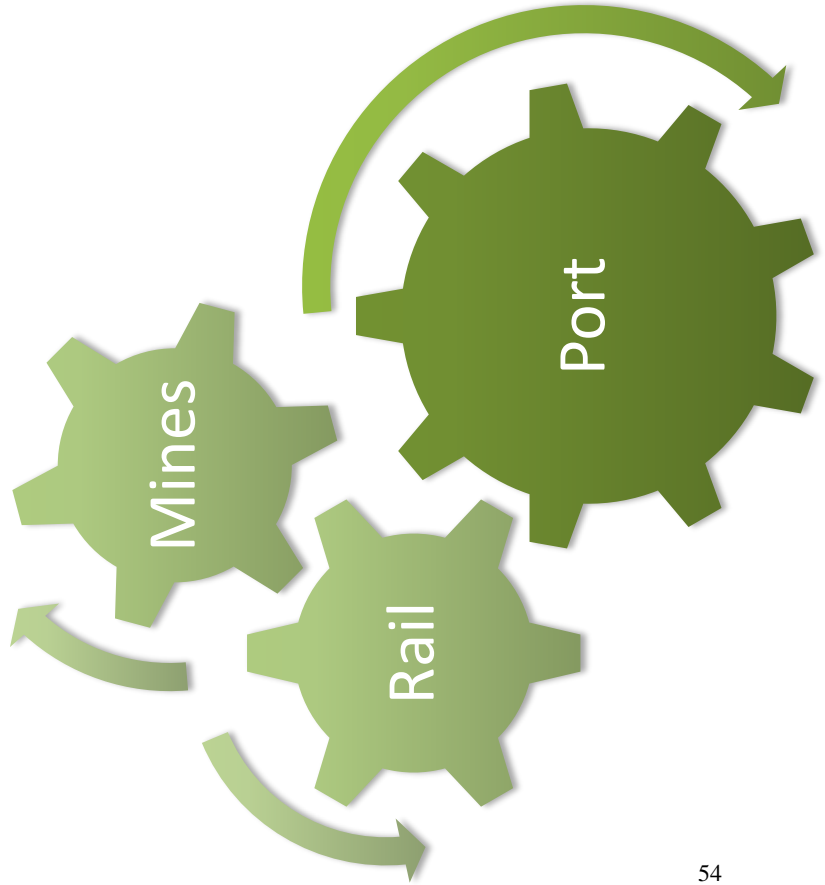
Commence design, construction and maintenance contract

Construction scheduled to commence in mid 2012

Commence operation early 2015 in line with other coal chain projects



# Coal chain cooperation is integral



**For Public Register**

The timing and execution of WICET (need Stage 1 to move forward before Stage 2 can be built), related infrastructure and mining projects are vital to the successful operation of Surat Basin Rail.



# Queensland coal systems

For Public Register



# WICET expansion – Stage 2A

Capacity  
commitments  
in late 2011

Financial close  
anticipated in  
mid 2012

Shipments  
anticipated in  
2015

For Public Register





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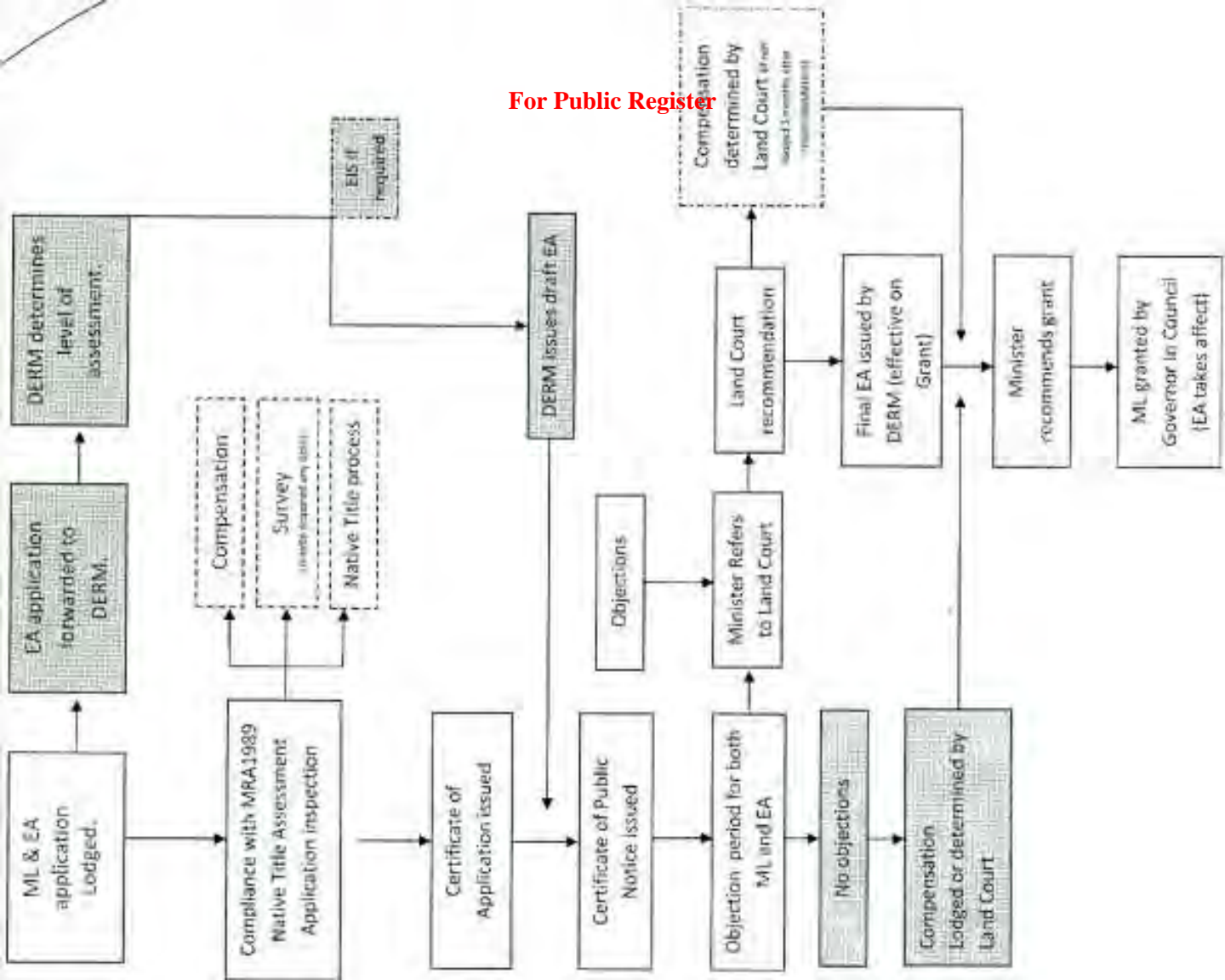


New = 15-20 mtpa

# The mining lease process is complex

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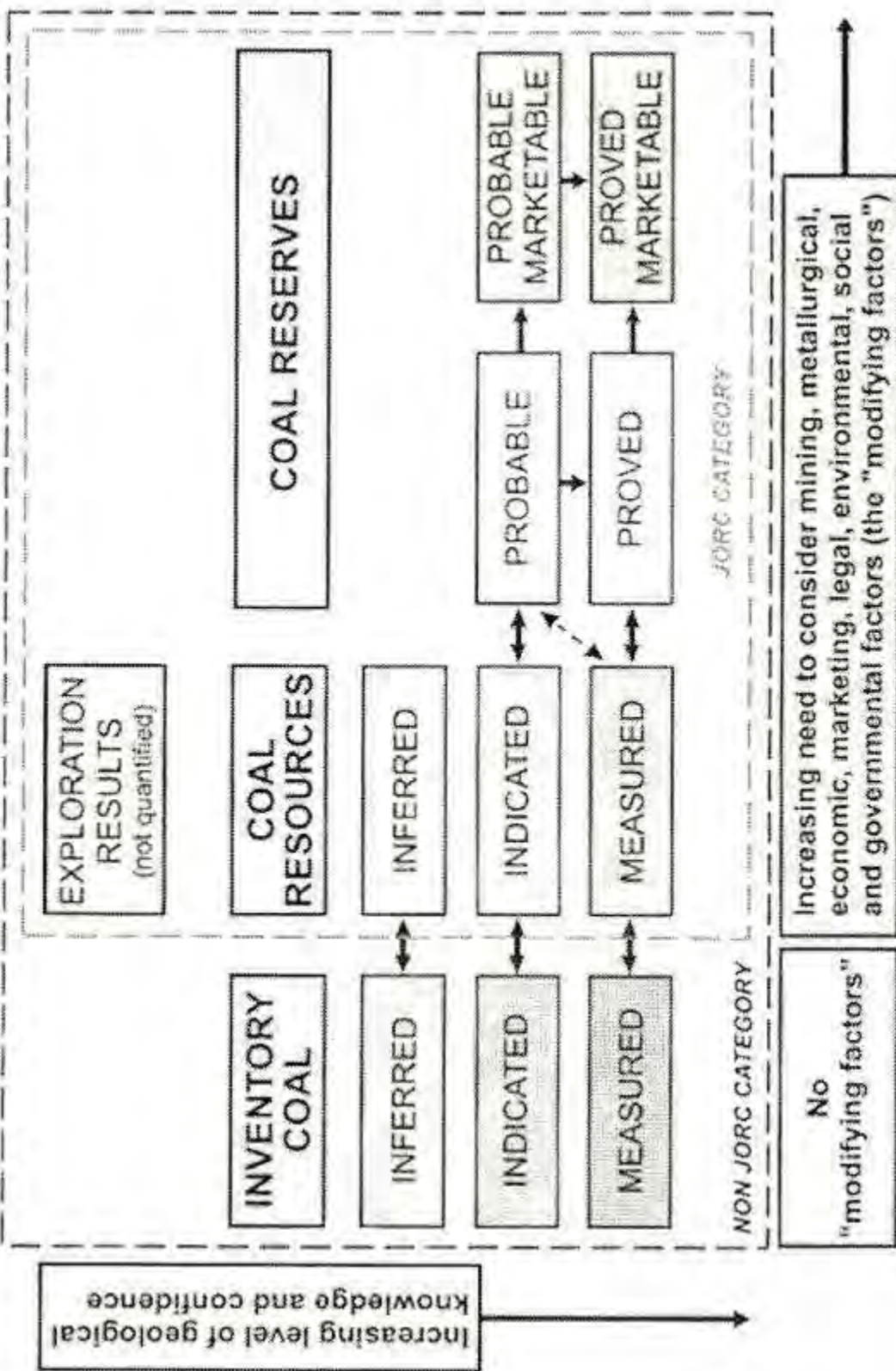
For Public Register





# The JORC process

RELATIONSHIP BETWEEN INVENTORY COAL, COAL RESOURCES AND COAL RESERVES



# Reaching a final investment decision

A final investment decision will only be made by the Joint Venture when the following objectives have been achieved:

- Sufficient “Take or Pay” contracts agreed with potential Foundation Customers that demonstrate to the SBRJV shareholders and the project’s bankers that this project is bankable
- Key agreements successfully negotiated with the State to a point that they are bankable

For Public Register



# Reaching a final investment decision (continued)

- Our preferred DC&M contractor delivers a Risk Adjusted Maximum Price that meets the requirements of both the shareholders and the project's bankers
- Individual shareholder requirements are met.

For Public Register

# Opportunities are provided by critical infrastructure

Surat Basin Rail will:

- Support significant employment opportunities, skills development and regional growth
- Require a construction, operation and maintenance workforce of about 1,500 in peak periods
- Offer employment opportunities leading to improved demand for housing and infrastructure in the region
- Continue to work with affected landowners, the local council and relevant government agencies to effectively manage this change and growth.

For Public Register

Surat Basin Rail will significantly enhance  
the existing coal rail network and  
improve opportunities for coal reserves  
in the Surat Basin

Stay tuned



# Any questions?

## Annexure 7 - WICET Assumed Projects

### Stage 1

- One balloon loop at the port (one dump station by WICET)
- Third North Coast Line (NCL) between Aldoga and WICET loop plus connections to Aldoga Yard
- Blackwater duplications (currently propose three)
- Enhancements on south end of Goonyella System (likely two passing loops and potentially some duplication)
- Callemondah Feeder Station

*Note: Assumes power systems upgrading work is completed in 2012 as currently planned*

### Stage 2

- Additional balloon loops at port (2<sup>nd</sup> dump station by WICET consortium)
- Quadruplication of NCL is unlikely to be required but further investigations are required
- Moura Link
- Banana to Wooderson Upgrade
- Surat Basin Rail Line (by Surat Basin Rail Joint Venture)
- South of Wandoan
- West of Moura Mine
- Balloon loop layout and preliminary designs are being undertaken as part of Stage 1 study package. Detailed design, environmental planning approvals etc, are in stage 2.
- NCL Aldoga to WICET Loop – layout design for quadruplication will be undertaken as part of Stage 1
  - will need to do more capacity modelling to determine infrastructure required but current indications are that quad will not be required
- Moura Link
  - EIS complete
  - land acquisition in progress
  - detail civil design tender closed
- Banana to Wooderson Upgrade
  - Progress report issued to Underwriters

**For Public Register**

- interfaces with Surat Basin Rail Line being managed
- Surat Basin Rail (by Surat Basin Rail Line Joint Venture)
  - being progressed by JV
- South of Wandoan
  - being progressed in conjunction with producers
- West of Moura mine
  - to be progressed with producers



## **Annexure 8 – Surat Basin mines likely to require access to the Surat Basin Rail line**

Mine/project name	Company
Summer Hill (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Turkey Hill (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Mud Creek (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Frank Creek (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Wabagul (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Glen Laurel (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Stanley Park (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Burunga (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Austinvale (Wandoan Group)	Xstrata Coal Queensland Pty Ltd
Cattle Creek	Xstrata Coal Queensland Pty Ltd
Orazabah	Xstrata Coal Queensland Pty Ltd
Pony Plains	Xstrata Coal Queensland Pty Ltd
Glen Ardens	Xstrata Coal Queensland Pty Ltd
Cowangah	Xstrata Coal Queensland Pty Ltd
Meeleebee	Xstrata Coal Queensland Pty Ltd
The Range	Stanmore Coal Ltd
Bottle Tree	Cockatoo Coal Limited
Bushranger	Cockatoo Coal Limited
Collingwood	Cockatoo Coal Limited
Davies Road	Cockatoo Coal Limited
Krugers	Cockatoo Coal Limited
Taroom	Cockatoo Coal Limited
Tin Hut Creek	Cockatoo Coal Limited
Woori (Guluguba)	Cockatoo Coal Limited



**For Public Register**

Columboola	Metrocoal Limited
Bundi	Metrocoal Limited
Rywung	Yancoal Australia
Sefton Park	Yancoal Australia
Back Creek	Allegiance Coal
Taroorm	Blackwood Corporation
Byrmont	Blackwood Corporation
Chincilla	Blackwood Corporation