

MARK HINSON SC

17th Level
239 George Street
BRISBANE QLD 4000

Phone: (07) 3229 8155
Fax: (07) 3221 2806
E-mail: mhinson@qldbarr.asn.au

2 May 2006

Clayton Utz
Lawyers
GPO Box 55
BRISBANE Q 4001

Your Ref: Mr Dunphy

**RE: QUEENSLAND COMPETITION AUTHORITY – DRAFT
ACCESS UNDERTAKING SUBMITTED BY
BBI (DBCT) MANAGEMENT PTY LTD**

MEMORANDUM OF ADVICE

1. I am briefed to advise the Authority whether the legal rights of any potential access seekers could be affected if the Authority:-
 - (a) approved BBI's draft access undertaking which incorporates past queuing arrangements;
 - (b) accepted a proposed pro-rata approach.
2. BBI's draft access undertaking (DAU) would preserve past queuing arrangements established and managed by BBI on a first to commit basis. Two access seekers, Anglo Coal Australia Pty Ltd and Peabody Energy Australia Coal Pty Ltd, have made submissions to the Authority opposing approval of the DAU. Since those submissions were received by the Authority on or about 22 March 2006, the Authority has invited further submissions from BBI and other access seekers about issues raised by Anglo and Peabody. Submissions were made by BBI, Rio Tinto Coal Australia, Foxleigh Mining, Xstrata Coal, Macarthur Coal and AMCI Holdings. They urged the Authority to reject the submissions made by Anglo and Peabody and to approve the DAU.

Approval of DAU

3. It is apparent from the various submissions received by the Authority that Peabody opposes approval of the DAU and that Anglo "is prepared to allow the current method

- 2 -

of allocating tonnage by BBI but reserves its position in the event that this does not deliver a fair outcome to all access seekers who have made significant commitments to developing new mines”.

4. If the Authority approves the DAU then s.150A of the Act requires BBI as the responsible person to comply with the approved access undertaking. To the extent that approval of the DAU will preserve the past queue established by BBI that means that BBI will be required to comply with and give effect to that past queue. BBI's breach of an approval access undertaking may be remedied under s.158A of the Act by an order of the Supreme Court directing BBI to comply with the undertaking and directing BBI to compensate anyone who has suffered loss or damage because of the breach.
5. Compliance by BBI with an approved access undertaking in the form of the DAU will affect legal rights which existed prior to approval. Rights which presently exist in relation to the establishment of the existing queue are affected by incorporation of the queue into an approved access undertaking. So far as those rights are rights which arise from inclusion in the queue, those rights are entrenched by the operation of ss.150A and 158A of the Act. Those rights must now be given effect to by BBI under s.150 A and remedies are provided for under s.158A if BBI does not give effect to those rights. Access seekers who enjoy rights under the existing queue are unlikely to complain.
6. Access seekers who do not presently enjoy any rights arising from inclusion in the queue may have existing rights to challenge the establishment of the queue or the establishment of the queue in a manner which deprived them of an opportunity to be included in the queue at all or included in the queue with a particular priority. Anglo and Peabody are the only access seekers who appear to be in that position.
7. From the content of their submissions it appears that there is potential for such challenges against BBI under the Trade Practices Act 1974 for misleading and deceptive conduct or unconscionable conduct, or for negligent misstatement or on the grounds of promissory estoppel. There is reason to doubt, on the basis of submissions received by the Authority commenting on the issues raised by Anglo and Peabody, whether any such claims would be successful. The Authority is not in possession of all the facts which might be relied upon in support of or in defence of such claims, but there is sufficient information available to suggest that claims as described above may be open to Anglo or Peabody.
8. If any such claims could be prosecuted to a successful conclusion the likely outcome would be an award of damages. Under s.87 of the TPA remedial orders can be made which have the effect of varying contractual arrangements. In a promissory estoppel action one form of relief available is an order directing the defendant to do something which will “make good” the representation and bind the defendant not to depart from it. In the present context such orders would be in the nature of orders directing BBI to

- 3 -

include the access seeker in the queue in a particular position. Such an order will obviously affect the rights of other access seekers included in the queue. A court would not make such an order unless those other access seekers were heard in opposition to the making of an order. In short, there is no real prospect of such an order being made, and at best Anglo or Peabody would be entitled if successful to an award of damages.

9. Approval of the DAU will not affect any legal right to sue BBI for damages. The underlying basis of any such claim will be the contention that by its conduct BBI prevented Anglo or Peabody from securing a place in the queue, and that loss was suffered as a consequence of being denied a place in the queue or the opportunity to secure a place in the queue. For so long as the queue continues to be the basis of access, that loss will be suffered. Approval of the DAU has the result that the queue, as presently established, governs access. BBI brought about that situation by submitting a DAU based on the existing queue. While approval by the Authority of the DAU binds BBI to act in accordance with the approved access undertaking, it was always BBI's intention to give effect to the existing queue. The Authority's approval of the DAU is conduct which is consistent with BBI's intended course of conduct which is to give effect to the existing queue. In my opinion, there is no break in the chain of causation between BBI's conduct and any loss suffered by Anglo or Peabody simply because BBI is bound, by s.150A of the Act, to give effect to an approved access undertaking, when it was always BBI's intention to give effect to the existing queue and BBI sought approval of the DAU which gives effect to the existing queue.
10. I would therefore answer the first question by saying that to the extent that any potential access seeker had legal rights against BBI arising out of the establishment of the existing queue, approval of the DAU which incorporates and preserves the existing queue arrangements does not affect those rights if they are a right to claim damages from BBI. Those rights, if any, continue to exist, and may be pursued against BBI. If those rights included a right to relief against BBI in the form of an order altering the queuing arrangements, approval of the DAU does affect those rights. But there was no real prospect of an order of that kind being made unless access seekers included in the queue were parties to any proceedings and were entitled to be heard in opposition to the making of any such order.

A Proposed Pro-Rata Approach

11. Peabody is the only interested party who has propounded a pro-rata approach, although Anglo may have reserved its position on this issue. Peabody proposes that there be a pro-rata allocation of capacity shortly after the commencement of the approved access undertaking between those access seekers who had previously requested in writing an allocation of capacity. The recent submissions received by the Authority are all opposed to a pro-rata approach.

- 4 -

12. Acceptance of a pro-rata approach would affect existing legal rights of access seekers who have a place in the queue. The potential claims against BBI that those access seekers might pursue are similar to those mentioned in paragraph 7. But in this case I think that there is a significantly better prospect of BBI being able to successfully defend claims on the basis that the Authority's rejection of the DAU and adoption of a pro-rata approach does break the chain of causation between BBI's conduct and any loss suffered by an access seeker as a result of that conduct. BBI can legitimately say that the loss suffered by an access seeker, being loss of a place or priority in the queue established by BBI, is attributable only to the Authority's rejection of the DAU incorporating that queue, and is not attributable to any conduct of BBI. BBI's conduct in establishing the queue and pressing for its incorporation in an approved access undertaking has not caused any loss to an access seeker in the queue if access on a pro-rata approach is adopted.

Conclusions

13. Approval of the DAU has the potential to affect legal rights. That effect will not be adverse for those who enjoy rights under the existing queuing arrangements because approval will preserve those rights. The effect will be adverse on rights which presently exist to challenge the establishment of the queue or its establishment in a manner which resulted in non-inclusion in the queue. But that adverse effect will not result in a deprivation of those rights to the extent that they are rights to recover damages from BBI.
14. Adoption of a pro-rata approach has the potential to affect legal rights. That effect will be adverse only for access seekers who are included in the queue. Their rights, so far as they exist because of inclusion in the queue, will be lost if the queue is not continued.
15. The loss of those rights, as a result of the queue not being incorporated into an approved access undertaking, will not be attributable to any conduct of BBI but rather will be attributable to the Authority's decision not to approve the DAU so far as it preserves the existing queue.

With compliments,



M D HINSON SC