

- 9 MAY 2006

PEABODY PACIFIC

DATE RECEIVED

9 May 2006

E J Hall
Chief Executive
Queensland Competition Authority
Level 19
12 Creek Street
BRISBANE QLD 4000

Dear Mr Hall

Dalrymple Bay Coal Terminal – Draft Access Undertaking

We refer to your email to us of 4 May 2006. We also refer to the Authority's *Request for Comments on Supplementary Submissions (request for comments)* posted on its website on 13 April 2006.

Response to the Authority's request for comments

In your email of 4 May 2006, you state that Peabody Pacific did not provide a response to the Authority's request for comments by the due date of 28 April 2006, specifically as to whether:

- (a) the 2006 draft access undertaking (**the second DAU**), if approved in its current form, could be seen to impact on the legal rights of parties who claim that there were deficiencies in the manner in which requests for additional capacity have been handled by DBCT Management. If so, are there alternatives to avoid affecting the legal rights (if any) of those parties?
- (b) the adoption of the 'pro-rata allocation of capacity' proposal could impact on the legal rights of parties who have currently taken up positions in the queue established by DBCT Management. If so, are there alternatives to avoid affecting the legal rights (if any) of those parties?

In relation to paragraph (a), we viewed this as a request for other users of DBCT to respond to Peabody Pacific's submission of 22 March 2006. As such, we did not think it necessary or appropriate to make further submissions in this regard.

In relation to paragraph (b), we are not in a position to comment. Peabody Pacific does not have knowledge of the legal rights of other users. The legal obligations as between DBCT Management and other users of DBCT is a confidential matter as between those parties.

Senior Counsel's advice

In that email you state that the Secretariat has sought the advice of Senior Counsel on the potential legal impact on stakeholders if the Authority either approved the second DAU as submitted by BBI or approved an amended DAU which incorporated the pro-rata approach to capacity allocation proposed by Peabody Pacific.

You have requested that if we disagree with Senior Counsel's assessment, that we provide you with a response by Tuesday 9 May 2006.

You summarised Senior Counsel's view as follows:

- (a) If the Authority accepts a DAU which has been amended to incorporate the pro-rata approach to capacity allocation, this change could affect the legal rights of access seekers who have taken up positions in the informal queue.
- (b) If the Authority accepts the second DAU in its current form, the parties who object to the BBI queuing arrangement could still seek to recover damages from BBI. Other legal challenges to the relative priority rights within the queue might be affected by the acceptance by the Authority of the second DAU in its current form. However, remedies affecting the positions in the queue are unlikely to be granted by the Courts given the existence of other third party rights in respect of the queue and the potential availability of damages as an adequate remedy.

In relation to paragraph (a), we are not in a position to comment. Peabody Pacific does not have knowledge of the legal rights of other users. The legal obligations as between DBCT Management and other users of DBCT is a confidential matter as between those parties.

We note, however, Senior Counsel's reference to there being an *informal queue*. In this regard, we confirm our position as stated in paragraph 5 of the executive summary, and paragraphs 10 to 21, of our submission of 22 March 2006. At no time was Peabody Pacific provided with the rules/protocol which DBCT Management intended to apply in respect of allocation of capacity arising from capacity expansions; to the extent that any such rules/protocol were provided to Peabody Pacific, they were not provided in a timely or proper manner and after all expanded capacity was allocated to users, or would be within a short period of time. [REDACTED]

In relation to paragraph (b), we repeat and rely on our comments made in relation to paragraph (a). Further, we are not in a position to comment on the likelihood of the Courts granting remedies affecting the positions in the informal queue nor the potential availability of damages as an adequate remedy. Importantly, we have no knowledge of the legal rights of other users.

Yours faithfully


Ian S Craig
Managing Director