

Allens

480 Queen Street
Brisbane QLD 4000 Australia

GPO Box 7082
Brisbane QLD 4001 Australia

T +61 7 3334 3000
F +61 7 3334 3444
www.allens.com.au

ABN 47 702 595 758

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11 March 2021

David Hatfield
Director - Exemptions
Australian Competition and Consumer
Commission

Dear David

Dalrymple Bay Coal Terminal Authorisation - AA1000541

As you know, we act on behalf of the Applicants for Authorisation AA1000541 seeking authorisation for the collective negotiation (and, if required, collective arbitration) of access terms in respect of the Dalrymple Bay Coal Terminal.

We note that following the conclusion of the ACCC's initial consultation process DBIM made a further late submission dated 4 March 2021. While the ACCC has subsequently granted interim authorisation, to ensure the ACCC is properly informed in considering the substantive case for authorisation, the Applicants have provided a short response to that submission below.

DBIM's late submission appears to assert that without the appointment of a third-party negotiator or specified ring-fencing requirements, irreversible harm will necessarily occur. The Applicants strongly disagree with that assertion, and consider that DBIM's submission:

- (a) significantly overstates the importance of those issues to the authorisation process it references; and
- (b) fails to acknowledge:
 - (i) that those issues were only relevant in the context of the referenced authorisation because the ACCC considered an increased risk of collusion existed in the circumstances of that application as a result of the downstream markets involving a *'smaller number of competitors, all of whom are proposed to be engaged in information sharing'*; and
 - (ii) those are not the circumstances that exist in relation to the coal markets in which the Applicants compete.

As recognised in paragraph 31(c) of the ACCC's decision to grant authorisation:

It is unlikely that conditional interim authorisation will materially harm competition ... interim authorisation does not extend to sharing of commercially sensitive information between users in relation to coal markets (such as downstream customers, customer pricing, volume projections or marketing strategies) or any other markets in which they are or may be competitors.

The Applicants are well aware that authorisation does not extend to anti-competitive arrangements in relation to any dependent markets and have expressly acknowledged that in previous submissions.

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There is no reason to assume that the Applicants will wilfully contravene competition laws (which is what DBIM is effectively asking the ACCC to assume).

In addition, it is clear from the circumstances which exist in relation to this application that there are numerous other controls in place to protect against any theoretical risks of collusion arising in other markets.

In particular:

- (a) an external lawyer will be engaged to assist the Applicants in the anticipated collective negotiation – such that there is a 'third party negotiator' who will be in a position to ensure that preparatory discussions and the negotiations themselves are occurring in a manner that is consistent with competition law compliance;
- (b) users and access seekers have extensive experience with appropriately managing competitively sensitive information through the users' joint participation in Queensland Competition Authority regulatory processes through the 'DBCT User Group' – which has at times involved provision of individual user information solely to engaged lawyers and economists which is treated confidentially, not disclosed to other users and then only presented to the Queensland Competition Authority in an aggregate or de-identified manner;
- (c) the representatives of the Applicants are typically infrastructure and logistics managers, project managers, other commercial managers or in-house lawyers, and with only one exception, are not directly responsible for coal sales and marketing decisions; and
- (d) users and access seekers that are present in negotiations and preparatory discussions will all be particularly conscious of ensuring competition law compliance, and the organisations they are employed by and represent have their own compliance policies which their representatives will be required to comply with.

While the Applicants reject that it is required, the Applicants are also happy to confirm to the ACCC that:

- (e) the lawyer they intend to engage for the collective negotiations will have competition law experience such that they are well placed to supervise all group meetings to ensure discussions do not give rise to competition law risks; and
- (f) in any meetings of the user group or negotiations occurring under the coverage of the authorisation, the meeting or negotiation would include a reminder of the applicable competition law requirements.

Accordingly, the Applicants submit that the application does not involve any increased risk of collusion (or any harm or detriment) in other dependent markets and the application for authorisation should be granted.

Yours sincerely



John Hedge
Partner
Allens

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