Australian Competition & Consumer Commission

Determination

Applications for authorisation

lodged by

Dalrymple Bay Coal Terminal Pty Ltd

in respect of

a queue management system designed to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal and the capacity of the Goonyella coal chain

Date: **15 December 2005**

Commissioners: Samuel
Sylvan
Martin
McNeill
Smith
Willett

Authorisation no's: A30239, A30240, A30241

Public Register no. C2005/584

Executive Summary

The ACCC has decided to grant authorisation to the queue management system until 31 December 2008.

On 5 April 2005 Dalrymple Bay Coal Terminal Pty Limited (DBCTPL) lodged applications for authorisation A30239, A30240 and A30241 with the Australian Competition and Consumer Commission (ACCC).

DBCTPL has sought authorisation for a queue management system (QMS) designed to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal (the Terminal) and the capacity of the Goonyella coal chain, including at the Terminal (together, System Capacity).

The *Dalrymple Bay Coal Terminal, Queue Management System Amendments to Terminal Regulations* (the Terminal Regulations) are the detailed operating provisions which provide for the operation of the QMS.

Background

DBCTPL is the operator of the Terminal at the Port of Hay Point, south of Mackay in Queensland. DBCTPL operates the Terminal under a contract with the long term lessee of the Terminal, Babcock and Brown Infrastructure.

Due to a global surge in demand for coal and constrained export infrastructure, at the time of lodging the applications for authorisation there was a queue of over 50 vessels anchored off the Terminal waiting for coal to be loaded. This resulted in significant delays at the Terminal and substantial deadweight demurrage costs[1] being incurred by Australian coal producers.

In response, the QMS was developed rapidly by DBCTPL as a transitional measure, which aims to limit the demurrage costs associated with excessive queues until scheduled capacity expansion projects are operational.

The QMS is designed to allocate the capacity of the Goonyella coal chain among coal producers according to their existing annual contract tonnages at the Terminal.

Public detriment

Public detriment concerns raised by interested parties primarily focused on whether the QMS will result in reduced coal exports through the Terminal.

The ACCC considers that any reduction in aggregate coal exports as a result of the QMS would result in a public detriment. However, the ACCC is satisfied the risk of this occurring is low, particularly due to the introduction of the flexibility measures, including the 90 000 tonne loading buffer and the short notice period for producers engaging in swaps of entitlement, under the QMS.

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[1] Where vessels are required to wait longer than a specified period of time to load goods (such as coal) the vessel owners charge demurrage to producers (coal mines).

Concerns were also raised that there would be a reduction in System Capacity arising from overseas customers sending smaller ships and increasing multi-parcelling under a monthly, rather than quarterly, QMS. The ACCC notes that initial data suggests that the average vessel size has been increasing, rather than decreasing, since the introduction of the QMS. Furthermore, a sub-optimal vessel mix and multi-parcelling may occur irrespective of whether a QMS is operating at the Terminal or not.

Public benefit

The ACCC is satisfied that the QMS is likely to result in significant public benefit, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where a queue persists. The ACCC recognises there is no way of accurately predicting the level of the queue going forward if the QMS were not in place. However, based on the same level of queue actually reached early on this year, the ACCC considers DBCTPL's estimate of $350 million for 2005 is not unreasonable.

Having said this, the ACCC considers this estimate may be at the high end of expectations, as the queue is unlikely to have exceeded 50 vessels for the entire period for which authorisation is sought. As such, the ACCC is cautious about rolling this estimate forward over the entire period. Absent authorisation, the ACCC would also expect the size of the queue to fluctuate over time, which has also occurred under the interim authorisation of the QMS. However, irrespective of the exact dollar value of the savings, the ACCC considers that producers would be likely to face significantly higher demurrage costs without the QMS in place.

The ACCC considers the QMS may result in some additional public benefit to the extent that it:

- reduces coal stockpiling costs for producers
- maintains the reputation of the Terminal
- reduces the risk of environmental harm being caused to the Great Barrier Reef, by reducing the number of large cargo vessels being anchored nearby.

Balance of public benefit and detriment

Overall, the ACCC considers that in all the circumstances, the public benefit likely to flow from the QMS is likely to outweigh the public detriment.

Length of authorisation

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances. In this instance, the ACCC considers the QMS is a transitional measure to address the current imbalance between demand for coal loading services and System Capacity.

The trigger mechanism included under the QMS provides that the scheme will not operate when System Capacity reaches or exceeds on a sustained monthly basis the aggregate of monthly contract tonnages that producers want to ship through the Terminal. The ACCC is of the view that this trigger mechanism addresses potential concerns about whether excess demand conditions will result in a substantial queue of vessels at the Terminal and therefore, whether the QMS is likely to generate a public benefit.

Furthermore, the ACCC considers that commercial incentives exist under the QMS for participants along the Goonyella coal chain to maximise coal exports. The Terminal owner, Babcock and Brown, has committed to a scheduled program of investment which is expected at this stage to deliver increased Terminal capacity of up to 80 million tonnes per annum by the end of 2008.

Reporting

DBCTPL volunteered to provide an annual report to the ACCC on the operation of the QMS and the nature of ongoing and planned investment in the Goonyella coal chain more generally. Reports will be provided to the ACCC by 21 January each year during the period of authorisation, commencing in 2007.

The ACCC considers such reporting should introduce additional accountability and address concerns parties may have about the operation of the QMS over time.

Interim authorisation

At the time of lodging the application, DBCTPL sought interim authorisation to commence the implementation of the proposed QMS in order to reduce the queue of over 50 vessels at the Terminal. On 29 April 2005 the ACCC granted interim authorisation to DBCTPL to commence the implementation of the proposed QMS.

DBCTPL subsequently requested the ACCC defer issuing its draft decision between July and September 2005 to allow the industry to review the operation of the QMS under interim authorisation with a view to determining whether operational refinements were necessary.

DBCTPL made three requests to the ACCC to amend the interim authorisation so as to apply to various revisions to the QMS arising from the ongoing review. In each instance, the ACCC agreed to vary the interim authorisation so as to apply to the Terminal Regulations, as amended.

On 2 December 2005 DBCTPL requested that the ACCC make its final determination based on a revised version of the QMS, which incorporates some minor amendments to the description of the Pre-loading Requirements set out in the Schedule to the Terminal Regulations.

Accordingly, the ACCC amends interim authorisation to as to apply to the Terminal Regulations, as amended. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

List of abbreviations

Babcock and Brown	Babcock and Brown Infrastructure
BMA	BHP Billiton Mitsubishi Alliance
DBCTPL	Dalrymple Bay Coal Terminal Pty Ltd
Expert	The independent expert appointed by the DBCTPL Board, currently BMT Maritime Consultants Pty Ltd, who is responsible for periodically declaring System Capacity and the desired length of the operational queue (or 'working queue') at the Terminal.
GCCIP	Goonyella Coal Chain Improvement Program
mtpa	Million tonnes per annum
Terminal	Dalrymple Bay Coal Terminal
TPA	*Trade Practices Act 1974*
System Capacity	Capacity of the Goonyella coal chain, including at the Dalrymple Bay Coal Terminal.

CONTENTS

1. INTRODUCTION

Authorisation

1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

1.3 Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.4 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.

1.5 Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.6 The TPA requires that the ACCC then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.

1.7 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.

1.8 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

The applications for authorisation

1.9 On 5 April 2005 Dalrymple Bay Coal Terminal Pty Limited (DBCTPL) lodged applications for authorisation A30239, A30240 and A30241 with the ACCC.

1.10 In particular, DBCTPL applied for authorisation of its proposed queue management system (QMS) to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal (the Terminal) and the capacity of the Goonyella coal chain, including the Terminal (together, System Capacity).

1.11 The rules for the operation of the QMS are set out in the *Dalrymple Bay Coal Terminal, Queue Management System Amendments to Terminal Regulations* (the Terminal Regulations). A copy of the Terminal Regulations is provided at Attachment A. These Terminal Regulations operate in conjunction with the existing take or pay contracts for coal loading (called the User Agreements) between coal producers and the Terminal owner, Babcock and Brown (formerly Prime Infrastructure).

1.12 Broadly, the QMS is designed to allocate System Capacity among coal producers according to their existing annual contract tonnages under their User Agreements with Babcock and Brown.

1.13 The QMS involves the following three steps:

- declaration of System Capacity by an independent expert
- monthly allocation of System Capacity to permit coal producers to manage vessel nominations
- management of allocations.

1.14 DBCTPL seeks authorisation of the QMS until 31 December 2008, which it considers to be a reasonable period after the current estimation for increased system capacity to be operational, allowing time for delays and the need to improve capacity in other parts of the system, such as rail.

Interim authorisation

1.15 At the time of lodging the application, DBCTPL sought interim authorisation to commence the implementation of the proposed QMS in order to reduce the queue of over 50 vessels at the Terminal. On 29 April 2005 the ACCC granted interim authorisation to DBCTPL to commence the implementation of the proposed QMS but noted that it was considering an outstanding issue in relation to new producers. At this time, the Terminal Regulations were in draft form and subject to Babcock and Brown's approval. This approval was delayed due to commercial discussions between new producers and Babcock and Brown. New producers were concerned that under the Terminal Regulations they would be unable to swap unused capacity entitlement as a result of production delays.

1.16 On 24 May 2005 DBCTPL sought to amend the Terminal Regulations to address concerns about the potential impact of the QMS on new coal producers. On 25 May 2005 the ACCC agreed to vary interim authorisation so as to apply to the Terminal Regulations as amended. This version of the Terminal Regulations received approval from Babcock and Brown on 27 May 2005.

1.17 On 1 June 2005 DBCTPL advised that it would be reviewing the operation of the QMS in July, with a view to possibly amending the Terminal Regulations. In this regard, DBCTPL requested the ACCC delay issuing its draft determination until the completion of this review. Under the interim authorisation, industry participants conducted a review of the operation of the QMS in July 2005.

1.18 Following this July review, on 5 August 2005 the ACCC received another request from DBCTPL to vary interim authorisation for a number of proposed minor variations to the Terminal Regulations. On 10 August 2005 the ACCC decided to vary the interim authorisation so as to apply to the Terminal Regulations, as amended.

1.19 In August 2005, DBCTPL requested the ACCC to further delay issuing its draft determination so as to allow the industry to conduct an extended review of the operation of the QMS during August and September.

1.20 On 4 October 2005 the ACCC received a request from DBCTPL to vary interim authorisation so as to apply to three further refinements to the QMS resulting from the September review. On 19 October 2005 the ACCC agreed to vary the interim authorisation so as to apply to the amended Terminal Regulations.

1.21 On 2 December 2005, following the ACCC's draft determination, DBCTPL requested the ACCC make its final determination based on a revised version of the QMS, which incorporates some minor amendments to the description of the Pre-loading Requirements set out in the Schedule to the Terminal Regulations. DBCTPL submits these amendments do not modify the operation of the QMS. The amendments clarify and streamline the notifications and procedures for DBCTPL, producers and a vessel in the period between notification of a vessel and loading.

1.22 Accordingly, the ACCC varies interim authorisation so as to apply to the Terminal Regulations, as amended. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

Draft determination

1.23 On 10 November 2005 the ACCC issued a draft determination proposing to grant authorisation to the QMS until 31 December 2008.

Chronology

1.24 Table 1.1 provides a chronology of significant dates in the consideration of this application. Notably, the proposed arrangements for which authorisation is sought were developed rapidly in response to the extensive queue of vessels that had formed at the Terminal in early 2005.

1.25 DBCTPL subsequently requested the ACCC defer issuing its draft decision between July and September 2005 to allow it, along with the producers, to review the operation of the QMS under interim authorisation to determine whether operational refinements were necessary.

Table 1.1: Chronology of applications for authorisation A30239 – A30241

DATE	ACTION
5 April 2005	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
25 April 2005	Closing date for submissions from interested parties in relation to DBCTPL's request for interim authorisation.
29 April 2005	The ACCC granted interim authorisation to DBCTPL to commence the implementation of the proposed QMS.
13 May 2005	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
24 May 2005	DBCTPL sought to amend the Terminal Regulations to address concerns about the potential impact of the QMS on new coal producers.
25 May 2005	The ACCC agreed to vary the interim authorisation to enable DBCTPL to commence operation of the proposed QMS as soon as possible in accordance with the Terminal Regulations, as amended.
1 June 2005	DBCTPL advised that it would be reviewing the operation of the QMS in July, with a view to possibly amending the Terminal Regulations. DBCTPL requested the ACCC delay issuing its draft determination until the completion of this review.
24 June 2005	Letter seeking additional information sent to DBCTPL.
2 August 2005	The ACCC received additional information from DBCTPL. DBCTPL requested the ACCC to further delay issuing a draft determination so as to allow the industry to conduct an extended review of the operation of the QMS during August and September.
5 August 2005	DBCTPL sought to vary the interim authorisation granted on 29 April 2005 (and amended on 25 May 2005) to allow the interim authorisation to apply to a number of proposed amendments to the Terminal Regulations arising from the July review.
10 August 2005	The ACCC agreed to vary the interim authorisation so as to apply to the Terminal Regulations, as amended.
4 October 2005	The ACCC received additional submission from DBCTPL following the September review of the operation of the QMS. DBCTPL sought to vary interim authorisation granted on 29 April 2005 (and amended on 10 August 2005) to allow the interim authorisation to apply to further amendments to the Terminal Regulations arising from the September review.

DATE	ACTION
19 October 2005	The ACCC agreed to vary the interim authorisation so as to apply to the Terminal Regulations, as amended.
10 November 2005	Draft determination issued.
1 December 2005	Closing date for submissions from interested parties in relation to the draft determination.
2 December 2005	Submission received from DBCTPL.
15 December 2005	Final determination issued.

2. BACKGROUND TO APPLICATION

The Queensland coal industry

2.1 Queensland contains more than 30 billion tonnes of identified resources of black coal, of which approximately one third is coking coal and two thirds thermal coal.[2] Coking coal (or metallurgical coal) is predominantly used in the production of iron and steel. Coking coal primarily comprises hard coking coal but also includes other coal used in steelmaking, such as semi-soft coking coal and PCI coal. PCI coal is finely ground and injected into the base of a blast furnace, partly replacing coke. Thermal coal (or steaming coal) is mainly used in electricity generation.

2.2 During 2003-04 Queensland produced a record 160 million tonnes of saleable coal, of which 135 million tonnes (84 per cent) was exported, representing a 5 per cent increase on the previous year. The value of exports in 2003-04 was A$7.2 billion. Of these exports, 86.9 million tonnes (64 per cent) was coking coal and 42.3 million tonnes (31 per cent) thermal coal.[3]

2.3 During the March 2005 quarter exports from Queensland increased by 4 million tonnes (or 12.75 per cent) compared with the corresponding quarter in 2004.[4]

2.4 Queensland coal is exported through six coal export terminals at four deep water ports on the eastern coast. From north to south these are:

- Port of Abbot Point (Abbot Point Coal Terminal)
- Port of Hay Point (Dalrymple Bay Coal Terminal and Hay Point Coal Terminal)
- Port of Gladstone (RG Tanna Coal Terminal and Barney Point Coal Terminal)
- Port of Brisbane (Fisherman Islands Coal Terminal).

2.5 Figure 2.1 shows the location of Queensland's coal export terminals.

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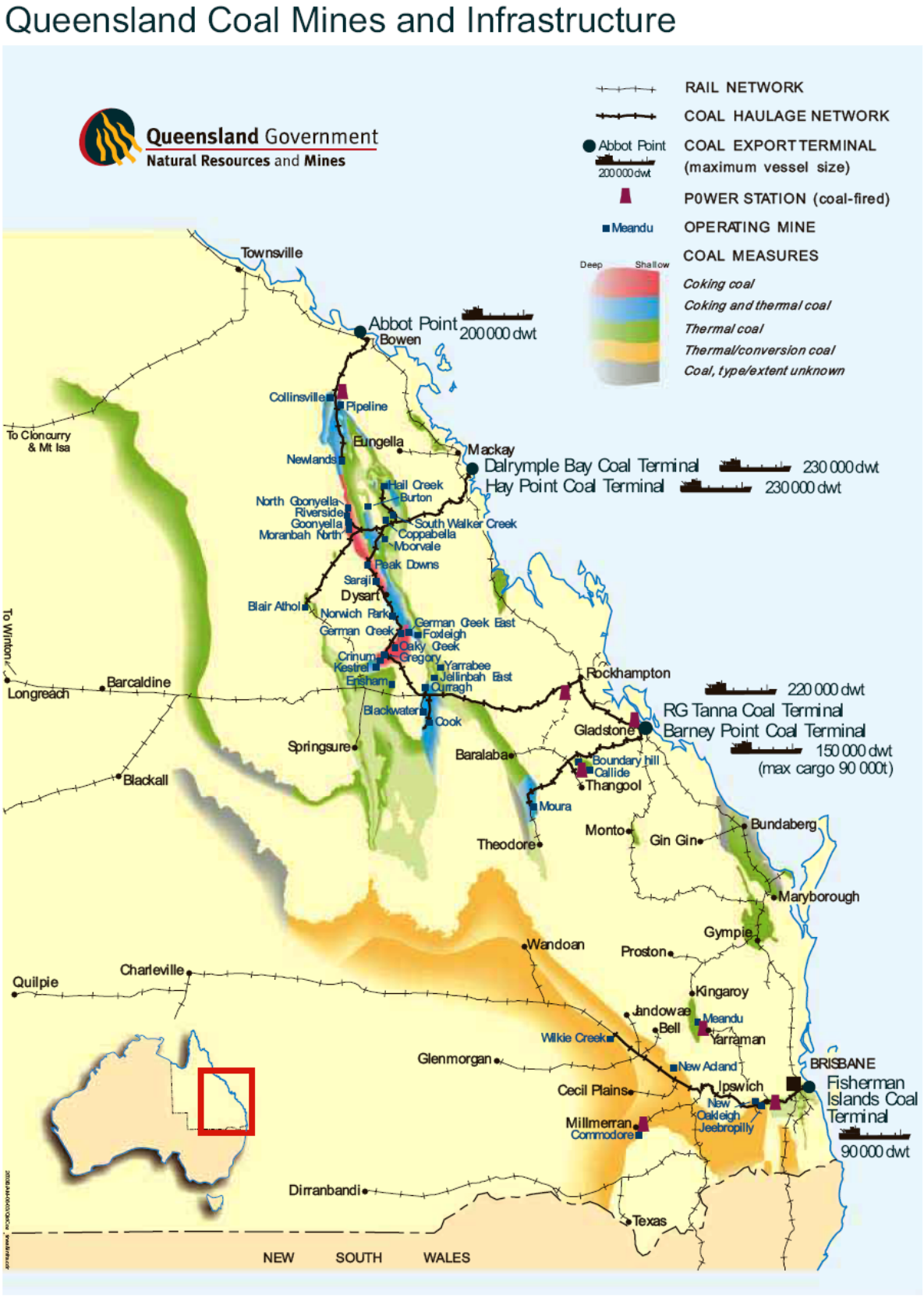
[2] DBCTPL supporting submission to the application, 5 April 2005, p9.

[3] Queensland Government, Department of Natural Resources and Mines website: http://www.nrm.qld.gov.au/mines/coal/overview.html, *Coal Industry Overview*, viewed 31 August 2005.

[4] Queensland Government, Department of Natural Resources and Mines website: http://www.nrm.qld.gov.au/mines/coal/pdf/mar_2005_qtr_rpt.pdf, Queensland Coal Report, January – March 2005, viewed 31 August 2005.

Figure 2.1: Queensland coal export terminals[5]



[5] Queensland Government, Department of Natural Resources and Mines website: http://www.nrm.qld.gov.au/mines/coal/pdf/coalfacts.pdf, viewed 31 August 2005.

2.6 Table 2.1 compares the annual throughput capacities of Queensland's coal export ports. Currently, the largest volume of coal is exported from Dalrymple Bay Coal Terminal, with the next two largest terminals (by capacity) being RG Tanna Coal Terminal at Gladstone and the Hay Point Coal Terminal. Collectively, these three terminals handle approximately 85 per cent of Queensland's coal exports.

Table 2.1: Throughput capacity of Queensland coal terminals[6]

	Annual throughput capacity (million tonnes)
Port of Abbot Point	
Abbot Point Coal Terminal	15
Port of Hay Point	
Dalrymple Bay Coal Terminal	54.5
Hay Point Coal Terminal	35
Port of Gladstone	
RG Tanna Coal Terminal	40
Barney Point Coal Terminal	5
Port of Brisbane	
Fisherman Islands Coal Terminal	5
Total	**154.5**

The Goonyella coal chain

2.7 The Goonyella coal chain is located in the Bowen Basin in central Queensland. Dalrymple Bay Coal Terminal forms part of this coal transport system. Coal from the Goonyella system is also exported through the neighbouring Hay Point Coal Terminal. Dalrymple Bay Coal Terminal is a multi-user port facility, while Hay Point Coal Terminal is owned privately by the BHP Billiton Mitsubishi Alliance (BMA) and is a single user port facility. Coal from the Goonyella system may also be railed to the Abbot Point Coal Terminal, north of Dalrymple Bay.[7]

2.8 Coal is transported from the various mines to both terminals via a rail network. The coal rail network is owned and operated by QR Network Access and QR National, Queensland Government-owned corporations.[8]

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6 Queensland Government, Department of Natural Resources and Mines, *Queensland Ports May 2005*.
7 DBCTPL supporting submission to the application, 5 April 2005, p21.
8 Queensland Government, Department of Natural Resources and Mines website: http://www.nrm.qld.gov.au/mines/coal/rail_ports.html, *Rail and Ports Infrastructure*, viewed 31 August 2005.

2.9 The Dalrymple Bay Coal Terminal is declared for third party access under the *Queensland Competition Authority Act 1997 (Qld)* (QCA Act). This declaration means that Babcock and Brown must not hinder or prevent access to the Terminal and must negotiate in good faith with access seekers. In April 2005, the Queensland Competition Authority also determined a price cap mechanism for reference tonnages for coal loading services at the Dalrymple Bay Coal Terminal. QR's rail infrastructure is also regulated under the QCA Act.

2.10 There are currently eleven mines supplying coal to the Dalrymple Bay Coal Terminal. These mines are listed at Table 2.2.

Table 2.2: Mines currently supplying coal to the Dalrymple Bay Coal Terminal[9]

Mine	Operator
Blair Athol	Rio Tinto Coal Australia Pty Ltd
Riverside	BM Alliance Coal Operations Pty Ltd
German Creek	Anglo Coal (Capcoal Management) Pty Ltd
Oaky Creek	Xstrata Coal Queensland Pty Ltd
North Goonyella	North Goonyella Mines Pty Ltd (owned by Peabody Energy Australia Coal Pty Ltd)
Burton	Thiess Pty Ltd (owned by Peabody Energy Australia Coal Pty Ltd)
Moranbah North	Anglo Coal Australia
Hail Creek	Rio Tinto Coal Australia Pty Ltd
Foxleigh	Foxleigh Mining Pty Ltd
Coppabella	Macarthur Coal (formerly Australian Premium Coals Pty Ltd)
Moorvale	Macarthur Coal

DBCTPL

2.11 DBCTPL is responsible for the daily operation and management of the Terminal under an operations and management contract with Babcock and Brown. It is also responsible for putting forward the Terminal Regulations, which govern the handling of coal through the Terminal, for approval by Babcock and Brown. The operations and maintenance contract is currently effective until March 2009 with the capacity for a further extension until 2014.

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[9] DBCTPL supporting submission to the application, 5 April 2005, p15.

2.12 The major functions performed by DBCTPL are:[10]

- coordinating the railing of coal from the mine sites to the Terminal (in conjunction with QR)
- managing and operating train unloading, stockpiling and shiploading activities within the Terminal
- preparing shipping documentation on behalf of the mines shipping the coal
- maintenance and minor engineering functions.

2.13 DBCTPL is an incorporated joint venture company owned by the following coal producers:

- Blair Athol Coal Pty Ltd (Rio Tinto)
- Anglo Coal (Capcoal Management) Pty Ltd
- Anglo Coal (Moranbah North Management) Pty Ltd
- BHP Mitsui Coal Pty Ltd
- Mount Isa Mines Limited (Xstrata)
- Burton Coal Pty Ltd (Peabody)
- Foxleigh joint ventures.

2.14 Each year, all coal producers that export through the Terminal are offered shares in DBCTPL. There is currently one producer, Macarthur Coal (C & M Management) Pty Limited (formerly known as Australian Premium Coals), that has not taken a shareholding in DBCTPL. There are also two new producers, AMCI and Millennium Coal, commencing production in 2006 that do not currently have shares in DBCTPL.

The Terminal

2.15 The Terminal is located in the Port of Hay Point, 38 kilometres south of Mackay in Queensland. It is owned by the Queensland government (through Dalrymple Bay Coal Terminal Holdings Pty Limited). In 2001, Babcock and Brown (formerly the Prime Infrastructure Group) acquired a long term lease of the Terminal at a cost of $630 million.[11]

[10] DBCTPL supporting submission to the application, 5 April 2005, p17.
[11] The lease has a 50 year term, with an option to extend this by an additional 49 years.

2.16 The Terminal itself consists of purpose built rail in-loading facilities, on-shore stockpile yards and off-shore wharves. Jetty supported conveyor systems service the off-shore wharves, which extend 3.8km out to sea to allow for deep water loading. The Terminal currently has three berths and two outloading systems with a capacity to load 7200 tonnes of coal per hour.[12] The Terminal exports around 6 per cent of the world's seaborne coal trade.[13]

2.17 The Terminal processes three commercial coal types, namely, coking coal, PCI coal and thermal coal, which can be blended into a possible 58 products. Coal processed through the Terminal is defined as a homogenous product attracting a single terminal infrastructure charge.

2.18 The Terminal is viewed as a 'boutique' port where customers can obtain multiple grades of both coking and PCI coal in the one stop. Typically, 3-4 different coal grades from different producers are loaded per vessel. Certain producers also blend coals at the port to make additional brands of coal.

2.19 Coal is traditionally sold to customers under long term contracts and the majority of coal from the Goonyella system is shipped through the Terminal on Free on Board (FOB) terms. Under FOB terms, the buyer charters the vessel, however, the coal producer is responsible for paying any demurrage charges incurred, based on the waiting time of the vessel at the Terminal, the contract loading rate and the demurrage rate specified for the vessel and/or provided for in the coal sales contract.[14]

2.20 The Terminal has stated throughput capacity of approximately 54 million tonnes per annum. In 2003-04 the actual total throughput of coal was 43.56 million tonnes.[15]

2.21 Table 2.3 illustrates the relationship between contracted tonnages and the actual volumes of coal shipped through the Terminal from 2001 to 2005. It is reported that during 2001-03 some coal producers 'under-shipped' in terms of their contracted throughput. This under-shipping was due to geotechnical and other production problems at the mines. Conversely, other producers have consistently over-shipped and have exported above their contracted tonnage at the Terminal. Over this same period, the Terminal and the supporting coal chain were not operating close to, or at capacity, so over-shipping against contract was absorbed by the Terminal and the supporting coal chain without causing system distress to the Goonyella coal chain.[16]

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[12] DBCTPL supporting submission to the application, 5 April 2005, p13.
[13] Babcock and Brown website: http://www.primeinfrastructure.com.au/, viewed 27 September 2005.
[14] DBCTPL supporting submission to the application, 5 April 2005, p11.
[15] Ibid, p13.
[16] Babcock and Brown Infrastructure *Dalrymple Bay Coal Terminal Master Plan 2005*, 28 April 2005, p21.

Table 2.3: Actual coal throughput versus contracted throughput at the Terminal[17]

	2001/02	2002/03	2003/04	2004/05*
Contract (million tonnes)	44.95	45.62	52.82	56.82
Actual (million tonnes)	40.23	43.06	43.56	50.4

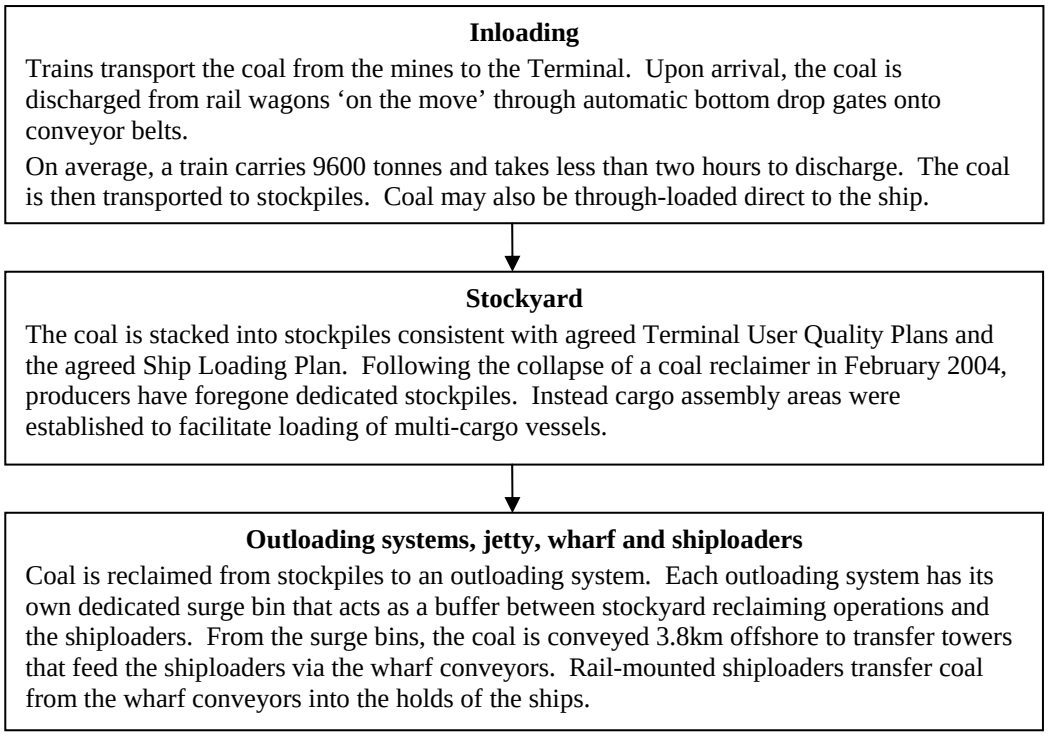
* Forecast based on FYD March 2005

2.22 The handling of coal through the Terminal is governed by the Terminal Regulations. Producers agree to abide by the Terminal Regulations as part of their long term take or pay contracts for coal loading (called 'User Agreements') with Babcock and Brown.

2.23 Under their User Agreements, coal producers have agreed annual contract tonnages with Babcock and Brown for a varying number of financial years beyond 2005. Annual contract tonnages were agreed before the current applications for authorisation were lodged with the ACCC. Coal producers are required to provide Babcock and Brown with quarterly demand forecasts for Terminal coal loading services.

The coal handling process

2.24 Coal generally goes through the following stages from the mine to being loaded on the vessels at the Terminal.



[17] Babcock and Brown Infrastructure *Dalrymple Bay Coal Terminal Master Plan 2005*, 28 April 2005, p21.

Surge in global demand

2.25 To take advantage of the recent increased global demand for coal and the consequent high coal prices (discussed in further detail from paragraph 2.50), producers increased their demand for coal loading services at coal export ports. At Dalrymple Bay in particular, this increased demand was greater than the capacity of the Goonyella coal chain, including the Terminal, and lead to a substantial queue of over 50 vessels forming off the coast in early 2005. This resulted in significant delays at the Terminal and substantial deadweight demurrage costs being incurred by Australian producers.

2.26 Given this excess demand, Babcock and Brown has committed to a program of investment to increase the capacity of Terminal. In addition, the industry has formed a logistics team to develop strategies to maximise the capacity of the coal chain.

Terminal expansion

2.27 The owner of the Terminal, Babcock and Brown, has developed a Master Plan to increase the capacity of the Terminal from 54 million tonnes per annum to 85 million tonnes per annum by the end of 2008.

2.28 This expansion is proposed to take place in four stages:[18]

Stage	Terminal capacity (mtpa)	Additional infrastructure	Date of earliest completion	Construction cost*
"Short Gain"	60 mtpa	Increase Terminal capacity from the current actual Terminal capacity (post reclaimer 1 collapse) of 54.5mtpa to 59 mtpa. An additional 1 mtpa is expected to be released from Ports Corporation of Queensland Hay Point departure path dredging program.	January 2006	$30 million
Phase 1	65-68 mtpa	Planning approvals have been secured and work must commence before November 2005. Expansion includes: • third in-loading system • stockpile upgrades • two new stockpile bunds • three new yard machines • minor outloading upgrades	July 2007	$340 million

[18] Babcock and Brown Infrastructure *Dalrymple Bay Coal Terminal Master Plan 2005*, 28 April 2005, p11.

Phase 2	75-80 mtpa	Expansion includes: • further stockyard expansion by the development of an additional bund and yard machine • third outloading string feeding the three existing berths	August 2008 to February 2009 (EIS dependent)	$319 million
Phase 3	+5 mtpa above phase 2	Construction of fourth berth.	Concurrently with phase 2	$98 million

* Estimates only

The Goonyella Coal Chain Improvement Program

2.29 The Goonyella Coal Chain Improvement Program (GCCIP), a coal chain logistics coordination team, was established in 2004. The GCCIP is governed by a steering group made up of representatives of each of the asset owners – being QR Network Access, QR National, DBCTPL, Babcock and Brown and BMA.

2.30 The aim of the GCCIP is for the various stakeholders to develop a common understanding of the Goonyella coal chain and identify short term and medium term efficiency initiatives to streamline and optimise coal chain efficiency and throughput.

2.31 The capacity of the Goonyella coal chain is the minimum of:

- collective capacity of mine load points
- below rail capacity
- above rail rolling stock and train scheduling
- terminal infrastructure capacity (including inloading and outloading functions).[19]

2.32 As at February 2005, the GCCIP had initiated several programs aimed at optimising throughput of the coal chain, including:

- mine and load point performance enhancement (QR and mines) to identify and reduce mine load-out delays and underloading/overloading issues
- coal chain maintenance planning alignment (all stakeholders) to align all planned maintenance activities to the same shutdown
- average payload increase (QR) by seeking to increase the capacity of each consist by adding two extra wagons.[20]

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[19] Babcock and Brown Infrastructure *Dalrymple Bay Coal Terminal Master Plan 2005*, 28 April 2005, p53.

2.33 The GCCIP has observed that the throughput capacity of the Terminal is presently constrained by the rate at which coal can be delivered into the Terminal.[21]

QR and BMA contract

2.34 BMA, who owns and operates the neighbouring Hay Point Coal Terminal, recently contracted with QR to secure the remaining 20 million tonnes of annual rail capacity in the Goonyella coal chain. BMA needed extra rail capacity to support planned expansion at its Hay Point terminal from annual throughput of 35 million tonnes to 55 million tonnes. As a result producers were reportedly left with 70 million tonnes of annual rail capacity to Dalrymple Bay.[22]

2.35 DBCTPL submits that the BMA/QR contract may affect future expansion plans at the Terminal. In particular, Babcock and Brown is understood to be concerned that the contract places Phase 3 of the proposed expansion (proposed to increase Terminal capacity to 85 million tonnes per annum) in some doubt. However, DBCTPL submits that Babcock and Brown has indicated that Phases 1 and 2 will still proceed while it assesses the issues. The ACCC is advised that QR has found additional rail capacity to cover all or some of the second expansion phase.[23]

2.36 Babcock and Brown is working with QR to identify alternative strategies to boost the capacity of the rail network, including possibly reorganising QR's practices or direct investment in the rail network by Babcock and Brown.[24]

Performance of the Goonyella coal chain

2.37 As previously noted, the ACCC granted interim authorisation to DBCTPL to commence the implementation of the proposed QMS on 29 April 2005. The QMS commenced operation (in 'queue reduction mode') on 3 June 2005.[25] Since 1 July 2005 the QMS has been operating under 'queue management mode'.[26]

2.38 Under interim authorisation the industry reviewed the performance of the QMS during July, August and September 2005. The results of this review are summarised below.

The vessel queue

2.39 DBCTPL submits the queue has reduced from over 50 vessels at 30 March 2005 to a working queue of approximately 15 vessels.[27]

2.40 Figure 2.2 illustrates the reduction in the number of vessels in the queue while the QMS operated in 'queue reduction mode' until the end of June.

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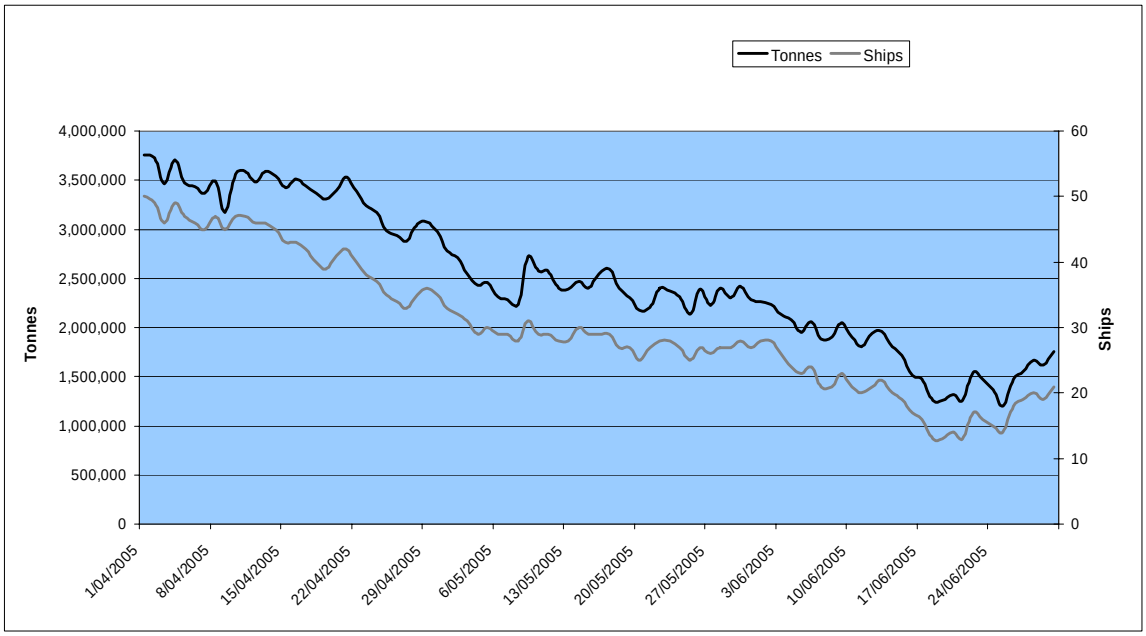
[20] Babcock and Brown Infrastructure *Dalrymple Bay Coal Terminal Master Plan 2005,* 28 April 2005, p41.
[21] Ibid, p 53.
[22] *BHP ties up Dalrymple access*, S Wisenthal, Australian Financial Review, 1 August 2005, p14.
[23] DBCTPL submission, 4 October 2005, p20.
[24] Ibid.
[25] DBCTPL submission, 2 August 2005, p 14.
[26] Ibid, p2.
[27] DBCTPL submission, 4 October, p2.

Figure 2.2: size of the queue while the QMS operated in 'queue reduction mode'[28]



2.41 The ACCC is advised that each vessel in the queue must pass through certain stages before berthing and loading can occur. For example, each vessel must have:

- an entitlement to load coal at the Terminal
- coal at the Terminal designated for loading onto the vessel
- completed the pre-loading process.[29]

2.42 Generally, a vessel is 'live' if it satisfies each of the requirements listed above. In most cases, a vessel is 'dead' if one or more producers loading onto that vessel are not in a position to supply the necessary coal. The demurrage cost ordinarily becomes the responsibility of the last delayed producer in multi-parcel vessels.[30]

2.43 The ACCC understands the vessels waiting in the queue are all typically at different stages and can become 'live' at varying times by notice to the Terminal. While operating in 'queue management mode', from 1 July 2005 to 9 September 2005 the total number of ships in the queue fluctuated between 20 and 8 vessels.[31] The balance of 'live' and 'dead' vessels also fluctuated over this time. For example, as at 9 September 2005 there were approximately 14 vessels in the queue, 6 of which were 'live' vessels and 8 of which were 'dead' vessels.[32]

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28 DBCTPL submission, 4 October 2005, p3.
29 DBCTPL submission, 2 August 2005, p11.
30 DBCTPL submission, 4 October 2005, p18.
31 DBCTPL submission, 4 October 2005, p3.
32 Ibid.

Demurrage

2.44 As previously mentioned, when vessels are required to wait longer than a specified period of time to load goods (such as coal) the vessel owners charge demurrage to the producers (coal mines).

2.45 DBCTPL submits that from the commencement of the interim authorisation granted by the ACCC until the end of August 2005 approximately $150 million in deadweight demurrage costs have been saved.[33]

Throughput at the Terminal

2.46 DBCTPL submits that the Terminal has operated at very high levels in July and achieved record throughput in August 2005. However, DBCTPL notes that there are a variety of reasons why record throughout was achieved and does not claim it is solely due to the operation of the QMS.[34]

2.47 DBCTPL expects throughput for September to be adversely affected by among other things, expansion works at the Terminal.[35]

Use of coal loading entitlement

2.48 Under-use of coal loading entitlement occurs if a producer does not sell the coal or is not able to produce it. Un-used coal loading entitlement does not necessarily mean lower throughput at the Terminal. DBCTPL submits that, to date, there has always been a working queue of vessels at the Terminal. As such, it believes there has not been any decrease in tonnages which could have been exported through the Terminal as a result of under-use of coal loading entitlement by producers.

2.49 Having said that, DBCTPL advises that there has been some underuse of entitlement. Figure 2.3 shows that there was 70 000 tonnes of un-used coal loading entitlement in July 2005 and 130 000 tonnes in August 2005.[36] In both months, over 4 million tonnes of coal loading entitlement was available to producers.

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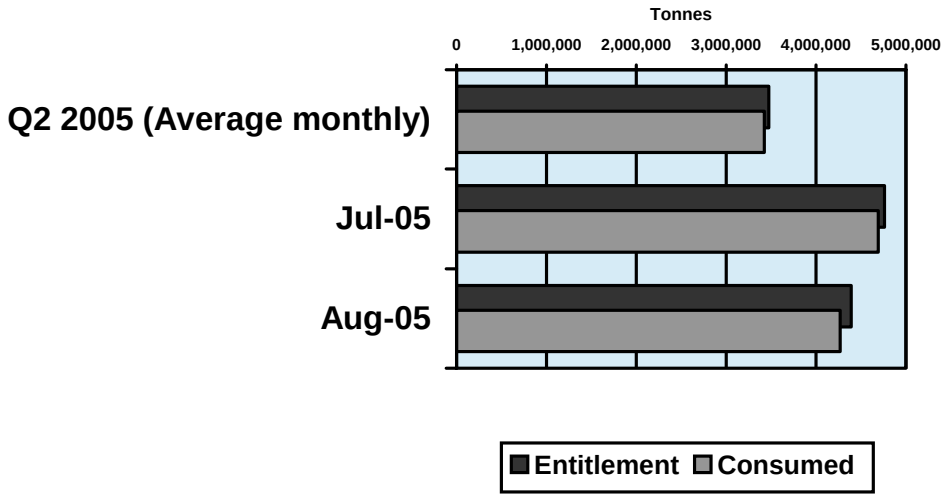
33 DBCTPL submission, 4 October 2005, p1.
34 Ibid, p3.
35 Ibid.
36 Ibid, p5.

Figure 2.3: Consumption of coal loading entitlement in July and August 2005[37]



World coal demand

2.50 The majority of coal currently exported through the Terminal is coking coal. For the 12 months to March 2004, approximately 71 per cent (30.7 million tonnes) of exports was coking coal and 29 per cent (12.4 million tonnes) thermal coal.[38]

2.51 ABARE forecasts a 6.5 per cent increase in the total volume of Australian coking coal exports to 122.9 million tonnes in 2005 and a further 8.7 per cent increase to 133.6 million tonnes in 2006.[39]

2.52 As regards thermal coal, ABARE forecasts a lower growth in world demand for the remainder of 2005 and 2006, due to easing world economic growth rates. In contrast to the global situation, continuing rapid economic growth in developing countries in Asia, such as China, will contribute to strong growth in demand for thermal coal.[40]

2.53 ABARE forecasts the growth of Australian thermal coal exports to remain stable in 2005 at 107.1 million tonnes compared to106.9 million tonnes in 2004. In 2006, the total volume of thermal coal exports is forecast to increase by 3.1 per cent to 110.5 million tonnes.[41]

2.54 Recent media articles predict at least 18 more months of the high contract prices for coking coal.[42] The price for coking coal rose to US$125 a tonne in 2005, up from US$57.50 in 2004.

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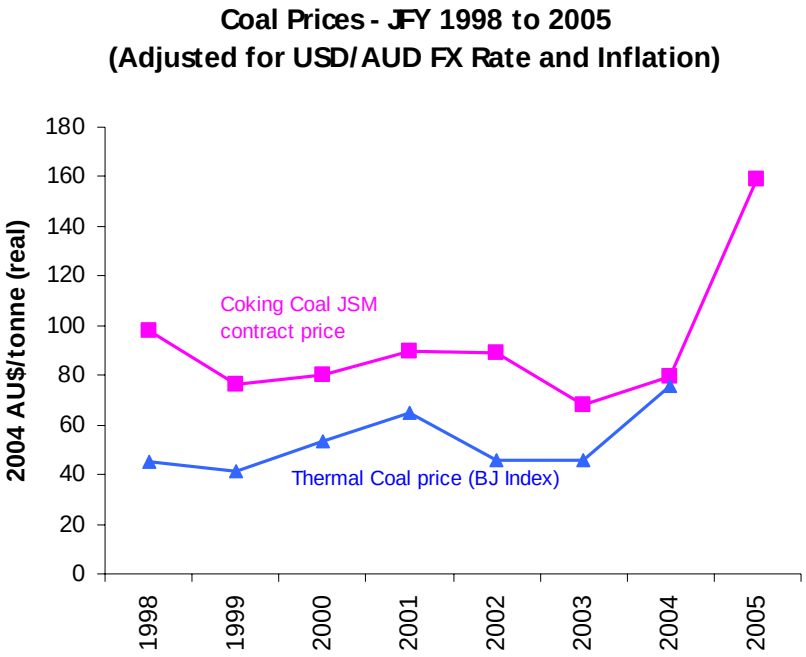
37 DBCTPL submission, 4 October 2005, p5.
38 The Department of Natural Resources and Mines, *Queensland Coal Report, January – March 2005,* p6.
39 ABARE, *Australian Commodities Vol 12 no. 3, September quarter 2005,* p511.
40 Ibid, pp498, 499.
41 Ibid, p501.
42 See for example, S Wisenthal, *Coking coal prices to stay at highs,* Australian Financial Review, 26 September 2005.

2.55 Contract prices for thermal coal rose to over US$60 a tonne in 2005, approximately double the 2003-04 price of US$26.75. ABARE predicts spot prices for thermal coal to fall over the remainder of 2005 and a downward pressure on contract prices for the 2006-07 Japanese financial year.[43]

2.56 Figure 2.3 shows movements in the thermal and coking coal price from 1998 to 2005.

Figure 2.3[44]



2.57 Japan has traditionally been Australia's primary market for coking coal, and while remaining as the main consumer of Australian coking coal, this has decreased over recent years with the industrialisation of other Asian countries. Over 90 per cent of Australia's export thermal coal is destined for Asia.[45]

2.58 The top ten purchasers of Queensland coking and thermal coal are listed in Table 2.4.

Table 2.4: Top ten purchasers of Queensland coal for the 12 months to March 2005.[46]

Coking coal		Thermal coal	
Country	**Quantity (million tonnes)**	**Country**	**Quantity (million tonnes)**
Japan	33.5	Japan	20.4
India	13.1	Korea	11.4
Korea	11.0	Taiwan	2.6
Brazil	6.1	India	1.5
Taiwan	4.8	China	0.8
France	4.6	Spain	0.7
United Kingdom	4.3	Malaysia	0.65
China	3.9	Israel	0.64
Netherlands	3.8	Netherlands	0.6
Belgium	2.7	Ireland	0.5

43 ABARE, *Australian Commodities, Vol 12 no. 3 September quarter 2005*, p498.
44 DBCTPL supporting submission to the application, 5 April 2005, p20.
45 Ibid, p11.
46 The Department of Natural Resources and Mines, *Queensland Coal Report, January – March 2005*, p8.

3. THE APPLICATIONS FOR AUTHORISATION

3.1 On 5 April 2005 DBCTPL lodged applications for authorisation A30239, A30240 and A30241 with the ACCC.

3.2 In particular, DBCTPL applied for authorisation of its QMS to address the imbalance between the demand for coal loading services at the Terminal and the capacity of the Goonyella coal chain, including the Terminal (together, System Capacity). The detailed operating provisions of the queue management system are set out in the Terminal Regulations.

3.3 The development and implementation of the QMS potentially raises concerns under the anti-competitive conduct provisions of the TPA. Consequently, DBCTPL has lodged three applications for authorisation with the ACCC.

3.4 Application A30239 was lodged under section 88(1) of the TPA for DBCTPL to make and give effect to a contract, arrangement or understanding, where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.

3.5 Broadly, an exclusionary provision exists where the proposed contract, arrangement or understanding is made by businesses (at least two of whom are competitors) for the purpose of preventing, restricting or limiting the supply of services to particular persons or classes of persons by all or any of the parties to the contract, arrangement or understanding.[47]

3.6 Application A30240 was lodged under section 88(1) of the TPA for DBCTPL to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

3.7 Application A30241 was lodged under section 88(7) of the TPA for DBCTPL, in concert with other persons, to engage in conduct that hinders or prevents, or may hinder or prevent, a third person supplying goods or services to, or acquiring goods or services from, a fourth person for the purpose of causing substantial loss or damage (prohibited by section 45D); to engage in conduct that hinders or prevents a third person supplying or acquiring goods or services to a fourth person for the purpose of causing a substantial lessening of competition (prohibited by section 45DA); and to engage in conduct that prevents or substantially hinders, or may prevent or substantially hinder, a third person from engaging in trade or commerce involving the movement of goods between Australian and places outside Australia (prohibited by section 45DB).

3.8 The ACCC notes that DBCTPL has requested that any authorisation apply to DBCTPL, DBCTPL's shareholders, Babcock and Brown and all current and future users of the Terminal.[48] Under section 88(6) of the TPA, any authorisation granted to a corporation is automatically extended to cover any other party to the conduct.

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[47] Section 4D, *Trade Practices Act 1974*.
[48] DBCTPL supporting submission to the application, 5 April 2005, p38.

4. THE QUEUE MANAGEMENT SYSTEM

4.1 The QMS – as set out in Terminal Regulations (see Attachment A) - is summarised below.

Administration

4.2 DBCTPL, in consultation with an independent expert, will administer the QMS. The independent expert appointed by the DBCTPL Board, currently BMT Maritime Consultants Pty Ltd, is responsible for periodically declaring System Capacity and the desired length of the operational queue (or 'working queue') at the Terminal (hereafter referred to as the Expert).

Objectives

4.3 The objectives of the QMS are to:

- ensure a fair, equitable and transparent allocation of System Capacity (and where applicable the Queue Adjustment System Capacity) from time to time between Terminal users
- achieve and maintain a working queue, so as to minimise deadweight demurrage costs to all Terminal users
- maximise utilisation of System Capacity, hence maximising coal exports from the Terminal
- restore and maintain the reputation of the Terminal as a reliable and low demurrage facility.[49]

Ongoing operation of the QMS

4.4 The QMS was proposed to commence operation on 1 April 2005 and end on the earliest of:

- the delivery of additional throughput capacity at the Terminal by reason of completion of 'Phase 1' of the program of expansion at the Terminal
- 31 December 2008 or
- the date when System Capacity reaches or exceeds on a sustained monthly basis the aggregate of monthly contract tonnages that producers want to ship through the Terminal.[50]

Trigger mechanism

4.5 As noted at paragraph 4.4, the QMS will not operate if the demand for Terminal coal loading services does not exceed the declared System Capacity for a sustained period.[51]

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[49] Clause 3, Terminal Regulations.
[50] Clause 1, Terminal Regulations.
[51] DBCTPL supporting submission to the application, 5 April 2005, p5.

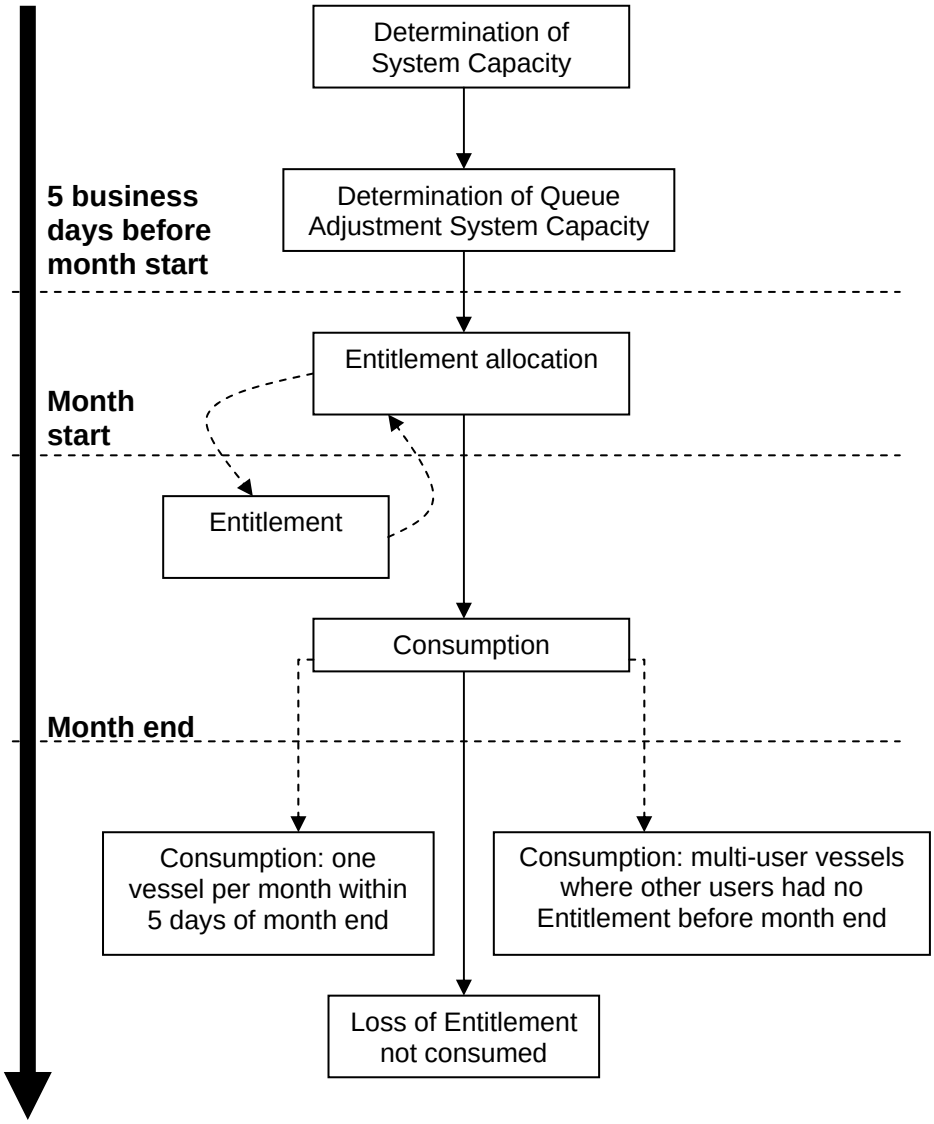
The operation of the scheme

4.6 The primary function of the QMS is to firstly assist DBCTPL to reduce the length of the vessel queue and then to maintain the queue at a workable length. It is designed to allocate the capacity of the Goonyella coal chain according to producers' existing annual contract tonnages under their User Agreements with Babcock and Brown.

4.7 In this regard, the QMS (as represented in Figure 4.1 below) has the following three key steps:

- capacity declaration by the Expert
- demand adjustment and allocation of coal loading entitlement
- management of entitlement by DBCTPL and the Expert.

Figure 4.1: Summary of the operation of the QMS[52]



[52] DBCTPL submission, 4 October, p16.

Annual contract tonnages of producers

4.8 As noted previously at paragraph 2.23, coal producers each have agreed annual contract tonnages under their existing User Agreements with Babcock and Brown for a varying number of financial years beyond 2005. DBCTPL submits that annual contract tonnages are an appropriate measure of each producer's forecast demand throughout the proposed period of operation of the QMS. Under the User Agreements, producers provide Babcock and Brown with quarterly forecasts of demand for Terminal services.[53]

4.9 Coal producers' User Agreements currently attract a take or pay obligation on annual contract tonnages, payable to Babcock and Brown.[54]

Capacity declaration by Expert

4.10 For each month the Expert will declare System Capacity and the resulting desired volume of the working queue.

4.11 In determining System Capacity, the Expert consults with QR Network Access, QR National, DBCTPL and the Stakeholder Operations Monthly Meeting (comprising representatives of all current Terminal users, QR, Hay Point Services and Babcock and Brown). The process for declaring System Capacity requires the Expert to analyse the following factors:

- the appropriate throughput rates for each element of the Goonyella coal chain – namely, below rail infrastructure, above rail infrastructure, Terminal in-loading facilities, Terminal stockyard facilities, Terminal outloading facilities and the vessel loading stream
- consideration is given to the coal chain's previous success rate in achieving the existing throughput levels
- planned and predicted outages (such expansion works and maintenance).[55]

4.12 DBCTPL then notifies the declared System Capacity to Babcock and Brown and each coal producer within 5 business days of receiving the Expert's determination in writing.[56]

4.13 If DBCTPL determines at any time that the queue of vessels at the Terminal is significantly larger or smaller than an optimal working queue, DBCTPL will request the Expert to determine a 'queue adjustment' System Capacity for one or more months.[57]

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[53] DBCTPL supporting submission to the application, 5 April 2005, p25.
[54] Ibid.
[55] DBCTPL submission, 2 August 2005, p10.
[56] Clause 4.1(d) of the Terminal Regulations.
[57] Clause 4.2(b) of the Terminal Regulations.

4.14 A 'queue adjustment' System Capacity is a notional throughput tonnage which is a percentage (either less than or greater than 100 per cent) of the actual System Capacity for a relevant month(s), which, if adopted instead of actual System Capacity for the purpose of determining coal loading entitlements for that month, is predicted by the Expert to either reduce or increase the queue to a working queue by the end of that period.[58]

4.15 DBCTPL will also monitor the coal chain performance. If the queue is likely to become either substantially less or substantially more than a working queue for a sustained period because the actual System Capacity is expected to be different from the original forecast of the Expert, DBCTPL may request the Expert to re-determine any previously determined System Capacity and to re-determine coal loading entitlements for the relevant period.[59]

4.16 If a re-determination reduces System Capacity (or 'queue adjustment' system capacity) it will take effect after DBCTPL provides six weeks notice to producers.[60]

Demand adjustment and allocation of coal loading entitlement

4.17 The demand adjustment mechanism in the QMS will apply if, following the System Capacity declaration process, demand for Terminal services (that is, producers aggregate annual contract tonnages) exceeds the System Capacity.[61]

4.18 Where demand for Terminal services is less than declared System Capacity each coal producer will be provided with an allocation equal to its annual contract tonnage.[62]

4.19 If demand for Terminal services exceeds the declared System Capacity for any period, a pro rata reduction based on annual contract tonnages for each producer will be calculated to balance demand with available System Capacity. Producers are provided with a monthly pro rata coal loading entitlement.[63]

4.20 A producer's monthly coal loading entitlement is calculated as follows:[64]

$$\text{Entitlement} = \text{System Capacity (or 'queue adjustment' System Capacity)} \times \frac{\text{individual monthly contract tonnage}}{\text{aggregate monthly contact tonnages}}$$

4.21 A producer's coal loading entitlement is consumed when it is allocated to a vessel. Entitlement held by a producer in the relevant month may be allocated to a vessel on which the producer's coal is to be loaded if:

- the actual time of arrival of the vessel occurs in that month
- the actual time of arrival of the vessel occurs in the first five days of the succeeding month (allowed to request one vessel per month)

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58 Clause 4.2(a) of the Terminal Regulations.
59 Clause 4.3(a) of the Terminal Regulations.
60 Clause 4.3(c) of the Terminal Regulations.
61 DBCTPL supporting submission to the application, 5 April 2005, p26.
62 Ibid.
63 Ibid.
64 Clause 5.5 of the Terminal Regulations.

- the balance of entitlement held by the producer, plus any 'discretionary buffer' (90 000 tonnes), equals or exceeds the volume of coal to be loaded.[65]

4.22 If a producer's monthly coal loading entitlement, plus any 'discretionary buffer', is less than the volume of coal to be loaded, DBCTPL will not load the vessel in the relevant month unless and until the producer acquires additional entitlement.[66]

4.23 Where a vessel is ready to load at month-end but only has remaining unused entitlement for part of the relevant cargo, that entitlement may be allocated to that cargo, with the balance of the required entitlement being allocated from the following month.[67]

4.24 Entitlement not consumed within the month to which it relates (including within five days of the following month) will lapse and may not be subsequently used by any producer.[68]

4.25 However, where a producer has a vessel but insufficient unused entitlement for its entire cargo on that vessel, the balance for that cargo may be allocated from entitlement accruing in the proceeding month.[69]

Management of coal loading entitlement

4.26 The main features concerning the management of the QMS are summarised below.

4.27 **Distribution of increases or decreases in coal chain capacity**: An increase or decrease in System Capacity is distributed to producers on a pro rata basis.[70]

4.28 **Swapping entitlement**: Producers may swap all or any part of their entitlement with other producers on any terms and conditions they mutually agree. To be effective, the swap must be notified in writing to DBCTPL by both producers by the commencement of loading of the relevant vessel.[71]

If a notice of a swap is given less than 14 days prior to the loading date for the vessel, then DBCTPL may reschedule the loading of that vessel if necessary to avoid any adverse impact that the swap may have on other producers. However, any rescheduling may not be to a date later than 14 days of the written notice of the swap.[72]

DBCTPL must record each swap arrangement and deal with the relevant producers on the revisions to their entitlements arising out of the notified swap.[73]

An alternative to producers negotiating swaps directly is for DBCTPL, upon request from a producer, to offer to all producers the volume of entitlement for sale on behalf of a producer. The sale is conducted anonymously.[74]

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65 Clause 5.3(a) of the Terminal Regulations.
66 Ibid.
67 Clause 5.3(b) of the Terminal Regulations.
68 Clause 5.3(e) of the Terminal Regulations.
69 Ibid.
70 DBCTPL supporting submission to the application, 5 April 2005, p26.
71 Clause 5.4(a) of the Terminal Regulations.
72 Clause 5.4(a) of the Terminal Regulations.
73 Clause 5.4(c) of the Terminal Regulations.

DBCTPL will also establish a forum (for example, an internet portal) to facilitate an exchange of information between producers to encourage them to engage in timely swapping of entitlement which they will unlikely be able to utilise within 14 days of the actual arrival of a vessel.[75]

4.29 **Pooling entitlement**: Producers may pool their entitlement for a month. Pooling is an arrangement whereby the aggregate entitlement held by those producers is re-distributed between them. Pooling arrangements must be notified in writing by all relevant producers to DBCTPL at least 14 days prior to the relevant month.[76]

DBCTPL records each pooling arrangement and deals directly with producers on the revisions to their entitlements arising out of the notified pooling arrangement.[77]

4.30 **New entrants**: New producers (those that enter into a User Agreement with Babcock and Brown) automatically receive coal loading entitlement under the QMS.[78]

A new producer's annual contract tonnage will be pro rated using a revised capacity reduction factor which accounts for the additional demand. All other producers will experience a pro rata reduction to release additional capacity entitlement to be distributed to the new producer.[79]

If the producer is not in a position to use its entitlement, it may trade entitlement with other producers.[80]

4.31 **Order of loading vessels**: Generally, DBCTPL loads vessels in the order of their actual time of arrival at the Terminal, subject to:[81]

- there being entitlement at the time of loading for each cargo intended to be loaded on the vessel
- all necessary coal for the vessel being available at the Terminal in time for loading
- each of the pre-loading requirements for the vessel having been fulfilled before the relevant minimum period prior to the commencement of loading.

A vessel which has the earliest actual time of arrival but which cannot meet one of the above listed requirements must cede priority to successive vessels which fully comply with the above mentioned requirements.[82] As previously mentioned (at paragraphs 2.42 – 2.43) such vessels remain in the 'dead queue' until they fully comply.

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74 Clause 5.4(d) of the Terminal Regulations.
75 Clause 5.4(e) of the Terminal Regulations.
76 Clause 5.4(b) of the Terminal Regulations.
77 Clause 5.4(c) of the Terminal Regulations.
78 DBCTPL submission, 2 August 2005, p14.
79 DBCTPL supporting submission to the application, 5 April 2005, p27.
80 DBCTPL submission, 2 August 2005, p14.
81 Clause 6.1(a) of the Terminal Regulations.
82 Clause 6.1(b) of the Terminal Regulations.

Dispute resolution

4.32 In the first instance, disputes between producers arising out of the implementation of the QMS will be determined by DBCTPL. This decision may be appealed to an Independent Administrator, currently Ernst and Young.

4.33 The Terminal Regulations provide that the Independent Administrator may determine any appeal by a producer in relation to the exercise of discretion by DBCTPL under the QMS which materially impacts upon that producer. This right of appeal only applies to the extent that an appeal can be conducted before DBCTPL's exercise of discretion is implemented.[83]

[83] Clause 7(a)(i) of the Terminal Regulations.

5. SUBMISSIONS RECEIVED BY THE ACCC

Prior to the draft determination

5.1 DBCTPL provided a supporting submission with its application for authorisation and then provided two additional submissions.

5.2 The ACCC also sought submissions from around 40 interested parties involved in the coal chain, including coal producers and rail operators and relevant government departments. The ACCC received public submissions from:

- Macarthur Coal
- Xstrata Coal
- BHP Billiton Mitsubishi Alliance
- Rio Tinto Coal Australia
- AMCI
- Millennium Coal
- Kobe Steel
- Sumitomo Metal Industries
- Department of Industry, Tourism and Resources

Following the draft determination

5.3 On 10 November 2005 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation.

5.4 A conference was not requested in relation to the draft determination.

5.5 The ACCC received one public submission in response to the draft determination from Rio Tinto Coal Australia in support of the draft determination. DBCTPL also provided a submission in response to the draft determination.

5.6 The views of DBCTPL and interested parties are outlined in the ACCC's evaluation of the QMS in Chapter 7 of this determination. Copies of public submissions are available on the ACCC's website (**www.acccc.gov.au**) by following the 'Public Registers' and 'Authorisations Public Registers' links.

6. THE PUBLIC BENEFIT TEST

6.1 The ACCC may only grant authorisation where the relevant public benefit test in section 90 of the TPA is satisfied.

Application A30239

6.2 DBCTPL lodged application for authorisation A30239 under section 88(1) of the TPA to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the TPA. The relevant public benefit test is found in section 90(8) of the TPA.

6.3 Section 90(8) provides that the ACCC shall not make a determination authorising a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding ought be authorised.

Application A30240

6.4 DBCTPL lodged application for authorisation A30240 under section 88(1) of the TPA to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA. The relevant public benefit test for this application is found in sections 90(6) and 90(7) of the TPA.

6.5 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the TPA in essence provide that the ACCC shall not make a determination authorising a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application A30241

6.6 DBCTPL lodged application A30241 under section 88(7) of the TPA to engage in conduct to which sections 45D, 45DA or 45DB might apply. Section 90(8) applies to authorisations lodged pursuant to section 88(7) of the TPA. The test set out in section 90(8) is discussed at paragraph 6.3 above.

Application of the tests

6.7 There is some variation in the language particularly between the tests in sections 90(6) and 90(7) and that in section 90(8) of the TPA.

6.8 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same.[84] In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition but that the test under section 90(8) was not so limited.

6.9 However, the Tribunal has previously stated that with respect to the test under section 90(6):

> [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.[85]

6.10 Consequently, when applying either test, the ACCC can take most, if not all, public detriment likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

6.11 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is applicable to section 90(7) also.

6.12 In many authorisation applications, all detriments likely to result from the conduct appear to arise from a lessening of competition. The ACCC considers this to be the case in this matter.

Definition of public benefit and public detriment

6.13 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. 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.[86]

6.14 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the 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 principal elements the achievement of the goal of economic efficiency.[87]

Future with-and-without test

6.15 The ACCC also applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.

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[84] *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

[85] Re Association of Consulting Engineers, Australia (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty. Ltd. and Amatil Ltd. for review* (1981) ATPR 40-200 at 42,763, 42766.

[86] *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677.

[87] Ibid at 42683.

6.16 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

Term of authorisation

6.17 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time. The ACCC may authorise different aspects of conduct for which authorisation is sought for different periods.

Conditions

6.18 Section 91(3) of the TPA allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the public benefit test.

7. ACCC EVALUATION

7.1 On 5 April 2005 DBCTPL lodged applications for authorisation of the proposed QMS designed to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal (the Terminal) and the capacity of the Goonyella coal chain, including the Terminal (together, System Capacity).

7.2 On 10 November 2005 the ACCC issued a draft determination proposing to grant authorisation to DBCTPL for the QMS until 31 December 2008. A conference was not requested by interested parties to discuss the draft determination.

7.3 The ACCC's evaluation of the QMS is in accordance with the public benefit test outlined in Chapter 6 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the QMS.

Market definition

7.4 The first step in assessing the effect on competition of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.

7.5 However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.

7.6 As previously mentioned, the Terminal is not the only coal loading facility in the region. There is also the neighbouring Hay Point Coal Terminal, and the ACCC is advised that coal may be railed to the Abbot Point Coal Terminal.[88]

7.7 The ACCC considers there are two relevant markets potentially affected by the QMS – the global market for coal (or at least the Asian coal market) and the market for the provision of coal loading services for bulk coal carrying ships in the Northern Bowen Basin.

The counterfactual

7.8 As noted in Chapter 6 of this determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'. This involves identifying a counterfactual; that is, making a prediction as to what is likely to happen if authorisation is denied. The ACCC makes a judgement as to what, on the information and evidence before it, is the most likely situation without the authorisation.

7.9 The ACCC then compares the public benefit and public detriment arising in the future if authorisation is granted with the public benefit and detriment arising under the counterfactual.

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[88] DBCTPL supporting submission to the application, 5 April 2005, p21.

7.10 At the time the current application for authorisation was lodged with the ACCC there was reported to be over 50 vessels in the queue at the Terminal, resulting in Australian coal producers incurring substantial demurrage costs. The ACCC granted interim authorisation to DBCTPL to commence the operation of the QMS on 29 April 2005.

7.11 DBCTPL submits the substantial vessel queue was caused by a combination of:

- high international demand for coal
- coal chain delivery system constraints – the loss of a major reclaimer (RL1) in February 2004, which is due to be replaced in 2006, means System Capacity has been reduced by several million tonnes per annum
- insufficient System Capacity to match high vessel arrival rates reflecting the high demand
- the lack of a capacity management mechanism to match vessel arrivals with System Capacity.[89]

7.12 In addition, DBCTPL believes a contributing factor to the queue was the practice of producers scheduling vessels which the Terminal would load under a 'best endeavours' clause of their contract. This was not a problem in the past when the Terminal was not operating at capacity. However, following the global surge in demand for coal, producers continued to schedule ships beyond their contracted capacity in an attempt to get additional coal through the Terminal.

7.13 Babcock and Brown consider contributing factors to the development of the large queue included:

- the difference between contracted and actual capacity at the Terminal
- the fact that the coal chain is operating at or close to capacity
- elements of producer strategies which hinder the effective management of the coal chain.[90]

7.14 DBCTPL submits the high demand for coal exported from the Goonyella coal chain is likely to continue until the end of 2008. This demand is likely to be driven by the economies of China and India.[91] It submits an indication of high demand is that prices have continued at near record levels for both thermal coal and coking coal.[92]

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89 DBCTPL supporting submission to the application, 5 April 2005, p3.
90 Babcock and Brown, *Dalrymple Bay Coal Terminal Master Plan 2005, 28 April 2005,* p39.
91 DBCTPL supporting submission to the application, 5 April 2005, p22.
92 Ibid.

7.15 DBCTPL also submits that contracted throughput at the Terminal is well above actual loading capacity and that capacity will be further significantly affected by the proposed expansion program at the Terminal. In these circumstances, particularly given the high prices for coking coal, DBCTPL believes that in the absence of the QMS, a vessel queue would re-form.[93]

7.16 The ACCC notes that the large vessel queue started to fall prior to the formal introduction of the QMS in June 2005. DBCTPL confirms that when the QMS was introduced the queue of (24) vessels was half the size it was at the time of lodging the application for authorisation.[94] Table 7.1 shows the number of ships in the queue at the various stages of the current application.

Table 7.1: Number of vessels in the queue at Dalrymple Bay[95]

Date	Event	Number of ships
5 April 2005	Application for authorisation lodged with the Commission.	Over 50
29 April 2005	The Commission granted interim authorisation to commence the operation of the QMS. However, commercial discussions between new coal producers and Babcock and Brown delayed the implementation of the QMS.	30
25 May 2005	The Commission decided to vary interim authorisation in accordance with the Terminal Regulations, as amended.	27
27 May 2005	Babcock and Brown approved the amended Terminal Regulations.	27
3 June 2005	The QMS was formerly implemented.	24
2 August 2005	Ongoing industry review of the operation of the QMS under interim authorisation.	12

7.17 More recently, the ACCC is advised that as at 20 September 2005 there were 19 vessels in the queue, 16 vessels as at 11 October 2005 and 14 vessels as at 8 November 2005.

93 DBCTPL submission, 4 October 2005, p17.
94 DBCTPL submission, 2 August 2005, p14.
95 Ibid.

7.18 DBCTPL submits the primary reason for the reduction in the vessel queue prior to the scheme's formal introduction was the prospect itself of the introduction of the QMS and the specifically targeted working queue (of 15 ships) targeted for July 2005. In this regard, it claims that producers were made aware of the system entitlements and proposed introduction of the QMS as early as March 2005. In April, an estimated overall percentage reduction against contract tonnes and estimates of individual producer positions were discussed. By early May, all users had received informal notification of their likely allocation for the April to June quarter and in late May those allocations were confirmed.[96]

7.19 Conversely, Macarthur Coal submits there are a number of other factors that contributed to the reduction of the queue prior to the June introduction of the QMS. For example, Macarthur Coal submits:

> Shipping schedules are generally set 2-3 months ahead of shipping. Hence, the reduction in the queue encountered in April and May were scheduled well ahead of any notification of the introduction of the QMS…
>
> Market factors also contributed. The contract year for the majority of coal contracts ends on 31 March. With coking prices this year rising from circa US$60 per tonne to over US$120 per tonne, large numbers of vessels were scheduled by customers to lift as much of the remaining low priced tonnage as possible prior to the end of the contract year…[97]

7.20 In addition, Macarthur Coal believes the GCCIP improved the efficiency of the Goonyella coal chain delivery system in May 2005, prior to the introduction of the QMS, through the implementation of initiatives to improve coordination through the inloading system at the Terminal. In May, record levels of throughput at the Terminal were achieved, which together with low vessel arrival rates, contributed to the reduction in the queue.[98]

7.21 The ACCC notes there are a range of views within the industry as to why the queue reduced prior to the formal introduction of the QMS. It understands that producers not only expected the QMS to be introduced but they were also aware of DBCTPL's intention to back date the operation of the scheme from 1 April 2005. As such, it may be, as suggested by DBCTPL, that coal producers had already changed their behaviour in the anticipation of the introduction of the scheme.

7.22 Having said that, the ACCC considers it is not certain whether the queue reduced because of the QMS and what length the queue would be absent any authorisation of the QMS.

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96 Ibid, p4.
97 Macarthur Coal submission, 7 September 2005, p2.
98 Ibid, p3.

7.23 As previously noted (at paragraphs 2.51 - 2.53) strong world coal demand is forecast to continue, at least in the short term. In response to high demand, producers in the Goonyella coal chain have forecast Terminal capacity requirements over the next four years of 64 million tonnes per annum in 2005/06, 85 million tonnes per annum in 2006/07, 85 million tonnes per annum in 2007/08 and 89 million tonnes per annum in 2008/09.[99]

7.24 Coal chain capacity appears to be increasing at a slower rate. Babcock and Brown's program of investment to enhance the Terminal's capacity is projected to deliver capacity of up to 68 million tonnes per annum by mid 2007 and up to 85 million tonnes per annum by mid 2008 (at the earliest).

7.25 It would seem that the capacity of the Goonyella coal chain is likely to remain below the level of demand for coal exports, at least in the short term, despite recent improvements in coal chain performance through initiatives introduced by the GCCIP.

7.26 While there has been some debate about certain design features of the QMS by interested parties, the ACCC notes that all producers consider a QMS is necessary to address the current imbalance between demand for coal loading services and System Capacity. Indeed, the ACCC has not received any submissions from interested parties opposing a QMS.

7.27 On this basis, the ACCC is of the view that a vessel queue is likely to re-form absent authorisation, since the QMS would not be operating. Return of an excessive vessel queue would give rise to substantial demurrage costs. The likely size of the queue and the consequent demurrage costs are discussed in further detail from paragraph 7.94. The ACCC notes that fluctuations in the queue as a result of production difficulties at the mines and adverse weather conditions are to be expected from time to time.

Public detriment

7.28 As noted at paragraph 7.7 the ACCC considers the two most relevant markets in this instance are:

- the global market for coal
- the market for the provision of coal loading services for bulk coal carrying ships in the northern Bowen Basin.

7.29 Prior to the draft determination the principle issue raised by interested parties was that the QMS must not result in a reduction of coal exported through the Terminal. In particular, concerns were raised that the pro-rating of contracted capacity will mean mines reduce their production schedules accordingly and will then be unable to rapidly increase production in the event that another mine experiences production difficulties. There are also concerns that monthly allocations (as opposed to quarterly allocations) limit the flexibility for producers to schedule vessels in time to utilise any spare capacity. This lack of flexibility may lead to smaller ships being scheduled, increasing the need for multi-parcelling at the Terminal, which also reduces System Capacity.

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[99] Babcock and Brown, *Dalrymple Bay Coal Terminal, Master Plan 2005, 28 April 2005*, p7.

7.30 DBCTPL believes the QMS will result in negligible, if any public detriment, and in particular, certain design features of the QMS (see paragraph 7.38) aimed at maximising coal exports through the Terminal, should reduce any public detriment concerns. In particular, DBCTPL submits the QMS will produce negligible public detriment for the following reasons:

- the QMS is designed to ensure that the Terminal continues to operate at full System Capacity and therefore there should be no overall reduction in the volume of coal shipped through the Terminal
- it will not reduce the incentives to expand the Terminal
- coal producers will still compete for customers in the international coal market
- the Terminal will still be operating at full capacity and will remain competitive with the alternative facilities in the region.[100]

7.31 No interested party provided a substantial submission in response to the public detriment conclusions in the ACCC's draft determination of 10 November 2005.

7.32 An assessment of the public detriment generated by the QMS, taking into account submissions from interested parties, follows.

Restricting aggregate coal exports from the Goonyella coal chain

7.33 The QMS is intended to allocate available loading capacity amongst producers having regard to the underlying contracted throughput under the User Agreements between individual producers and Babcock and Brown.

7.34 DBCTPL submits that the QMS is designed to ensure that the Terminal operates at full System Capacity, while facilitating better management of the vessel queue. It believes there should not be any reduction in exports as a result of un-used coal loading entitlement (or allocation) under the QMS. In particular, DBCTPL submits:

> Producers will receive allocations which, in aggregate (especially taking into account any flexibility provisions that may be available) exceed the actual capacity of the coal chain at a point in time. This is deliberate. The immediate impact of under-using capacity is a shortening of the queue…
>
> There would need to be significant and sustained un-used allocations before the coal chain stopped operating at full capacity.[101]

7.35 DBCTPL notes that since the QMS was implemented under the interim authorisation, there has been a small level of under-use of coal loading entitlement. For example, there was 70 000 tonnes of un-used entitlement in July 2005 and 130 000 tonnes in August 2005.

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[100] DBCTPL supporting submission to the application, 5 April 2005, pp32-34.
[101] DBCTPL supporting submission to the application, 5 April 2005, p33.

7.36 At the same time, DBCTPL submits there has not been any decrease in aggregate volumes of coal exported through the Terminal, as evidenced by there always being a working queue. In addition, DBCTPL notes that despite significant adverse events along the coal chain, including a rail derailment, August was a record month for throughput at the Terminal.[102]

7.37 DBCTPL submits that un-used System Capacity, and therefore lost exports, arise from operational breakdowns along the coal chain and mine production issues, rather than as a result of the QMS.[103] In this regard, DBCTPL forecasts that throughput in September 2005 will be adversely affected by such factors as expansion works at the Terminal.

7.38 Having said this, DBCTPL submits that the following features of the QMS should ensure that throughput at the Terminal is maximised:

- producers have always been able to put vessels in the queue in excess of their coal loading entitlement (but under the QMS, that vessel will now have to wait until all other vessels with entitlement are loaded)
- a working queue of vessels will be maintained (to act as a buffer, with the intention that there will always be vessels ready to start loading)
- swaps and transfers of entitlement are allowed
- producers are allowed to provide less than 14 days notice of a swap to DBCTPL and DBCTPL will provide a forum to encourage producers to swap entitlement as early as possible
- producers have a 90 000 tonne loading buffer
- the Expert may allocate additional entitlement above estimated System Capacity to further increase the working vessel queue.[104]

7.39 DBCTPL indicates that the QMS is designed to maintain the vessel queue at an efficient working level of around 15 vessels.[105]

7.40 In support, Rio Tinto Coal submits that the QMS will not have an adverse impact on future exports through the Terminal. In particular, it submits the QMS is:

> …designed to merely share the available capacity for those exports between the coal producers. The QMS will function to reduce the existing queue of ships to a realistic level, and then manage subsequent ship nominations, to ensure that ship arrivals match capacity.[106]

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[102] DBCTPL submission, 4 October 2005, p17.
[103] Ibid, p13.
[104] DBCTPL submission, 4 October 2005, p13.
[105] Ibid, p16.
[106] Rio Tinto Coal submission , 27 May 2005, p2.

7.41 Similarly, Xstrata believes the actual amount of exports through the Terminal will not be affected by the QMS. In particular, it considers:

> The QMS is a fair and equitable way to ensure maximum throughput and exports without the demurrage charges that result from strong demand, constrained capacity and a lack of coordination between the various elements of the coal chain.[107]

7.42 While supporting the introduction of a QMS at the Terminal, Macarthur Coal submits that the QMS has contributed to lost exports because:

- berth vacancies have occurred at the Terminal as a result of entitlement not being transferred with sufficient time to allow producers with available tonnage to arrange for shipment of their coal

- Macarthur Coal has reduced its production schedule for the 2005/06 financial year as a direct result of the introduction of the QMS. While production problems at other mines may result in it being able to ship coal in addition to its entitlements under the QMS, the uncertainty surrounding the availability of additional entitlement, the cost of maintaining stockpiles of coal and the limited capacity of those stockpiles means that it must cut back its production.[108]

7.43 Furthermore, Macarthur Coal believes that allocating entitlement on a monthly basis under the QMS (rather than a quarterly basis) limits the flexibility for producers and overseas customers in relation to their shipping requirements. It believes the lack of flexibility created by a monthly system may reduce the utilisation of Terminal capacity. Macarthur Coal's concerns regarding the operation of the QMS on a monthly basis are discussed in further detail from paragraph 7.64.

7.44 In response, DBCTPL agrees that there have been recent berth vacancies at the Terminal.[109] However, DBCTPL submits that vacant berth time is not a reliable measure of lost export opportunities. It also submits that berth vacancies can arise for a number of reasons independent of the QMS, including maintenance and adverse weather conditions.[110]

7.45 In particular, DBCTPL claims that the Terminal experienced berth vacancies before the QMS was introduced, including during periods in which there was a large vessel queue at the Terminal. DBCTPL explained that the current Terminal is a configuration of three berths and two outloading systems, which reflects the Harbour Master's rules that vessels being loaded at the Terminal must maintain their propeller underwater at all times. This rule means that the Terminal loading rate is ultimately constrained by the vessel deballasting rate. The extra berth at the Terminal permits an outloading system, previously committed to a vessel experiencing a deballast delay, to be assigned to a vessel capable of receiving coal – hence maximising both outloading system utilisation and Terminal throughput.[111]

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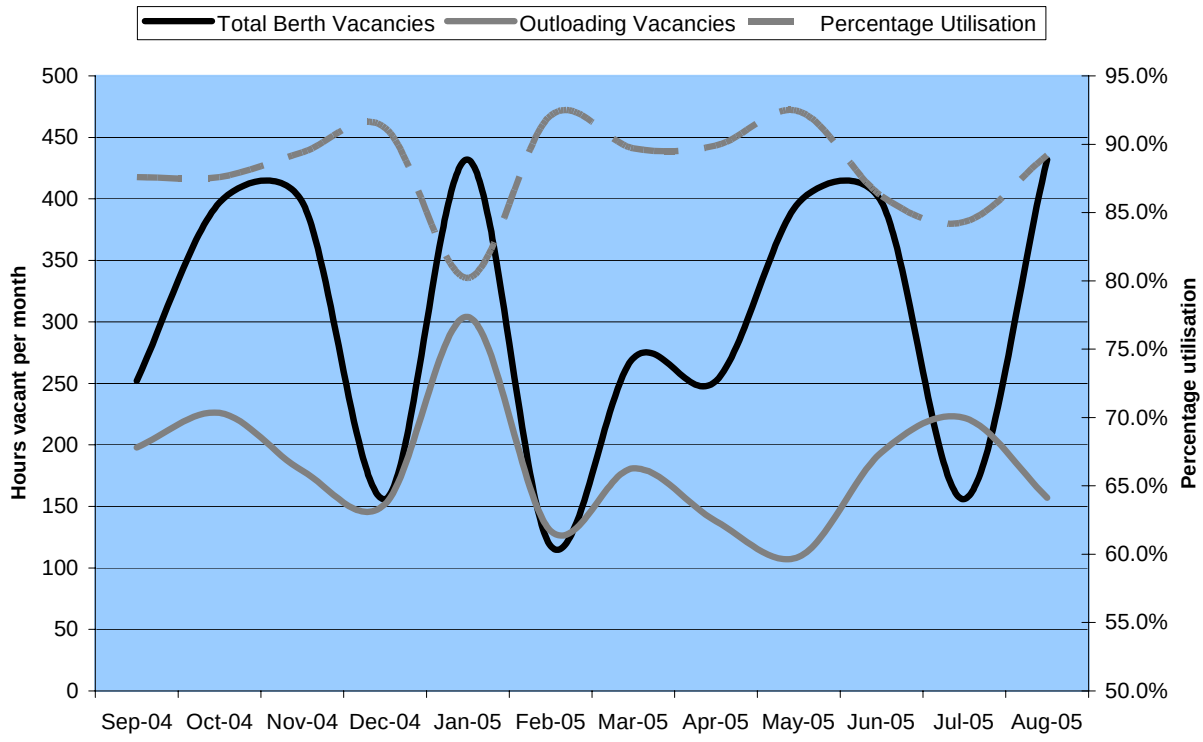
[107] Xstrata Coal submission, 22 April 2005, p3.
[108] Macarthur Coal submission, 7 September 2005, p4.
[109] DBCTPL submission, 4 October 2005, p20.
[110] Ibid, p13.
[111] Ibid, p20.

7.46 In addition, DBCTPL submits that rail receival and cargo assembly at the Terminal continues even when there are vacant berths. DBCTPL notes that when the Terminal is constrained by rail inloading capabilities, as it currently is, a vacant berth is a reasonably common event as the Terminal dispatches coal as soon as it is delivered and then may have to wait until the next shipment is assembled. DBCTPL submits that from July 2004 to when the QMS was introduced in June 2005, this was considered the 'normal' operating condition of the coal chain.[112]

7.47 Furthermore, DBCTPL submits that if sea swells increase, it may be unsafe to have a small (Handy/Handymax) vessel alongside a berth, as it may damage either the vessel or wharf fenders. Under these circumstances, a large (Cape) vessel, exhibiting greater stability, may be loaded if such a vessel is in the queue and ready to load.[113]

7.48 Figure 7.1 illustrates the fluctuation of berth vacancies at the Terminal over a twelve month period from September 2004 to August 2005. Over this period, DBCTPL submits there was 6.4 days of outloading lost in January 2005 due to two separate weather events. In June/July 2005, following the introduction of the QMS, the Terminal experienced bad weather, with high seas and winds requiring berths to be vacated. There was also a rail derailment at Coppabella. DBCTPL submits the key issue is percentage utilisation at the Terminal, which has been approaching 90 per cent in recent times under the QMS.[114]

Figure 7.1: Vacant berth time and outloading vacancies[115]



[112] Ibid, p21.
[113] Ibid, p21.
[114] Ibid.
[115] DBCTPL submission, 4 October 2005, p22.

7.49 As regards swapping coal loading entitlement, DBCTPL notes that substantial volumes of swaps have been occurring under the QMS and the timeliness of swaps is improving, with producers now providing six week timeframes to maximise time for vessel scheduling.[116] Confidential information provided to the ACCC in relation to agreed swaps between individual producers, reveals that producers have so far agreed to swap a total of approximately 2.5 million tonnes of entitlement under the QMS.

7.50 However, DBCTPL submits that there may always be some unused entitlement. It submits for example, that a producer may not be able to find a customer for specific coal that has been produced or market forces may mean that demand decreases at particular times. However, it believes the ability to swap entitlement and the forum to do so provided under the QMS, will encourage as much entitlement to be used as is needed to meet demand.[117]

7.51 In its draft determination, the ACCC noted that the industry was giving further consideration to whether an additional incentive (by way of forfeiture of entitlement) is required to encourage producers to actively trade entitlement in advance where a vessel would be delayed due to non-availability of coal.[118]

7.52 Following the draft determination the ACCC did not receive any further information on this issue. Therefore, the ACCC assumes the industry did not reach consensus that additional incentives should be included in the QMS. Having said this, the ACCC notes that incentives currently exist under the QMS for producers to trade or swap their coal loading entitlement (see paragraph 7.57).

7.53 As regards producers reducing their production schedules as a direct result of the QMS, DBCTPL submits this is an oversimplification of the mining process. In particular, DBCTPL submits:

> …it is unlikely that a long term coal mining operation will be scaled back in response to System Capacity allocation given the close relationship between the rate of underground face advance and ground conditions. Equally, in a strip mine, the ability of the mine to hold 'in-pit' inventory may be beneficial…
>
> A number of mines have more than one product, which in turn may be subject to a market price differential. Under these circumstances it is likely that preference will be given to production of the higher value product, with swing capacity being utilised on an 'opportunity basis'…
>
> A decrease in throughput to below capacity at the Terminal could only arise in situations of multiple mines ceasing production for operational reasons with no stockpiles being available. Given the amount of coal in the Goonyella basin, this is not a realistic probability.[119]

7.54 Furthermore, DBCTPL submits that some producers are (or have been) producing above their allocated entitlement to be able to opportunistically take advantage of additional entitlement through swaps.[120]

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[116] Ibid, p5.
[117] Ibid, p17.
[118] Ibid, p7.
[119] DBCTPL submission, 2 August 2005, pp18,19.
[120] DBCTPL submission, 4 October 2005, p19.

ACCC's conclusion

7.55 The ACCC considers that any reduction in the volume of coal exported from the Terminal as a result of the QMS would constitute a detriment to the public. At current coal prices, the size of any such detriment could be significant.

7.56 Having regard to all submission provided, there does not appear to be evidence of a reduction in aggregate coal exports from the Goonyella coal chain as a result of the QMS. Indeed, the ACCC notes the record volume of exports through the Terminal in August 2005 under the QMS, despite adverse events along the coal chain over this period.

7.57 However, if under the QMS producers do not release forecast un-used coal loading entitlement in time to enable it to be utilised by another producer, the ACCC considers this would be a public detriment. Underpinning the QMS is the existing take or pay obligations with Babcock and Brown, which apply if a producer ships less coal than their annual contract tonnage. Generally, the ACCC considers that take or pay obligations provide some incentive for producers to swap any forecast un-used entitlement, or otherwise pay for the un-used annual contract tonnage under their User Agreements. The ACCC notes that producers have been swapping entitlement under the QMS.

7.58 In addition, the QMS is designed to sustain a moderate working queue. This provides a demand buffer at the Terminal so that if there is some under-use of coal loading entitlement, the queue simply gets shorter while the Terminal continues to operate at maximum capacity.

7.59 The ACCC is also satisfied that the flexibility measures under the QMS (described at paragraph 7.38) should ensure that allocated entitlement of producers' who face production difficulties will generally be able to be utilised by other producers, and therefore ensure that System Capacity is maximised.

7.60 The ACCC has seen no evidence that the QMS has lead to a reduction in aggregate coal exports. Furthermore, it is of the view that commercial incentives exist under the QMS for all industry participants in the Goonyella coal chain to maximise coal exports.

7.61 The ACCC notes that throughput at the Terminal can be affected by other factors independent of the QMS. For instance, the ACCC understands that in recent times some mines have experienced production problems and there was a major rail derailment in June 2005.

7.62 Furthermore, the ACCC understands that vacant berths at the Terminal are not necessarily an indication that the QMS has lead to a reduction in coal exports. The ACCC also notes that berth vacancies may be caused by a variety of factors, including adverse weather conditions, which may occur with or without authorisation of the QMS.

7.63 The ACCC considers therefore that the risk of the QMS resulting in any public detriment as a result of an aggregate reduction of the volume of coal moved through the Goonyella coal chain is likely to be low.

Public detriment arising from the operation of the QMS on a monthly basis

7.64 Macarthur Coal believes that a monthly QMS, as opposed to a quarterly QMS, has the potential to generate System Capacity losses, and therefore lost exports. In particular, Macarthur Coal submits that:

> Having entitlement distributed on a month to month basis limits the flexibility producers can give customers in terms of shipping tonnages and shipping arrivals. This lack of flexibility may force customers to schedule smaller ships and increase the need for multi-parcelling.[121]

7.65 Macarthur Coal believes that customers may be forced into sending smaller ships because the volume of coal that they will be able to obtain from each producer will be limited and may not be sufficient to fill a large (Cape) vessel in a particular month. It also considers the tonnage limitation on a month to month basis may increase the number of coal types needed to fill each vessel.[122]

7.66 Macarthur Coal submits, as publicised by Babcock and Brown, a reduction in ship size and an increase in multi-parcelling reduces System Capacity. In addition, it submits that DBCTPL has also recognised that multi-parcelling reduces System Capacity by including the following clause in the Terminal Regulations governing the operation of the QMS:

> Users must use reasonable endeavours to cause purchasers of coal to minimise multiple loading of parcels of coal on vessels, where multiple loading would materially reduce System Capacity.[123]

7.67 Early in its consultation process, the ACCC received submissions from two Japanese steel mills in relation to this issue. Both were of the view that a QMS was needed to address the queue at the Terminal, however, they believed a monthly allocation system would cause disruption and difficulty with their shipping schedules.

7.68 In response, DBCTPL submits that a monthly QMS facilitates a more even use of coal loading entitlement by producers. In particular, it submits that:

> …where users anticipate a scarcity of capacity compared with entitlement, they have sought to 'front end load' the queue…Front end loading could be exacerbated in a quarterly allocation period.[124]

7.69 DBCTPL submits that the likely impact of front end loading, namely producers sending additional ships at the beginning of the quarter, would be to increase the size of the vessel queue thereby reducing the realisation of the public benefit arising as a result of the QMS. It believes that any unnecessary increase in the size of the vessel queue would result in increased demurrage costs being paid by Australian producers.[125]

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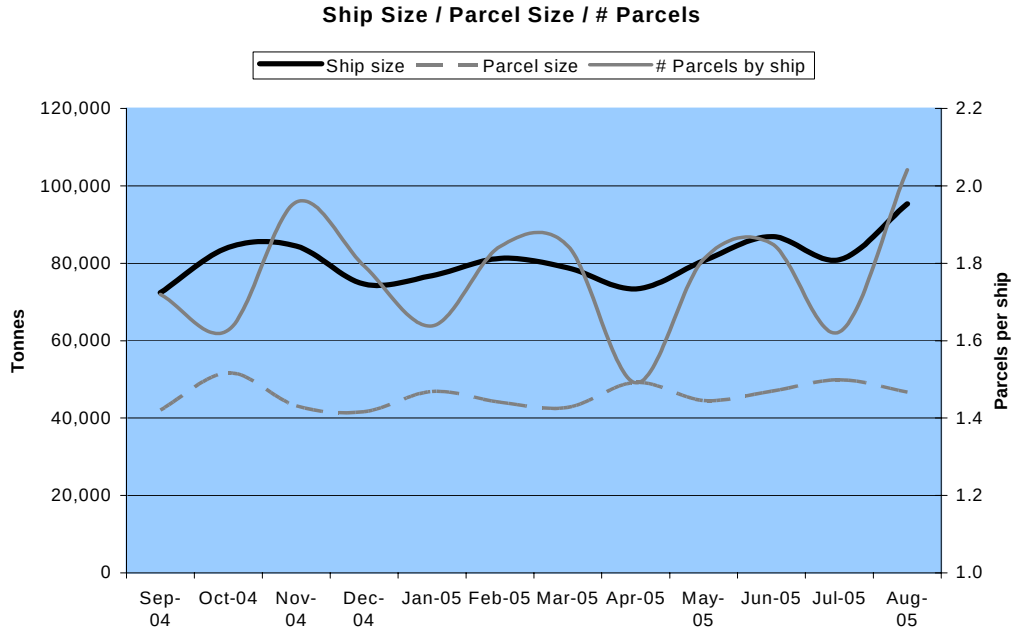
[121] Macarthur Coal submission, 13 May 2005, p2.
[122] Ibid.
[123] Clause 11 of the Terminal Regulations.
[124] DBCTPL submission, 2 August 2005, p16.
[125] Ibid.

7.70 In addition, DBCTPL considers that given the active expansion activity scheduled to occur at the Terminal over the coming months, monthly, rather than quarterly, determination of System Capacity and hence coal loading entitlement, allows greater scope for 'active management' of the queue.[126]

7.71 As regards vessels sizes at the Terminal, DBCTPL submits the QMS has been in operation for an insufficient period to determine its impact upon the vessel mix at the Terminal.

7.72 However, DBCTPL submits initial data suggests a trend towards larger vessels under the QMS.[127] Figure 7.2 illustrates the fluctuations in vessel size and multi-parcelling at the Terminal in the twelve months between September 2004 and August 2005.

Figure 7.2: Vessel size (tonnes) and the number of parcels by vessel at the Terminal[128]



7.73 Figure 7.2 also demonstrates that multi-parcelling at the Terminal is increasing. DBCTPL claims that this is a customer driven issue. In addition, given that the majority of coal sales are made on the basis that customers are responsible for chartering a vessel, it is difficult for producers to alter the vessel mix at the Terminal.[129] In this regard, the ACCC understands, for example, that irrespective of the QMS, coal buyers from India have to charter smaller vessels due to the size of Indian ports.

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[126] Ibid.
[127] DBCTPL submission, 4 October 2005, p23.
[128] Ibid, p24.
[129] DBCTPL submission, 4 October 2005, p23.

7.74 Having said this, DBCTPL recognises Macarthur Coal's concerns that a monthly system could lead to flexibility constraints. In this regard, the ACCC noted in its draft determination that the industry was reviewing whether operational efficiencies could be gained by amending the QMS to a longer three month rolling period. At that time DBCTPL advised the ACCC that there was no consensus among producers on the issue, but if consensus was obtained, it would aim to submit any such amendments to the ACCC by the end of November 2005.[130] Following the draft determination DBCTPL advised that no such consensus developed among producers.[131]

7.75 Furthermore, DBCTPL acknowledges that it received concerns from some coal customers that the monthly entitlement allocation system is causing disruptions to shipping schedules. DBCTPL submits it is aware of other coal customers who have taken a contrary view and prefer the monthly allocation system. In this regard, DBCTPL submits that it, along with coal producers, are having discussions with the relevant customers to provide greater explanation of the operation of the QMS in order to address the initial concerns about the logistics of the QMS.[132]

ACCC conclusion

7.76 The ACCC considers that any reduction in the utilisation of System Capacity as a direct result of shipping inflexibilities caused by the QMS operating on a monthly basis would potentially constitute a detriment to the public.

7.77 However, the ACCC notes that preliminary data suggests that the average vessel size has been increasing, rather than decreasing, under the QMS. The ACCC also notes that sub-optimal vessel mixes and multi-parcelling may occur irrespective of whether a QMS is operating at the Terminal or not. As such, reduced System Capacity can occur with or without ACCC authorisation of the QMS.

7.78 In addition, the ACCC understands that a monthly allocation system allows producers to speculatively arrange for a vessel to arrive at the Terminal towards the end of the month to enable the producer to take advantage of any additional coal loading entitlement that becomes available. If the producer is unsuccessful in obtaining additional entitlement, either through trading or swapping, it will only incur demurrage for a relatively short period until the vessel is assigned entitlement in the proceeding month.

7.79 Furthermore, as noted above, there does not appear to be a reduction of the volume of coal moved through the Goonyella chain as a result of the QMS. Overall it appears the risk of System Capacity being reduced as a result of the QMS operating on a monthly basis is small.

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[130] Ibid, p8.
[131] DBCTPL submission, 2 December 2005, p4.
[132] Ibid, p16.

7.80 It appears to the ACCC that a monthly allocation system provides better incentives in respect to ship nominations – that is, it helps to reduce front end loading and allows producers to engage in speculative behaviour – but it may also make it difficult for producers to swap entitlement. However, the ACCC notes that the industry did not reach agreement that operational efficiencies would be gained by moving from a monthly to a quarterly scheme. The ACCC also notes that DBCTPL has sought to address initial concerns of customers about the QMS.

Reducing the ability of producers to respond to market forces

7.81 Public detriment would potentially arise from the QMS if it constrained the ability of Goonyella producers to respond to the market.

7.82 DBCTPL believes that under the QMS individual producers have been, and continue to be, able to respond to market forces by declining to supply coal at uncommercial prices or seeking to maximise sales at time of high coal prices. It notes that presently producers are seeking to maximise throughput.[133]

7.83 Furthermore, DBCTPL submits that under the QMS, producers still have the ability to engage in opportunistic behaviour. However, such behaviour is likely to have less adverse impact on others under the QMS. In particular, DBCTPL submits that prior to the QMS, producers sending vessels to join the queue when there was limited System Capacity lead to the formation of the large vessel queue. Under the QMS, DBCTPL notes that producers may still send vessels to join the queue in excess of their coal loading entitlement and they will incur demurrage costs. However, under the QMS this will not produce on-queuing problems for other producers as the vessel without entitlement will have to wait in the queue until all other vessels with entitlement are loaded. Alternatively, a producer is likely to seek to acquire additional loading entitlement, and therefore certainty of loading.

7.84 In such circumstances, DBCTPL considers the individual decisions of producers will be based, among other things, on whether the price for coal outweighs the demurrage cost or cost of the swap.[134]

ACCC conclusion

7.85 As previously noted, the ACCC considers that the flexibility measures under the QMS, including the ability for producers to put vessels in the queue in excess of their coal loading entitlement, the 90 000 tonne loading buffer and the ability to swap entitlement, provide flexibility to producers to manage production to maximise throughput. Overall, the ACCC does not consider the QMS is likely to reduce the ability for producers to respond to the market.

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[133] DBCTPL submission, 4 October 2005, p14.
[134] DBCTPL submission, 4 October 2005, p14.

Reducing incentives for investment in the Goonyella coal chain

7.86 In considering similar applications for authorisation, the ACCC has noted that significant detriment would arise, in the form of lost coal exports, if capacity allocation systems had the effect of delaying efficient investment in infrastructure expansion along the coal chain.

7.87 Rio Tinto Coal submits that the QMS will not detract from the incentives to invest to expand the Terminal. In particular, it submits:

> The driver for expansion at DBCT relates to mines entering into bona fide commitments for additional capacity…whether or not a QMS is in operation has no impact on these contracts…[135]

7.88 Furthermore, Rio Tinto Coal submits the introduction of the QMS:

> ….will not ease the pressure on all stakeholders to expand existing capacity to cater for new mines and increased demand from customers.[136]

ACCC conclusion

7.89 The ACCC notes the QMS is a transitional measure which aims to limit the demurrage costs associated with excessive vessel queues until scheduled expansion projects are operational. In this regard, the Terminal owner, Babcock and Brown, has committed to a program of investment which is expected to deliver increased throughput at the Terminal to 68 million tonnes per annum by mid 2007 and 80 million tonnes per annum by August 2008 (at the earliest).

7.90 The ACCC is satisfied that the QMS is unlikely to remove the stakeholders' incentives to invest in expanding System Capacity, including at the Terminal, and is unlikely therefore to constrain export growth.

Public Benefits

7.91 DBCTPL submits the QMS will deliver substantial public benefits, including:

- demurrage cost savings
- reduced coal stockpiling costs
- improved reputation and competitiveness of the Terminal and Bowen Basin coal producers
- allowing producers to manage production more efficiently
- maintaining the queue at a more efficient level
- facilitating more efficient investment decisions and potential re-investment by participants in the Bowen Basin coal industry

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[135] Rio Tinto Coal Australia, 27 May 2005, p2.
[136] Rio Tinto Coal Australia submission, 27 May 2005, p2.

- reducing the risks associated with an extensive vessel queue adjacent to the Great Barrier Reef Marine Park.

7.92 No interested party provided a substantive submission in response to the public benefit conclusions in the ACCC's draft determination of 10 November 2005.

7.93 An assessment of the public benefits claimed by DBCTPL, taking into account the submissions from interested parties, follows.

Reduced demurrage

7.94 In its original supporting submission to the application for authorisation, DBCTPL estimated that demurrage savings under the QMS, based on 50 ships being in the vessel queue, as was the peak at the end of March 2005, would total $350 million for the 2005 calendar year.[137]

7.95 DBCTPL advises this estimate is based on:

- the queue continuing to rise by 4 vessels a month from April if a QMS was not introduced
- the queue falling from 50 vessels as at the end of March to 12-15 vessels under a QMS
- applying a demurrage rate based on US$0.27 per deadweight tonne per day, which was the estimated long term rate for the mix of vessels at the Terminal.[138]

7.96 Furthermore, DBCTPL submits that in the event that a queue of 50 vessels was maintained until the end of 2008, being the period of authorisation sought by DBCTPL, without the QMS in place, demurrage savings would approach $2.15 billion.[139]

7.97 In October, DBCTPL provided updated figures on the actual demurrage savings to producers since interim authorisation was granted to commence the operation of the QMS. As outlined at paragraph 2.45, DBCTPL advises that from the end of April 2005 until the end of August 2005 actual demurrage savings totalled around $150 million.

7.98 DBCTPL also advises that under the QMS, the average number of days vessels spend in the queue has reduced significantly. Figure 7.3 illustrates that the average delay for ships in the queue has reduced from 25 days in April 2005 to just over 5 days in August 2005.

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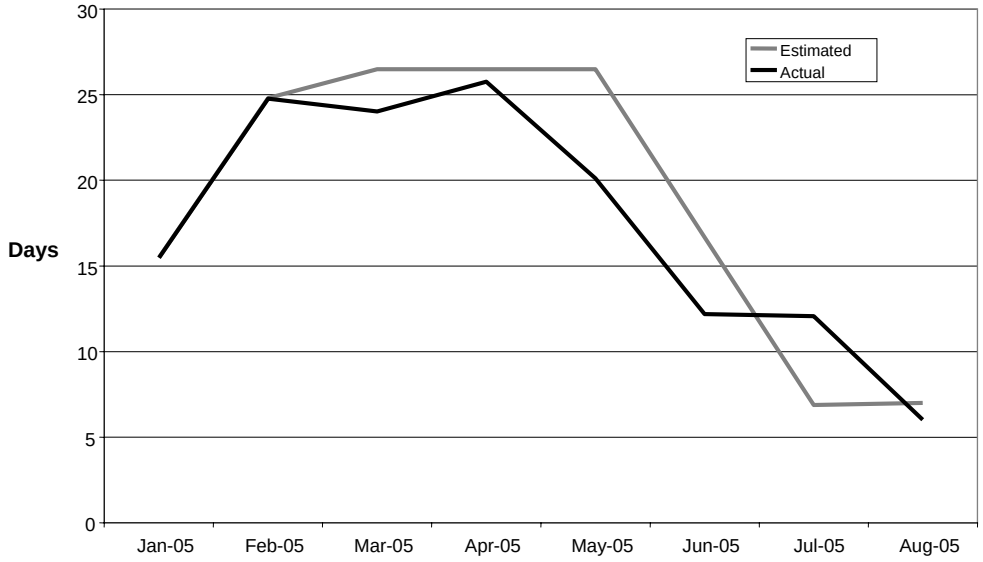
[137] DBCTPL supporting submission to the application, 5 April 2005, p29.
[138] DBCTPL submission, 4 October, p12.
[139] Ibid, p1.

Figure 7.3: Average time spent in the queue[140]



7.99 DBCTPL submits that under the QMS, demurrage costs have fallen from a peak of around US$10 per tonne in April to less than US$1 per tonne. It submits that this reduction represents demurrage savings of approximately $50 million a month.[141]

7.100 Rio Tinto Coal submits that its experience of a similar capacity management system at Port Waratah in Newcastle supports DBCTPL's public benefit claims, including significant demurrage savings.[142]

7.101 Xstrata believes that it would incur substantial demurrage charges if the large queue at the Terminal continued. In particular, Xstrata advises that its demurrage in the first quarter of 2005 was US$6.66 per tonne shipped (representing $11.8 million).[143] Xstrata considers that absent authorisation, and therefore the QMS, producers would immediately send more vessels to the Terminal causing the substantial vessel queue to re-form.[144]

7.102 The ACCC did not receive any public submissions from interested parties which questioned DBCTPL's estimated demurrage savings under the QMS.

ACCC conclusion

7.103 The ACCC generally considers that a reduction in deadweight demurrage payments represents an increase in economic efficiency - that is, the cost of exporting coal is reduced or alternatively, the amount of time that coal vessels sit unproductively in a queue at the Terminal is reduced.

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[140] DBCTPL submission, 4 October 2005, p12.
[141] Ibid.
[142] Rio Tinto Coal submission, 27 May 2005, p2.
[143] Xstrata submission, 22 April 2005, p3.
[144] Ibid, p4.

7.104 As previously noted (at paragraphs 7.16 - 7.21), there are a range of views within the industry as to why the vessel queue reduced (by half) prior to the formal introduction of the QMS. However, the ACCC is of the view that a queue is likely to re-form absent authorisation, since the QMS would not be operating. The ACCC considers it is difficult to predict the exact size the queue would have been, and hence the level of demurrage savings under the QMS.

7.105 However, given the existence of similar conditions, particularly high coking coal prices, to those which lead to a queue of over 50 vessels, and excess demand continuing in the short term, the ACCC considers the queue would increase and potentially to similar levels. As such, the ACCC believes the level of demurrage savings under the QMS is likely to be significant.

7.106 The ACCC considers DBCTPL's estimate of total demurrage savings for 2005 of approximately $350 million appears reasonable, since it was based on a queue size that was actually reached. However, the ACCC considers this estimate may be at the high end of expectations, as the queue is unlikely to have exceeded 50 vessels for the entire period for which authorisation is sought. As such, the ACCC is cautious about rolling this estimate forward over the entire period. Absent authorisation, the ACCC would also expect the size of the queue to fluctuate over time, which has also occurred under the interim authorisation of the QMS. However, irrespective of the exact dollar value of the savings, the ACCC considers that producers would be likely to face higher demurrage costs without the QMS in place.

Reduced stockpiling costs

7.107 DBCTPL submits the QMS:

> …gives producers greater certainty as to when a particular shipment of coal will be loaded and how much coal they will be able to load in a month. Producers can then use this greater certainty to better manage their production and stockpiling of coal. This will allow them to reduce stockpiling costs below what would be the case with the uncertainty of the vessel queue.[145]

ACCC conclusion

7.108 As discussed previously, the ACCC notes that in the current market some producers might decide to produce volumes in excess of their coal loading entitlement and therefore, maintain stock levels, in order to take advantage of any additional entitlement that becomes available.

7.109 The ACCC considers that the QMS is likely to provide greater certainty to producers as to the available capacity at the Terminal, enabling them to more accurately forecast their likely production levels and maintain optimal stockpiling levels. However, producers will make individual commercial decisions about whether to maintain production at higher levels to take advantage of any swaps of coal loading entitlement.

7.110 As such, the ACCC considers the QMS is likely to reduce stockpiling costs for most producers compared to a situation where the queue persists. However, the ACCC does not have enough information to properly assess the size of this benefit.

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[145] DBCTPL supporting submission to the application, 5 April 2005, p30.

Improved reputation and competitiveness of the Terminal

7.111 DBCTPL submits that a long vessel queue at the Terminal has a negative impact on the reputation of the coal producers in the Goonyella coal chain and the Terminal. In this regard, DBCTPL notes there was significant media scrutiny and commentary about the problems of extensive vessel queues at the Terminal at the beginning of the year.[146]

7.112 In addition, DBCTPL submits that without the QMS:

> International coal buyers, faced with uncertainty about how long it will take for their coal to be loaded at the Terminal because of a long vessel queue, may lose confidence in the Terminal's coal producers and be more likely to consider alternative sources of supply, including from other countries.[147]

7.113 Some interested parties support this view. For example, Rio Tinto submits:

> …implementation of the system will help to restore some of DBCT's reputation as a reliable export terminal.[148]

7.114 Xstrata submits that, prior to the introduction of the QMS there was:

> …strong anecdotal evidence in the market place that customers are attempting to avoid sending ships to DBCT wherever possible, instead sending ships to PWCS and other uncongested ports.[149]

7.115 In a confidential submission to the ACCC, an overseas customer advised that it had become increasingly concerned about the performance of the Terminal. It submits that reliability and predictability is a pre-requisite for long term steel-making raw material supplies, and without it, customers will migrate to other sources.

7.116 As discussed previously, Macarthur Coal submits that the QMS limits the flexibility of producers and customers in relation to their shipping requirements. It believes that unless sufficient flexibility is provided (by operating the QMS on a quarterly, rather than monthly, basis), the QMS will not result in full utilisation of the Terminal or enhance the reputation of the Terminal.[150]

ACCC conclusion

7.117 The ACCC notes that, despite receiving initial concerns from overseas customers about potential shipping difficulties created by a monthly scheme, customers support the need for a QMS to address the extensive vessel queue at the Terminal. DBCTPL advises that it and producers have held discussions with customers to address their initial logistics concerns with the QMS.

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[146] DBCTPL supporting submission to the application, 5 April 2005, p30.
[147] Ibid.
[148] Rio Tinto Coal submission, 26 April 2005, p1.
[149] Xstrata Coal submission, 22 April 2005, p3.
[150] Macarthur Coal submission, 7 September 2005, p3.

7.118 Overall, the ACCC considers that increased certainty with regard to coal deliveries and cost savings as a result of reduced vessel queues would appear to be factors that influence the purchasing decisions of overseas buyers. To the extent that the existence of a large vessel queue would discourage customers from purchasing coal from producers in the Goonyella coal chain, the ACCC considers the QMS, through the reduction of any such queue, provides a benefit to the public by maintaining the reputation of the Terminal and Goonyella coal sales.

Other efficiencies and facilitating re-investment in the Bowen Basin coal industry

7.119 DBCTPL submits that the QMS will allow it to operate the Terminal with an efficient working queue. It believes this will underpin the efficiency of the Terminal by ensuring that there are enough vessels to cope with any under-utilisation of coal loading entitlement by producers, while avoiding too many vessels sitting unproductively in a queue for extended periods.[151]

7.120 In addition, DBCTPL submits that the amounts saved in demurrage and stockpiling charges under the QMS are available to be re-invested in the Bowen Basin coal industry, and specifically for investment in expanding the capacity of the Goonyella coal chain.[152] It also claims that the QMS will provide producers greater certainty regarding the volume of coal they can ship and the amount of time it will take from when they produce a tonne of coal to when it will be loaded onto a ship. This added certainty will enable producers to manage production more efficiently.[153]

ACCC conclusion

7.121 The ACCC considers that any efficiency gains as a result of the QMS would be a benefit to the public. The main saving already identified is the demurrage savings arising from a reduction in the vessel queue. The ACCC notes that demurrage savings could flow on to be used by the industry to invest in capacity upgrades to, for example, the load points on the coal chain.

Reduced environmental risk

7.122 The Terminal is situated adjacent to the Great Barrier Reef. DBCTPL considers the Great Barrier Reef has enormous environmental importance to Australia and the rest of the world.[154]

7.123 It is clear that the risk of environmental impact increases as the number of vessels anchored in the port area increases. Given the port's proximity to the Great Barrier Reef, the associated environmental risks could be difficult to manage. DBCTPL claims that efficiently managing the queue to a working length of 10 – 15 vessels reduces such risks.[155]

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[151] DBCTPL supporting submission to the application, 5 April 2005, p31.
[152] DBCTPL supporting submission to the application, 5 April 2005, p30.
[153] Ibid, p31.
[154] DBCTPL supporting submission to the application, 5 April 2005, p31.
[155] Ibid.

ACCC conclusion

7.124 The ACCC considers that reducing the environmental risks associated with a large number of bulk cargo vessels anchored near the Great Barrier Reef Marine Park would be a benefit to the public. To the extent that the QMS reduces this risk, through maintaining the queue at a shorter length, the ACCC considers the QMS is likely to deliver additional environmental benefits.

Balance of public benefit and detriment

7.125 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the QMS is likely to result in a public benefit that will outweigh any public detriment.

7.126 The ACCC is satisfied that the QMS is likely to result in significant public benefit, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where a queue persists. The ACCC recognises there is no way of accurately predicting the level of the queue going forward if the QMS were not in place. However, based on the same level of queue actually reached early on this year, the ACCC considers DBCTPL's estimate of $350 million for 2005 is not unreasonable.

7.127 The ACCC considers the QMS may result in some additional public benefit to the extent that it:

- reduces coal stockpiling costs for producers
- maintains the reputation of the Terminal
- reduces the risk of environmental harm being caused to the Great Barrier Reef, by reducing the number of large cargo vessels being anchored nearby.

7.128 The ACCC considers that any reduction in aggregate exports due to the QMS would result in a public detriment. However, the ACCC is satisfied that the risk of the QMS resulting in a reduction of coal exports is low, particularly due to the introduction of the flexibility measures, including the 90 000 tonne loading buffer and the short notice period for producers engaging in swaps of entitlement.

7.129 Concerns were also raised that there would be a reduction in System Capacity arising from overseas customers sending smaller ships and increasing multi-parcelling under a monthly, rather than quarterly, QMS. The ACCC notes that initial data suggests that the average vessel size has been increasing, rather than decreasing, since the introduction of the QMS. Furthermore, a sub-optimal vessel mix and multi-parcelling may occur irrespective of whether a QMS is operating at the Terminal or not.

7.130 Overall, on balance, the ACCC considers that in all the circumstances, the public benefit is likely to outweigh the public detriment.

Duration of authorisation

7.131 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in light of any changed circumstances. In this instance, the ACCC considers the QMS is a transitional measure to address the current imbalance between demand for coal loading services and the capacity of the Goonyella coal chain, including at the Terminal.

7.132 DBCTPL seeks authorisation for the QMS until 31 December 2008, which it considers to be a reasonable period after the current estimate for increased System Capacity to be operational, allowing time for delays and the need to improve capacity in other parts of the coal chain, such as rail.

7.133 The ACCC notes that during the requested period of authorisation, the QMS will be 'switched off' when System Capacity reaches or exceeds on a sustained monthly basis the aggregate of monthly contract tonnages that producers want to ship through the Terminal. The ACCC is of the view that this trigger mechanism addresses potential concerns about whether excess demand conditions will result in a substantial queue of vessels at the Terminal and therefore, whether the QMS is likely to generate a public benefit.

7.134 Furthermore, the ACCC considers that commercial incentives exist under the QMS for participants along the Goonyella coal chain to maximise coal exports. The Terminal owner, Babcock and Brown, has committed to a scheduled program of investment which is expected to deliver increased Terminal capacity of 65-68 million tonnes per annum at the end of Phase 1 in 2007 and 75-80 million tonnes per annum at the end of Phase 2 in 2008. In the meantime, the ACCC considers the QMS is a transitional measure which aims to limit the demurrage costs associated with excessive queues until these capacity expansion projects are operational.

7.135 As such, the ACCC grants authorisation to the QMS until 31 December 2008. Importantly, the ACCC notes the QMS will only operate during the proposed period of authorisation if the demand for coal loading services exceeds System Capacity.

Reporting

7.136 Prior to the draft determination the ACCC received a submission from the Department of Industry, Tourism and Resources (ITR). ITR believed that should authorisation be granted to the QMS, DBCTPL should provide an annual report to the ACCC which includes information on the volume of coal exports through the Terminal, the nature of ongoing and completed capacity expansion projects and trends in producer consumption of available coal loading entitlement.

7.137 DBCTPL suggested that it would be willing to provide regular reporting to the ACCC on the operation of the QMS during the period of any authorisation and that it would consider the nature of information that could be provided to the ACCC.

7.138 Following the draft determination, DBCTPL proposed to provide an annual report to the ACCC by 21 January, commencing in 2007, which details the following information:

- the volume of coal exported through the Terminal in the preceding calendar year on an annual and monthly basis
- the declared System Capacity of the Terminal in the preceding calendar year on an annual and monthly basis
- the aggregate entitlement allocated to producers in the preceding calendar year on an annual and monthly basis
- the aggregate entitlement consumed by producers in the preceding calendar year on an annual and monthly basis
- the aggregate amount of entitlement not consumed in preceding calendar year on an annual and monthly basis
- the aggregate amount of entitlement swapped or transferred in the preceding calendar year on an annual and monthly basis
- the maximum and minimum length of the vessel queue at the Terminal in each month of the preceding calendar year, including an indication of whether and when the Expert has determined Queue Adjustment System Capacity to increase the length of the queue
- any expansion projects that have occurred at the Terminal in the preceding calendar year or are currently underway and their impact on System Capacity
- where any of the information provided indicates a trend of any sort, comments from DBCTPL on what may be influencing or causing such a trend.[156]

7.139 As part of its annual report, DBCTPL will also provide the following information, recognising that these are not matters within DBCTPL's direct knowledge or control:

- any expansions that have occurred in the Goonyella coal chain in the preceding calendar year and their impact (if any) on the Terminal's System Capacity
- any planned expansions to occur at the Terminal or in the Goonyella coal chain in the year in which the report is provided.[157]

7.140 The ACCC considers the reports to be provided on the operation of the QMS and the expansion activities in the Goonyella coal chain more generally, should introduce additional accountability and address concerns parties may have about the operation of the QMS over time.

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[156] DBCTPL submission, 2 December 2005, pp6, 7.
[157] Ibid, p7.

Variations to the Terminal Regulations

7.141 DBCTPL has made a number of variations to the Terminal Regulations since the applications for authorisation were lodged with the ACCC. In each instance, the ACCC agreed to vary the interim authorisation originally granted to DBCTPL in April 2005 so as to apply to the Terminal Regulations, as amended.

7.142 On 2 December 2005 DBCTPL requested that the ACCC make its final determination based on a revised version of the Terminal Regulations which incorporates some minor amendments to the description of the pre-loading requirements set out in the Schedule to the Terminal Regulations. In response, the ACCC has amended the interim authorisation so as to apply to the revised Terminal Regulations, which will remain in force until the date the ACCC's final determination comes into effect.

7.143 The ACCC notes that any amendments to the Terminal Regulations during the term of this authorisation would not be covered by the authorisation.

8. DETERMINATION

The applications

8.1 On 5 April 2005 Dalrymple Bay Coal terminal Pty Limited (DBCTPL) lodged applications for authorisation A30239, A30240 and A30241 with the Australian Competition and Consumer Commission (the ACCC).

8.2 Application A30239 was made using Form A, Schedule 1, of the *Trade Practices Regulations 1974*. The application was made under subsection 88(1) of the TPA, and sought authorisation to:

- make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA; and
- give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.

8.3 Application A30240 was made using Form B, Schedule 1, of the *Trade Practices Regulations 1974*. The application was made under subsection 88(1) of the TPA, and sought authorisation to:

- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA; and
- give effect to a provision of a contract, arrangement or understanding, a provision of which has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.

8.4 Application A30241 was made using Form D, Schedule 1 of the *Trade Practices Regulations 1974*. The application was made under subsection 88(7) of the TPA, and sought authorisation to:

- engage, in concert with other persons, in conduct that hinders or prevents, or may hinder or prevent, a third person supplying goods or services to, or acquiring goods or services from, a fourth person; and
- engage, in concert with other persons, in conduct that prevents or substantially hinders, or may prevent or substantially hinder, a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

8.5 The applications relate to DBCTPL's queue management system (QMS) to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal (the Terminal) and the capacity of the Goonyella coal chain, including the Terminal.

The public benefit test

8.6 For the reasons outlined in Chapter 7 of this determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

8.7 The ACCC is also satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

8.8 The ACCC therefore **grants** authorisation to applications A30239, A30240 and A30241.

Conduct for which the ACCC grants authorisation

8.9 Authorisation extends to the QMS as set out in the *Dalrymple Bay Coal Terminal, Queue Management System Amendments to Terminal Regulations* (the Terminal Regulations) at Attachment A until 31 December 2008.

8.10 Further, the authorisation is in respect of the QMS as it stands at the time authorisation is granted. Any changes to the QMS during the term of the authorisation would not be covered by the authorisation.

8.11 This determination is made on 15 December 2005.

Interim authorisation

8.12 At the time of lodging the application, DBCTPL requested interim authorisation to commence the implementation of the proposed QMS. The ACCC granted interim authorisation on 29 April 2005.

8.13 DBCTPL, along with coal producers, conducted a review of the operation of the QMS through July to September under the interim authorisation. DBCTPL made three requests to the ACCC to amend the interim authorisation so as to apply to various revisions to the QMS arising from the ongoing review.[158]

8.14 In each instance, the ACCC agreed to vary the interim authorisation so as to apply to the Terminal Regulations, as amended.[159]

8.15 On 2 December 2005 DBCTPL requested that the ACCC make its final determination based on a revised version of the QMS, which incorporates some minor amendments to the description of the Pre-loading Requirements set out in the Schedule to the Terminal Regulations.[160]

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[158] DBCTPL sought variations to the interim authorisation on 24 May, 5 August and 4 October 2005.
[159] The ACCC agreed to vary the interim authorisation so as to apply to amendments to the Terminal Regulations on 25 May 2005, 10 August 2005 and 19 October 2005.
[160] DBCTPL submission, 2 December 2005, p1.

8.16 Accordingly, the ACCC varies interim authorisation to as to apply to the Terminal Regulations, as amended. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

Date authorisation comes into effect

8.17 This determination is made on 15 December 2005. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 6 January 2006. If an application for review is made to the Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review, or
- where the application is withdrawn – on the day on which the application is withdrawn.

Attachment A

Dalrymple Bay Coal Terminal queue management system amendments to Terminal Regulations

Dalrymple Bay Coal Terminal

Queue Management System Amendments to Terminal Regulations

1. Definitions and interpretation

1.1 Definitions

In this document:

ACCC means the Australian Competition and Consumer Commission.

ATA means, in respect of a vessel, the actual (or, where relevant, deemed) time of arrival of the vessel for loading of a relevant cargo or cargoes of Coal at the Terminal, being the time of anchorage of the vessel at Hay Point (or at any other location required by the harbour master for Hay Point) in readiness to load.

BBI means BBI (DBCT) Management Pty Ltd (ACN 097 698 916), and has the same meaning as ***Lessee*** in the Terminal Regulations.

consume or ***consumption*** in respect of Entitlement means the allocation of Entitlement to a vessel, at which time it is deducted from a relevant User's remaining Entitlement available for allocation (subject to further adjustment pursuant to clause 5.3(c)).

Discretionary Buffer means in respect of each User Agreement, in each Month of the period from 1 July 2005 to the end of the Term**,** a maximum buffer by which:

(a) the tonnage of Coal actually loaded from 1 July 2005 to that Month (inclusive) less any tonnage shipped in that period without Entitlement, pursuant to clause 6.2(a)(i);

may exceed

(b) the aggregate Entitlement which has been acquired by the User in that period less any Entitlement accrued in that period -which the User has forfeited or disposed of by way of Swap.

The buffer is 90,000 tonnes for each User Agreement, except that where a User holds more than one User Agreement or related bodies corporate between them hold more than one User Agreement, the aggregate buffer under those User Agreements will be 90,000 tonnes (divided equally between each relevant User Agreement where the Entitlement under those User Agreements is not pooled).

Entitlement means entitlement (expressed as a tonnage) allocated to a User pursuant to clause 5, reduced or increased by any subsequent adjustment, consumption, Swap or forfeiture pursuant to the Queue Management Procedures.

Goonyella Coal Chain means all infrastructure between and including respective rail loading facilities at mines and the ship loading facilities of the Terminal, relating to the Shipping of Coal through the Terminal.

Hay Point means the port of Hay Point (near Mackay), Queensland.

Independent Administrator means Ernst & Young (Brisbane Office), or such other independent professional service firm as the Operator (after consultation with BBI and all Users) from time to time appoints as such.

Independent Expert means BMT Maritime Consultants Pty Ltd (ABN 99 104 767 651) or such other independent professional service firm as the Operator (after consultation with BBI and all Users) appoints as such.

Loading Tonnage, in respect of a vessel or a parcel of Coal on a vessel, is taken to be the maximum nominated tonnage (which includes the master's discretion) until such time as the Operator receives a stowage plan for that vessel or parcel, at which time it will become the tonnage in that stowage plan.

Key Objectives means the key objectives in clause 3.

Month means a calendar month.

Monthly Contract Tonnage in respect of a User for a relevant Month, the Annual Contract Tonnage of that User at that time pursuant to its User Agreement divided by the number of days in the relevant Financial Year, multiplied by the number of days in the relevant Month. (For clarification, the Annual Contract Tonnage under a User Agreement in a relevant Month will be taken to be an annualised amount at that time, even if it is not expressed as such in a User Agreement. For example, if a User Agreement entitles a User to Ship 3 million tonnes of Coal in the period January to June in a Financial Year, the Annual Contract Tonnage during that

period will be taken to be expressed as (approximately) 6 million tonnes per annum for the purposes of this definition.**)**

Notional Entitlement Procedures means the interim amendments to Terminal Regulations which commenced to apply as from 1 October 2004 and were previously intended to continue to apply until 30 June 2005.

Pooling means an arrangement between two Users (or by one User in respect of two or more User Agreements to which it is a party) whereby the aggregate Entitlement held by those Users (or pursuant to those User Agreements) is re-distributed between them, as they determine and notify the Operator from time to time.

Pre-loading Requirements means the pre-loading requirements of the Operator in the Terminal Information Booklet from time to time, the current such requirements being those set out in the Schedule

Queue means, at a relevant time, the vessels at that time anchored at Hay Point (or any other location to which they are consigned by the harbour master of Hay Point before entering Hay Point), and waiting to be loaded at the Terminal.

Queue Management Procedures means the provisions in this document.

Queue Adjustment System Capacity means a tonnage which in respect of a Month is a percentage of actual System Capacity for that Month, and which the Independent Expert determines pursuant to clause 4.2.

Swap means an arrangement between two Users under which one User's Entitlement in respect of one or more Months is agreed to be reduced by a specified tonnage and the other User's Entitlement for that Month or Months is agreed to be increased by a corresponding tonnage (subject to it being effective pursuant to clause 5.3(f)).

System Capacity means, in respect of a relevant Month, the maximum practicable throughput tonnage of the Goonyella Coal Chain for that Month, as predicted by the Independent Expert and notified to Users pursuant to clause 4.1 or (if revised) clause 4.3.

Term means the period commencing on 1 April 2005 and ending on the earliest of:

(a) the delivery of additional throughput capacity at the Terminal by reason of completion of "Phase 1" (as that term has been explained by BBI to Users prior to the commencement of the Term) of the anticipated further expansion of the Terminal;

(b) 31 December 2008; and

(c) the date when System Capacity reaches or exceeds on a sustained Monthly basis the aggregate of Monthly tonnages of Coal which Users wish to ship through the Terminal on a sustained basis (that determination of sustained System Capacity being made by the Independent Expert).

Terminal Regulations means the Terminal Regulations from time to time for the Terminal, and where the context allows means the Terminal Regulations as amended by the Queue Management Procedures.

User means a company (or companies) which is (or are) a party to a User Agreement with BBI, and has the same meaning as ***Customer*** in the Terminal Regulations;

User Agreement means an agreement (including an agreement novated from Ports Corporation of Queensland to BBI) between BBI and a User, whether or not there are other parties to it, allowing the Shipment of Coal through the Terminal.

Working Queue means a Queue which is consistent with both maximising the throughput of Coal through the Terminal and as far as practicable minimising demurrage (the initial target for 30 June 2005 being a Queue in the order of 15 vessels intending to load an aggregate in the order of 1.26 million tonnes).

Terms defined in each User Agreement and in Terminal Regulations have the same meaning in this document (except where they are separately defined in this document).

1.2 Interpretation

(a) In this document:

(i) the provisions in Schedule 3 to each User Agreement in relation to interpretation of that agreement also apply to this document; and

(ii) unless the context otherwise requires, references to clauses refer to clauses in this document.

(b) For the purposes of clause 9.2 of each User Agreement, if the aggregate tonnage of Coal:

(i) for which a User acquires and consumes Entitlement; and

(ii) which that User is also able to ship without Entitlement, pursuant to clause 6.2(a),

in a Financial Year exceeds the Annual Contract Tonnage of that User under its User Agreement, there will be taken to be:

(iii) sufficient available unallocated capacity at the Terminal; and

(iv) no additional expense or unreasonable interference to other Users from Shipping that aggregate tonnage,

with the intent that the User not be precluded by that clause of its User Agreement from being entitled to Ship Coal up to that aggregate amount in that Financial Year.

(c) For the avoidance of doubt, nothing in the Queue Management Procedures affects or derogates from the rights or obligations of BBI or the Operator under the Operations & Maintenance Contract (***OMC***) between them, and in the event of any inconsistency between the terms of the Queue Management Procedures and the OMC, the terms of the OMC will prevail.

2. Queue Management Procedures Apply for the Term

(a) The Queue Management Procedures amend and form part of the Terminal Regulations (by supplementing and, where inconsistent, modifying existing Terminal Regulations) for the Term.

(b) The Notional Entitlement procedures cease to apply on and from 1 April 2005.

(c) The Queue Management Procedures replace the Notional Entitlement Procedures on and from 1 April 2005.

(d) The procedures and requirements of the Queue Management Procedures will be taken to have been in effect on and from 1 April 2005, even though they have not become part of the Terminal Regulations until after that date.

(e) The transitional provisions in clause 14 apply in respect of the transition from the Notional Entitlement Procedures to these Queue Management Procedures.

(f) Amendments to the Queue Management Procedures made in August 2005 will be taken to have applied retrospectively from 1 April 2005 (except where the Operator determines that it is only practical to implement them from the date they are made).

3. Key Objectives

The key objectives of the Queue Management Procedures are to:

(a) ensure a fair, equitable and transparent allocation of System Capacity (and where applicable Queue Adjustment System Capacity) from time to time between Users;

(b) achieve and maintain a Working Queue, so as to minimise deadweight demurrage costs to all Users;

(c) maximise utilisation of System Capacity, hence maximising Coal exports from the Terminal; and

(d) restore and maintain the reputation of the Terminal as a reliable and low demurrage facility.

4. System Capacity

4.1 Periodic determination of System Capacity

(a) The Operator must request the Independent Expert to determine System Capacity for each of the following periods:

(i) 1 April 2005 to 30 June 2005 inclusive;

(ii) each Month of each succeeding calendar quarter which falls (wholly or partly) in the Term;

(b) The Operator must periodically require the Independent Expert to determine System Capacity for each Month of each calendar quarter, and at the same time to provide an indicative forecast of System Capacity for each Month of the 12 monthly period following that calendar quarter, as follows:

Date of Determination: 5 Business Days before the respective dates below	**Period of Determination of System Capacity**	**Period of indicative forecast**
The date 10 Business Days after commencement of Queue Management Procedures	1 April 2005 – 30 June 2005	The 12 month period following the period in column 2
15 May 2005	1 July 2005 – 30 September 2005	The 12 month period following the period in column 2
15 August 2005	1 October 2005 – 31 December 2005	The 12 month period following the period in column 2
15 November 2005	1 January 2006 – 31 March 2006	The 12 month period following the period in column 2
15 February 2006	1 April 2006 – 30 June 2006	The 12 month period following the period in column 2

and so forth throughout the Term, so that the date of each determination in column 1 is the fifteenth of the Month which is two Months before commencement of the corresponding quarterly period in column 2, and the period of each indicative forecast in column 3 is the 12 Month period following the corresponding calendar quarter in column 2.

(c) The Independent Expert must make its assessment of System Capacity following consultation, before the determination needs to be made, with the Operator and such other stakeholders as it considers relevant, and having regard to predictions of all relevant factors which are likely to impinge on System Capacity.

(d) The Operator must notify BBI and each User of each determination of System Capacity by the Independent Expert, within 5 Business Days after the Operator is advised in writing by the Independent Expert of that determination.

4.2 Determination of Queue Adjustment System Capacity, to increase or decrease Queue

(a) The *Queue Adjustment System Capacity* is a notional throughput tonnage which is a percentage (either less than or greater than 100%) of the actual System Capacity for a relevant Month or Months, which, if adopted instead of actual System Capacity for the purpose of determining Entitlements in that Month or Months, is predicted by the Independent Expert to either reduce or increase (as the case requires) the Queue to a Working Queue by the end of that period (assuming that vessels will be ordered at rates consistent with receiving Entitlement on their ATA and so that all available Entitlement will be consumed, or assuming such alternative or additional circumstances as the Independent Expert considers relevant).

(b) If the Operator, acting reasonably, determines at any time that the Queue is significantly larger or smaller than a Working Queue and is not likely to be reduced or increased (as the case requires) to a Working Queue without this clause 4.2 being invoked, the Operator must request the Independent Expert to determine a Queue Adjustment System Capacity for one or more Months. That period must commence:

(i) for the period 1 April 2005 to 30 June 2005 inclusive – as of 1 April 2005; and

(ii) in respect of any period after the period in (i) above:

(A) no earlier than 6 weeks after the date of notification by the Operator of the Queue Adjustment System Capacity if it is less than actual System Capacity (i.e. intended to reduce to Queue); and

(B) no earlier than the first day of the month following the date of notification by the Operator of the Queue Adjustment System Capacity if it is more than actual System Capacity (i.e. intended to increase the Queue).

(c) When the Independent Expert determines the Queue Adjustment System Capacity for a Month or Months, it must notify the Operator of that determination in writing, and the Operator must within 5 Business Days notify BBI and the Users of that Queue Adjustment System Capacity.

(d) Without limiting clause 4.2(a), the Independent Expert may take account of vessels which have consumed Entitlement but whose loading has been delayed because of unavailability of coal, in determining Queue Adjustment System Capacity.

4.3 Determination of revised System Capacity or Queue Adjustment System Capacity, to adjust predictions of System Capacity

(a) If the Operator determines that the Queue is or is likely to become either substantially less or substantially more than a Working Queue for a sustained period because the actual System Capacity is expected to be different from the original forecasts of the Independent Expert, the Operator may request the Independent Expert to re-determine any previously determined System Capacity (and, if relevant, any previously determined Queue Adjustment System Capacity) for a relevant Month or Months, and to re-determine Entitlements for that Month or those Months accordingly.

(b) A determination of revised System Capacity may be undertaken by itself, or in conjunction with a determination or re-determination for the same or other Months of Queue Adjustment System Capacity. (For example, to stabilise the Queue it may be necessary to determine or re-determine a Queue Adjustment System Capacity for one or more Months, followed by a revised determination of System Capacity thereafter.)

(c) A re-determination which reduces System Capacity or Queue Adjustment System Capacity from a tonnage previously determined cannot take effect earlier than 6 weeks after notice of it is given by the Operator to Users.

4.4 Consequences of re-determination

A revised System Capacity or Queue Adjustment System Capacity duly notified to Users will replace the previously determined and notified System Capacity or Queue Adjustment System Capacity previously notified in respect of each relevant Month.

5. Entitlements

5.1 Initial allocation of Entitlements

Each User will be awarded an Entitlement which relates to each Month (or other relevant period) in respect of which System Capacity or Queue Adjustment System Capacity is determined in accordance with clause 4. That Entitlement for a Month will be calculated as follows:

$$E = SC \; x \; \frac{MCT}{AMCT}$$

Where:

E means the Entitlement awarded to the User in respect of the relevant Month (or the initial 3 Month period)

SC means the System Capacity (or, where relevant, Queue Adjustment System Capacity) for the relevant Month (or the initial 3 Month period)

MCT means the Monthly Contract Tonnage of that User for that Month (or the aggregate Monthly Contract Tonnages for all Months in the initial 3 Month period); and

AMCT means the aggregate of the Monthly Contract Tonnages for all Users for that Month (or the initial 3 Month period)

5.2 Revised allocation of Entitlements

(a) If a User has been awarded an Entitlement in respect of a Month (or other relevant period) based on a determination of System Capacity or Queue Adjustment System Capacity for that Month (or other relevant period) and that determination is amended in accordance with clause 4.2 or 4.3, then the Entitlement allocated to that User in respect of that Month (or other relevant period) will be taken to be adjusted accordingly.

(b) If part or all of the Entitlement held by a User for a Month (or other relevant period) has been Swapped by a User and that Entitlement is subsequently revised pursuant to this clause 5.2(a), then, unless the relevant Users agree otherwise (and give the Operator notice appropriately):

(i) if the Entitlement previously held is reduced, the proportion of it which was Swapped will be taken to be reduced accordingly; and

(ii) if the Entitlement previously held is increased, the tonnage which has been Swapped will be unaffected, and the User will be entitled to the balance of the increased Entitlement allocated to it**.**

5.3 Consumption and loss of Entitlement

(a) (**Consumption at ATA if sufficient for entire cargo**)

(i) Entitlement held by a User in respect of a Month (or other relevant period) may be allocated to a vessel on which that User's Coal is to be loaded, if:

(A) the ATA of the vessel occurs in that Month (or - if so requested by the User, in the case of one vessel per Month only on which it is to load Coal, alone or with others - if the ATA of that vessel occurs in the first 5 days of the succeeding Month); and

(B) the amount of Entitlement held by the User for that Month (or other period) and not already consumed, plus any Discretionary Buffer of the User at that time, equals or exceeds the relevant Loading Tonnage of Coal of the User.

(ii) For clarification, if the Entitlement of a User for a Month (or other relevant period) plus any Discretionary Buffer at that time is less than the relevant Loading Tonnage, the vessel must not be loaded unless and until the User acquires sufficient further relevant Entitlement which (together with all or part of the Discretionary Buffer available at that time, should that be needed) equals or exceeds the Loading Tonnage, and is allocated to that vessel.

(b) (**Vessel may be allocated Entitlement for a Month after the Month in which ATA occurs**) If at the ATA of a vessel there is insufficient Entitlement on the part of every relevant User to allocate to it in respect of each intended cargo on that vessel in accordance with above 5.3(a), and that vessel remains in the Queue after the end of that Month, then :

(i) the User or Users which have sufficient Entitlement for their cargo on that vessel in the month in which the ATA occurred (or in the previous month if the words in brackets in clause 5.3(a)(i)(A) apply) will be taken to have consumed that Entitlement in respect of that vessel in respect of that month (irrespective of the time of loading can occur pursuant to clause 5.3(a)(ii)); and

(ii) Entitlement which accrues to the remaining Users in a subsequent Month, if sufficient, may then be allocated to that vessel as contemplated in clause 5.3(a)(ii).

(c) (**Measurement of Entitlement consumed**) The amount of Entitlement of a User consumed in respect of a vessel will be:

(i) initially determined based on the maximum nominated tonnage (which includes the master's discretionary tonnage) of the User's Coal to be loaded;

(ii) subsequently adjusted to accord with the stowage plan received by the Operator in respect of that Coal; and

(iii) subsequently adjusted to accord with the actual tonnage of the User's Coal loaded, at the time of loading.

If an adjustment subsequent to loading causes the User to have loaded more than its Entitlement (plus any unused Discretionary Buffer at that time) for a Month, the amount of that excess will be deducted from its Entitlement for the following Month.

(d) (**Substitution of Entitlement**) A User may request that where a vessel intending to load its Coal has sufficient Entitlement to do so, the amount of that Entitlement may instead be allocated to another vessel (with the amount of Entitlement allocated on the intended tonnage of the latter vessel).

(e) (**Loss of Entitlement not consumed**) Any Entitlement which is not consumed in the Month to which it relates (including any relevant 5 day period pursuant to clause 5.3(a)(i)(A)), will lapse, and may not subsequently be used by any User, except that:

(i) Entitlement is not lost where the User has a vessel (but not more than one vessel) whose ATA occurs in that Month (or the first five days of the next Month where clause 5.3(a)(i)(A) would apply) but there is insufficient unused Entitlement for the entire cargo of the User on that vessel (in which case that unused Entitlement may be allocated to that cargo, with the balance required for that cargo being allocated from Entitlement accruing in the following Month); and

(ii) if any part of the Discretionary Buffer has been utilised as at the end of the immediately previous Month, the shortfall of unconsumed Entitlement in the relevant month will be taken not to have been forfeited (up to a maximum tonnage equal to the amount of the Discretionary Buffer utilised as at the end of that previous Month), for the purposes of future calculations of the Discretionary Buffer.

(f) (**Clarifications**) For clarification:

(i) the fact that a User has Entitlement in respect of a Month does not guarantee that all or any part of that Entitlement will be shipped in that (or any) Month; and

(ii) neither Entitlement in itself nor any Swap undertaken pursuant to clause 5.4 affects the basis of charging TIC, TPC, TR, HCV or HCF

5.4 Swaps and Pooling of Entitlement

(a) (**Swaps**) Users may Swap all or any part of an allocation between themselves on any terms and conditions they mutually agree. No Swap will be effective for the purposes of the Queue Management Procedures unless it is notified in writing by both relevant Users to the Operator by commencement of loading of the relevant vessel. If notice of a Swap is given to the Operator less than 14 days prior to the date for loading of the relevant vessel, as

scheduled at the time of that notice, then the Operator may reschedule the loading of that vessel to the extent (if any) that it considers is necessary to avoid any adverse impact that the Swap may create for other Users. However, any such re-scheduling may not be to a date later than 14 days after the date of that notice if all other requirements to permit loading can be fulfilled by that date.

(b) (**Pooling**) One or more Users may agree to Pooling of their Entitlement for a Month. No Pooling will be effective for the purposes of the Queue Management Procedures unless it is notified in writing by all relevant Users to the Operator at least 14 days prior to the relevant Month.

(c) (**Operator must observe Swaps and Pooling**) The Operator must:

(i) record each Swap and Pooling arrangement duly notified to it in accordance with the Queue Management Procedures; and

(ii) thereafter deal with the relevant Users on the revisions to their Entitlements arising out of the notified Swap or Pooling;

(d) (**Operator to provide facility for Swaps**)

(i) As an alternative to Users negotiating Swaps directly between themselves, if a User so requests, the Operator must offer to all Users such part of the Entitlement of that User as is nominated by it, for sale on behalf of that User, without disclosing the identity of the seller.

(ii) The Operator may do this in any way it chooses (for example by email or by way of placing the offer on a website) and may accept any bid on behalf of and in accordance with instructions from the seller (whose identity may then be disclosed to the buyer or buyers).

(iii) Once an offer of Entitlement has been accepted pursuant to this clause 5.4(d), the buyer(s) must promptly pay the selling price (if any) to the seller, and the Swap(s) will be taken to have occurred.

- (**Operator to provide forum to encourage Swaps**)

The Operator must establish a forum (for example, a meeting in person or by telephone, or an internet portal) to facilitate an exchange of information to encourage Users to Swap Entitlement which they will be unlikely to utilise within 14 days of a relevant ATA, and to do so as early as practicable (preferably at least 2 weeks before the start of the Month in which the relevant Entitlement will accrue).

6. Order of Loading of Vessels

6.1 General rules

(a) Subject to any other provision in the Queue Management Procedures, vessels are to be loaded at the Terminal in the order of their ATA, but subject to:

(i) there being Entitlement at the time of loading for each cargo intended to be loaded on the vessel; and

(ii) all necessary Coal for the vessel being available at the Terminal in time for loading; and

(iii) each of the Pre-loading Requirements for the vessel (other than those the responsibility of the Operator) having been fulfilled to the satisfaction of the Operator for not less than the relevant minimum period prior to commencement of loading, as provided in the Schedule.

(b) A vessel which has the earliest ATA at the time but which cannot fulfil one or more of paragraphs (i), (ii) and (iii) in clause 6.1(a) must cede priority to successive vessels which otherwise fully comply with the conditions in those paragraphs, until such time as all of paragraphs (i), (ii) and (iii) are fulfilled in respect of that vessel, at which time it will become the next vessel entitled to load at the Terminal.

6.2 Exceptions to general rules

(a) If, at a relevant time, no vessel in the Queue fulfils all the requirements of clause 6.1(a), vessels in the Queue will be loaded in the order that the Operator determines it is practicable to load. For clarification:

(i) a vessel loading pursuant to this clause 6.2(a) need not have any Entitlement in respect of that loading and if it has no Entitlement it will not be taken to have thereby consumed, future Entitlement or Discretionary Buffer; and

(ii) if it does have Entitlement (with or without utilising its Discretionary Buffer) that Entitlement will be taken to be consumed, and the tonnage shipped will be relevant for calculating its Discretionary Buffer.

(b) If tidal, weather, industrial, yard conflicts, rail disruptions or other factors are such that loading of vessels out of the order of priority under clause 6.1 or clause 6.2(a) is likely to be more effective in achieving the Key Objectives (including maximising berth utilisation), then the Operator has a discretion to change what would otherwise be the order of priority for loading vessels, provided that:

(i) such exercises of discretion are the exception rather than the norm; and

(ii) the Operator uses reasonable endeavours to consult in advance with affected Users about the exercise of that discretion (recognising that rapid decisions must be made).

7. Independent Administrator

(a) The Independent Administrator will:

(i) determine any appeal by a User in relation to an exercise of a discretion by the Operator under the Queue Management Procedures which materially impacts on that User but only to the extent that this can be done before the actions resulting from the exercise of the discretion are implemented; and

(ii) audit and verify the administration by the Operator of the Queue Management Procedures, and report to the Operator, BBI, the Users and the ACCC in respect of adherence to the Queue Management Procedures for the period ending 30 June 2005, and each 6 monthly period thereafter during the Term.

(b) For clarification, the Independent Administrator does not have power to determine the legal consequences of the exercise of a discretion by the Operator, nor to grant any legal redress to any person.

8. Reporting

The Operator must send BBI and Users a "System Management Report" at least weekly which contains:

(a) (**Entitlement updates**) an update of each User's use of, and current amounts of, Entitlement;

(b) (**performance**) current Terminal performance (including details of performance problems);

(c) (**discretionary loading**) details of any loading out of order pursuant to the Operator's discretion under clause 6.2, including information as to which Users' Coal was loaded, the tonnages involved, and the impact on other Users;

(d) (**relevant information**) berthing prospects, railing prospects and any other information the Operator reasonably considers relevant, with a view to optimising utilisation of the Terminal.

9. Stockpiles

(a) (**No dedicated stockpiles**) For the period of these Queue Management Procedures, Users will forego rights to dedicated stockpiles, to the extent required by the Operator from time to time.

(b) (**No residual stockpiles**) Subject to clause 9(c), Users must ensure that Coal is railed in amounts such that, after Shipment, there will be no residual stockpile of a grade of Coal other than a grade which is frequently shipped through the Terminal by that User. (For example, if a less common grade of Coal is to be shipped, the amount of Coal railed should be less than the anticipated Shipment, with the Shipment being topped up with a more common grade of Coal, to ensure that any residual stockpile comprises the more common grade.)

(c) (**Quality Plans**) Clause 9(b) does not apply to a User which provides a Quality Plan acceptable to the Operator, to promptly dispose of a residual stockpile of the kind referred to in that clause.

(d) (**General principle**) Without limiting the foregoing, Users must in any event take reasonable steps to minimise the quantity of residual stockpiles after loading of each Vessel.

10. Blending

Users required by their sales contracts to provide blended Coal may do so, but:

(a) (**Operator to approve Quality Plan**) Coal will not be blended except in accordance with a Quality Plan approved by the Operator prior to the rail ordering and planning which precedes railing of that Coal;

(b) (**strict blends not preferred**) preference will be given to a Quality Plan in which "strict blending" is not required;

(c) (**no increase in proportions**) no User will have a right to blend in proportions which are greater than those commonly provided at the Terminal prior to 15 February 2004;

(d) (**blending at mine**) any blending of Coal from a single mine must take place at or before railing; and

(e) (**blending before stockpiling**) to the extent practicable, Coal must be blended at or prior to stockpiling at the Terminal, in preference to blending on outloading.

11. Multiple Loading

Users must use reasonable endeavours to cause purchasers of Coal to minimise multiple loading of parcels of Coal on Vessels, where multiple loading would materially reduce System Capacity.

12. Loading in general

(a) (**Single reclaimer**) The Operator may utilise single reclaimer loading during the Term to maximise throughput, even if guaranteed loading rates under Coal sales contracts might not be achieved when that occurs.

(b) (**Master's discretion**) Each User must ensure that a relevant Quality Plan is given to the Operator for a Vessel at least 72 hours prior to commencement of loading, clearly directing how Coal loadable at the master's discretion is to be dealt with.

13. Rail Scheduling

During the Term, all provisions of Terminal Regulations relating to railing will apply to all Users and to all Coal delivered and to be delivered to the Terminal, despite past practice. For clarification, the Operator may require that all scheduling of railing of Coal to the Terminal is controlled by it, and that none is scheduled by the operator of Hay Point Coal Terminal.

14. Transitional

(a) The transitional provisions in this clause 14 apply despite any contrary provision in the Queue Management Procedures.

(b) Any vessel:

(i) in the Queue at 1 April 2005;

(ii) with an ATA occurring before 1 April 2005; and

(iii) with an accrual of "Notional Entitlement" under the Notional Entitlement Procedures for one or more (but not necessarily all) cargoes to be loaded, attributable to the January-March 2005 quarter (ie. that would not have been deducted from Notional Entitlement attributable to the April-June 2005 quarter had the Notional Entitlements Procedures continued),

will be loaded as if it had Entitlement for each User and an ATA determined in accordance with the Queue Management Procedures.

(c) Despite clause 14(b), if a User loading Coal on a vessel referred to in that clause would have been taken to have consumed Notional Entitlement from the April-June 2005 quarter had the Notional Entitlement Procedures continued, then an equivalent amount of Entitlement will be deducted from any new Entitlement which would otherwise be allocated to that User pursuant to clause 14(e) and clause 14(f).

(d) Any vessel in the Queue at 1 April 2005 and with an ATA before 1 April 2005 but which did not have Notional Entitlement under the Notional Entitlement Procedures for any of its intended cargoes:

(i) will become subject to the Queue Management Procedures;

(ii) will be deemed to have an ATA of 1 April;, and

(iii) will only be loaded in the April–June 2005 quarter if Entitlement is allocated in respect of every cargo on it under the Queue Management Procedures.

If more than one vessel falls in this category, their respective times of arrival on 1 April will be determined in accordance with their respective actual ATAs.

(e) Any vessel with an actual (or deemed) ATA on or after 1 April 2005 will be subject solely to the Queue Management Procedures, and will only have Entitlement to the extent that the Queue Management Procedures provide for it to have Entitlement.

(f) The Independent Expert will determine a Queue Adjustment System Capacity for the period 1 April 2005 to 30 June 2005 inclusive, and new Entitlement for that period (ie. Entitlement other than that deemed to be acquired under clause 14(b)) will be determined accordingly, taking into account the Entitlement to be acquired pursuant to clause 14(b).

15. The Operator's Role

The Operator:

(a) (**rail to meet Key Objectives and loading order**) will endeavour to schedule railing to meet the Key Objectives and to facilitate loading in the priority contemplated in clause 6;

(b) (**equity and good faith**) will endeavour to administer the Terminal Regulations (as modified by the Queue Management Procedures) equitably and in good faith, and with a view to achieving the Key Objectives;

(c) (**disputes**) will determine all disputes between Users arising out of the implementation of the Queue Management Procedures (subject to appeal to the Independent Administrator pursuant to clause 7(a)(ii)); and

(d) (**no liability if acting in good faith**) will not be liable to any User or to BBI for the consequences of a decision made in good faith in endeavouring to achieve the Key Objectives or any other general objectives of the Queue Management Procedures.

Schedule
(Pre-loading Requirements)

Activity and Minimum Period prior to commencement of loading	Details of Activity Advice etc

Parcel Nomination – User.
 	
Indicative at 28 days with negotiated changes allowed down to 14 days.
 	
Final at 14 days prior to vessel ETA. Not to be altered.
	Preliminary advice of application for coal handling services.
	
	User advises intended Shipping:
	
	• Maximum nominated tonnage (which includes the Master's discretion)
	• Destination details
	• Product
	• Parcel
	• Handling instructions
	  o Remnant management strategy
	  o Blending / mixing (ratio and mine source)
	  o Stockpile management requirements
	  o Direct load requirements
	• Product availability – updates required at 14, 10 and 7 days prior to berthing

Parcel Nomination – Operator	• Approval of parcel by Operator

Vessel Nomination – User. Completed 14 days prior to vessel ETA including vessel vetting below.	Vessel Nomination – 'naming the vessel' User advises: • Vessel nomination • IMO number • ETA • Tonnage requested to load plus Master's discretion • Discharge port • Shipping agency (if appointed) • Vessel part loading
Vessel Nomination - Operator	• Vet vessel according to Operator's ship vetting procedure • Approval of vessel by Operator

Vessel arrival notification – Vessel Master's first notification of ETA 10 days prior to ETA.	• Departed last Discharge Port • ETA • Ship loading sequence plan • Deballasting requirements • Arrival and departure drafts (stage 2 UKC) • Further arrival notices – ~~14~~,10,7,5,3,2,1 days
Vessel arrival notification - Operator	• Review and approve Vessel information • Establish communications with Master (agent if appointed) • Update vessel status

Berthing Plan – Operator	• Create 14 day indicative berthing plan based on information received • Advise QR of indicative railing requirements • Publish 14 day berthing plan

Parcel Assembly Plan – User 7 days prior to intended berthing	• Final confirmation of coal availability
Parcel Assembly Plan – Operator	• Update berthing plan for input into rail plan • Advise QR of railing requirements • Publish 7 day parcel assembly plan

Authority To Load – User 72 hours prior to berthing	• User(s) authorise berthing and loading of Vessel o Re-confirm maximum and minimum tonnages • Issue instructions for all commercial documentation
Authority To Load - Operator	• Issue pro forma Bill(s) of Lading • Confirm and publish berthing schedule

48 hr Schedule – User Provided 24hrs prior to commencement of 48hr Schedule (not to be altered)	• Confirmation of product availability and readiness to load all trains in 48hr Schedule
48 hr Schedule – Operator	• Create berthing schedule • Advise QR of rail requirements

	• Publish 48hr schedule • Monitor and review performance to schedule

Administration – Shipper's agent	• Provides commercial shipping documentation instructions
Administration – **Operator**	• Operator executes all commercial documentation and dispatches documents as instructed

Report and review - Operator	Review: • Variations from plan • Railing • Stacking • Reclaiming • Throughloading • Vessel loading • Inventory (stockpile and handling) • Berthing / sailing Performance reporting Non – conformances initiated (Users, QR, Vessel Master, cargo, Superintendency company, Draft surveyor and Operator)