Australian Competition & Consumer Commission

Draft Determination

Application for revocation of authorisations A30239-A30241 and substitution by A91060-A91062

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: 20 December 2007

Commissioners: Samuel King Martin Smith Willett

Authorisation no.: A91060 – A91062

Public Register no.: C2007/1782

Summary

The ACCC proposes to grant authorisation to the queue management system at Dalrymple Bay Coal Terminal for **12 months** as a transition period to enable a long-term solution to the vessel queue to be developed and implemented.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application for revocation and substitution

On 26 September 2007, Dalrymple Bay Coal Terminal Pty Ltd (DBCTPL) lodged an application for revocation of authorisations A30239-A30241 and substitution by new authorisations A91060-A91062. DBCTPL also requested interim authorisation.

DBCTPL has sought authorisation to extend the term of their queue management system (QMS) designed to address the imbalance between the demand for coal loading services at Dalrymple Bay Coal Terminal (the Terminal) and the capacity of the Goonyella coal chain. The imbalance between demand and capacity of the coal chain has caused a large queue of vessels to form off Dalrymple Bay.

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.

The ACCC granted interim authorisation to extend the term of the QMS on 17 October 2007.

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.

The ACCC previously granted authorisation to the QMS until 31 December 2008. DBCTPL has sought to extend the term of the QMS, because the Terminal Regulations are due to expire upon completion of Phase One expansion (expected in early 2008).

Public detriment

No significant detriments were raised by interested parties in response to DBCTPL's application to extend the term of the QMS. However, the ACCC is concerned that the operation of the QMS for an extended period may hinder the development of a long-term solution to address contracting issues that exist within the Goonyella coal chain.

The ACCC notes comments in the O'Donnell Review which suggest that even after Phase Two/Three expansions at the Terminal there may be insufficient System Capacity to match coal producer's contracted port tonnages of 85mtpa.

The ACCC is concerned that the longer the QMS is in operation, there may be a greater likelihood that normal market signals will be distorted and that there are reduced incentives to address long-term issues that exist in the Goonyella coal chain.

Public benefit

The ACCC considers that the continued operation of the QMS is likely to result in the following public benefits:

- reducing deadweight demurrage costs
- reducing inefficient stockpiling and associated costs
- improving the reputation of the Australian coal industry, the Goonyella coal chain, and the Terminal
- other efficiencies and facilitating re-investment in the Bowen Basin coal industry and
- reducing the environmental risks associated with a large number of bulk cargo vessels.

Balance of public benefit and detriment

The ACCC is concerned that the current QMS does not address the underlying issues associated with the Goonyella coal chain, and in particular, the propensity for various service providers to enter contracts based on individual capacity without reference to the whole of System Capacity.

The ACCC considers that the longer the QMS is in place the greater the potential for detriments to occur.

However, the ACCC is satisfied that, in the short term, the continued operation of the QMS is likely to result in a net public benefit by reducing deadweight demurrage costs and improving economic efficiency, relative to a situation where an excessive vessel queue persists. The ACCC is also mindful of the benefits associated with reducing environmental risks and improving the reputation of the Australian coal industry.

Based on DBCTPL's estimates, the ACCC considers that without the QMS the queue is likely to be in the vicinity of 60 vessels. However, given the number of vessels currently in the queue and its tendency to fluctuate, the ACCC considers that DBCTPL's estimate of A$273.2 million in demurrage savings is at the higher end, at best.

Nevertheless, the ACCC is satisfied that coal producers would be likely to face higher demurrage costs without the QMS in place and that the resultant demurrage savings constitute a public benefit.

On balance, the ACCC considers the public benefit in the short term 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 is concerned that the current QMS does not address the underlying causes of the vessel queue. The ACCC understands that the DBCT Producer Working Group intends to develop a system that addresses these issues.

In any event, the ACCC is concerned that the QMS has been in place since April 2005 and these issues have still not been addressed. As such, the ACCC proposes to grant authorisation to extend the operation of the QMS for **12 months** as a transition period to enable a long-term solution to the vessel queue to be developed and implemented.

The next steps

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

List of abbreviations

Amended QMS	The only amendment to the existing QMS is to the termination clause
Babcock and Brown	Babcock and Brown Infrastructure – owner of Dalrymple Bay Coal Terminal
BMA	BHP Billiton Mitsubishi Alliance
DBCTPL	Dalrymple Bay Coal Terminal Pty Ltd – operator of the Terminal
DITR	The Australian Government Department of Industry, Tourism & Resources
Existing QMS	The QMS for which authorisation was granted in 2005
Independent Expert	The expert appointed by the DBCTPL Board, currently Twenty-Three Nineteen Pty Ltd who is responsible for periodically declaring System Capacity and the desired length of the operational queue (or 'working queue') at the Terminal.
mtpa	Million tonnes per annum
QRN	QR National
Terminal	Dalrymple Bay Coal Terminal
the Act	*Trade Practices Act 1974*
System Capacity	Capacity of the Goonyella coal chain, including at the Dalrymple Bay Coal Terminal

1. Introduction

Authorisation

1.1 The Australian Competition and Consumer Commission (**the ACCC**) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (**the Act**). A key objective of the Act 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 Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

1.3 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 public consultation process when it receives 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.

1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

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

1.7 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 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 benefit to the public or reduce the public detriment.

1.8 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined in paragraphs 1.4 to 1.7).

The application for revocation and substitution

1.9 On 26 September 2007, Dalrymple Bay Coal Terminal Pty Ltd (**DBCTPL**) lodged an application for revocation of authorisations A30293-A30241 and substitution by new authorisations A91060-A91062 with the ACCC. DBCTPL also sought interim authorisation.

1.10 DBCTPL sought authorisation to extend the term of their queue management system (**QMS**) which is designed to address the imbalance between the demand for coal loading services at Dalrymple Bay Coal Terminal (**the Terminal**) and the capacity of the Goonyella coal chain.

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* (**Terminal Regulations**). The Terminal Regulations operate in conjunction with the existing take-or-pay contracts for coal loading (**User Agreements**) between coal producers and the Terminal owner, Babcock and Brown Infrastructure (**Babcock and Brown**).

1.12 DBCTPL seeks authorisation until the later of:

i) Completion of Phase Two and Phase three of the expansion and

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

but in any event no later than **31 December 2010** when System Capacity expansion is expected to have occurred.

Interim authorisation

1.13 On 17 October 2007, the ACCC granted interim authorisation to the Amended QMS.

1.14 In granting interim authorisation, the ACCC considered the following points:

- there was benefit in providing coal producers with certainty that the QMS would continue to operate beyond early 2008 (the expected completion of Phase One Expansion)
- coal producers are required to provide quarterly demand forecasts for Terminal coal loading services and, without certainty of the operation of the QMS, demand forecasts for the first quarter of 2008 may be disrupted
- without some assurance that the QMS would continue to operate it is possible that the vessel queue could increase substantially causing further deadweight demurrage costs and other associated detriments
- granting interim authorisation would help to maintain the market status quo and reduce the prospect of any further increase in the number of vessels in the queue at Dalrymple Bay, while the ACCC considered the merits of the substantive application
- irrespective of a decision by the ACCC in relation to the current application, the ACCC was mindful of the benefits in providing some certainty that the operation of the QMS could continue beyond the first quarter of 2008 and
- any decision affecting the operation of the QMS would preferably include a transition period to allow industry to prepare for the change in circumstances.

Chronology

1.15 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A91060-A91062

DATE	ACTION
26 September 2007	Application for revocation and substitution lodged with the ACCC, including an application for interim authorisation
5 October 2007	Closing date for submissions from interested parties in relation to the request for interim authorisation
17 October 2007	The ACCC granted interim authorisation to maintain the market status quo while the ACCC considered the merits of the application
26 October 2007	Closing date for submissions from interested parties in relation to the substantive application for authorisation
19-20 November 2007	ACCC meetings with interested parties
20 December 2007	Draft determination issued

2. Background to the application

2.1 This chapter focuses on:

- an overview of DBCTPL, the Terminal and the capacity of the Goonyella coal chain
- the ACCC's 2005 evaluation of the current authorisations A30239-A30241
- current issues with the Goonyella coal chain and
- the recent review of the Goonyella coal chain by Stephen O'Donnell.

2.2 Further background information on the industry participants and the operation of the Goonyella coal chain is provided in Chapter 2 of the ACCC's determination of 15 December 2005 in relation to the existing authorisations (A30239-A30241).

Dalrymple Bay Coal Terminal Pty Ltd

2.3 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.

2.4 The major functions performed by DBCTPL are:[1]

- 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
- maintenance and minor engineering functions.

2.5 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
- Xstrata Coal Queensland Pty Ltd
- BHP Mitsui Coal Pty Ltd

[1] DBCTPL supporting submission to applications A30239-A30241, 5 April 2005, p17

- Burton Coal Pty Ltd (Peabody)
- CAML Resources Pty Ltd
- Bowen Basin Investments Pty Ltd
- ICRA Foxleigh Pty Ltd
- Lake Lindsay Investments Pty Ltd

The Terminal

2.6 The Terminal is located in the Port of Hay Point, 38 kilometres south of Mackay in Queensland. It is leased from the by the Queensland Government by Babcock and Brown[2].

2.7 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.

2.8 The Terminal has a stated throughput capacity of approximately 55.53 million tonnes per annum (**mtpa**) and in 2006-2007 had total throughput of 49.97mt[3].

2.9 The handling of coal through the Terminal is governed by the *Dalrymple Bay Coal Terminal Queue Management System Amendments to Terminal Regulations* (**Terminal Regulations**). Producers agree to abide by the Terminal Regulations as part of their long-term take-or-pay contracts for coal loading (**User Agreements**) with Babcock and Brown.

2.10 Under their User Agreements, coal producers have agreed annual contract tonnages with Babcock and Brown for a varying number of financial years beyond 2007. Coal producers are required to provide Babcock and Brown with quarterly demand forecasts for Terminal coal loading services.

2.11 Table 2.1 illustrates the relationship between contracted tonnages and the actual volumes of coal shipped through the Terminal from 2002/03 to 2006/07.

Table 2.1: Actual coal throughput versus contracted throughput at the Terminal[4]

	2002/03	2003/04	2004/05	2005/06	2006/07
Contract (million tonnes)	45.62	52.82	56.82	59.37	60.42
Actual (million tonnes)	43.06	43.56	50.26	50.33	49.68

[2] The lease has a 50 year term, with an option to extend this by an additional 49 years
[3] DBCTPL submission, 26 September 2007, p13
[4] Information provided by DBCTPL, December 2007

Terminal expansion

2.12 Babcock and Brown, as owner of the Terminal, have developed a Master Plan to increase the capacity of the Terminal from 54 million tonnes per annum (**mtpa**) in 2005 to 85mtpa by the end of 2009.

2.13 The Terminal is currently being expanded from approximately 60mtpa initially to approximately 68mtpa (Phase One expansion) and is expected to be completed in early 2008. Phase Two and Phase Three expansions are expected to increase the capacity of the Terminal to 85mtpa, and are forecast to be completed by the end of 2009.

2.14 Modification, enhancements or new plant and equipment are proposed for all major areas of the Terminal during the 3 phases of expansion.

Capacity of the Goonyella coal chain

2.15 The capacity of the Goonyella coal chain (**System Capacity**) is determined by the following components:

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

2.16 In discussions with the ACCC, a number of interested parties considered that System Capacity is likely to be less than the capacity of any one of the individual components of the coal chain. In other words, the throughput of the Goonyella coal chain, or System Capacity, is likely to be **lower** than:

- the capacity at the Terminal
- the capacity of the rail system or
- the collective capacity of mine load points.

2.17 In November 2007, the Independent Expert released the forecast capacity for the Goonyella coal chain for 2008. The System Capacity forecast for the 2008 calendar year was **54.5 million tonnes**[5].

The current authorisations A30239-A30241

2.18 On 15 December 2005, the ACCC granted authorisation to DBCTPL for the Existing QMS until 31 December 2008.

[5] The Forecast System Capacity for the Goonyella Coal Chain – DBCT Component, Independent Expert – Bruce Martin, November 2007.

2.19 The Existing QMS is expressed to terminate upon completion of Phase One expansion. The ACCC understands that Phase One expansion is expected to be completed in early 2008.

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

2.21 The ACCC stated that it was satisfied that the QMS was likely to result in significant public benefit, particularly by reducing demurrage costs for industry and hence improving economic efficiency relative to a situation where a queue persisted. The ACCC recognised there was no way of accurately predicting the level of the queue going forward if the QMS were not in place. However, the ACCC considered DBCTPL's estimate of $350 million in demurrage savings for 2005 was not unreasonable.

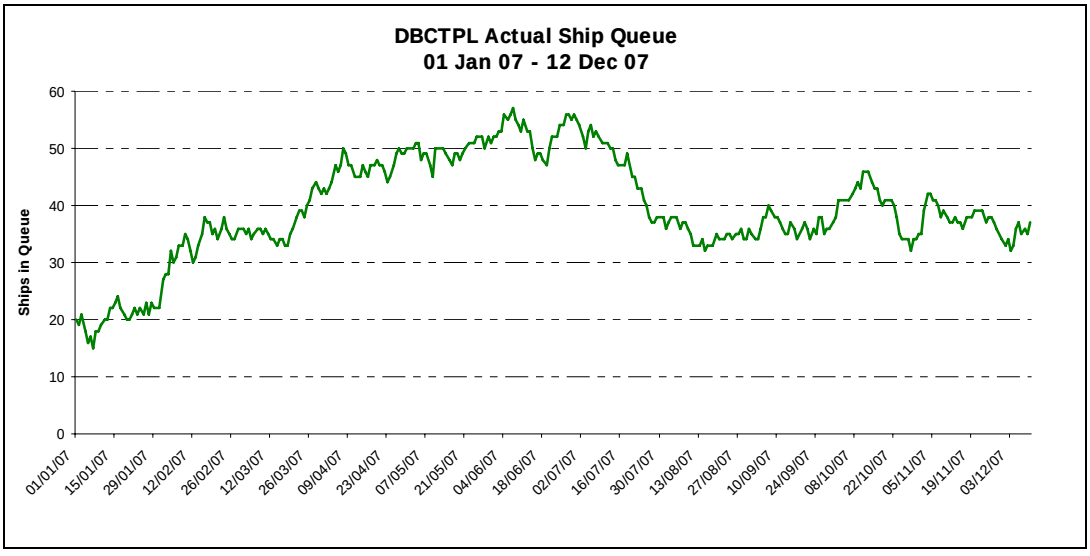
2.22 The ACCC considered that the QMS was a transitional measure which aimed to limit the demurrage costs associated with excessive vessel queues until capacity expansion projects were operational.

Current issues with the Goonyella coal chain

2.23 DBCTPL advise that over the first half of 2007 extraneous coal chain issues (including industrial action at Queensland Rail, cancellations of trains due to rolling stock and crewing issues), and extraneous weather issues (a cyclone) have led to a significant queue of vessels (numbering more than 50 in June and July 2007).

2.24 Figure 2.2 illustrates the number of vessels in the queue at Dalrymple Bay Coal Terminal for the period 1 January 2007 to 12 December 2007.

Figure 2.2: Number of vessels in the queue at DBCT: 1 Jan 07 – 12 Dec 07



2.25 At the time of lodging authorisation, DBCTPL advised that the operation of a Queue Adjustment, as provided for in the Existing QMS, was reducing the vessel queue and was expected to further reduce the vessel queue over the next few months.

2.26 As at 18 December 2007, there were 38 vessels in the queue with Entitlement.

2.27 DBCTPL believes that current vessel queue issues are caused by a combination of:

- System Capacity limitations
- increased demand and prices
- high vessel arrival rates and
- rail issues.

2.28 More specifically, DBCTPL submits that the following extraneous events have occurred during 2007 which have contributed to the vessel queue reforming despite the operation of the QMS.

- rail provider – industrial action (February 2007)
- above rail (locomotive) reliability (December-February, March and June)
- rail crewing issues (December 2006-March 2007)
- short loaded trains, 250 – 300 tonnes per train under target (January-August)
- unscheduled power outage (March)
- weather – excessive rain, block chutes and high wind events (January, February, June)
- implementation of Coal Transport Plan 30, Peak 17 trains per day (CTP30) (February – August)
- Terminal expansion impact (July-August)
- fire on one of two Terminal inloading conveyers (June)
- poor performing vessels – excessive deballast stops (June-July)
- stockyard constraints due to high yard stock levels (August) and
- slow unloading due to sticky coal (January-August).

The Goonyella Coal Chain Capacity Review

2.29 On 29 July 2007, a review of the Goonyella Coal Chain Capacity was completed by Stephen O'Donnell (**the O'Donnell Review**). The review was jointly commissioned by the Queensland Government and the Queensland Resources Council representing those coal producers that make use of the system.

2.30 The broad objectives of the O'Donnell Review were to[6]:

- identify system constraints (both actual and perceived)
- have stakeholders agree on realistic throughput targets against contracted throughput
- recommend a reporting regime to restore customer confidence and
- make recommendations focussed on improving:
    - transparency
    - the capacity of the system to deliver contracted throughput and
    - confidence in capacity forecasts.

2.31 The principal recommendations of the Review were as follows[7]:

- a central coordination role be created to oversee and if necessary coordinate all activities which span the whole of the supply chain
- QRN to immediately commence a process, including negotiating commercial contracts with users, to purchase additional train sets to allow it to meet projected volumes and
- a business improvement program be commenced across the supply chain, starting immediately with Queensland Rail as this is the current bottleneck.

2.32 Further information on the O'Donnell Review is contained in Chapter 6, ACCC evaluation.

[6]Queensland Government, Department of Transport website: http://www.transport.qld.gov.au/Home/Industry/Rail/Goonyella_coal_chain_capacity_review, Goonyella Coal Chain Capacity Review, page 1.
[7]Ibid, page 4-5

3. The applications for authorisation

3.1 DBCTPL seeks re-authorisation of their QMS[8] designed to address the imbalance between the demand for coal loading services at the Terminal and the capacity of the Goonyella coal chain.

3.2 This chapter outlines the following:

- authorisations A30239, A30240, and A30241
- DBCTPL's current application for revocation and substitution and
- the Queue Management System.

Authorisations A30239, A30240, and A30241

3.3 On 15 December 2005, the ACCC granted authorisation to the Existing QMS (authorisations A30239-A30241) until 31 December 2008. The provisions of the Terminal Regulations which set out the Existing QMS contain a termination clause.

3.4 The Existing QMS is expressed to terminate at the earliest of:

- The end of Phase One Expansion
- 31 December 2008 and
- The date when System Capacity reaches or exceeds on a sustained Monthly basis the aggregate of Monthly tonnage 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).

3.5 DBCTPL advise that as Phase One Expansion is expected to be completed in early 2008, and System Capacity will not reach the aggregate of Monthly tonnage before then, the Existing QMS will come to an end on completion of Phase One Expansion (early 2008).

3.6 DBCTPL lodged the current application to extend the term of the QMS.

DBCTPL's application for revocation and substitution

3.7 On 26 September 2007, DBCTPL sought revocation of authorisations A30239, A30240, A30241 and substitution by new authorisations A91060, A91061, A91062. DBCTPL has sought authorisation to extend the term of the QMS.

3.8 DBCTPL do not propose to alter the way in which the QMS currently operates. The only amendment to the Terminal Regulations relates to the expiry of the QMS as follows:

[8] For further information regarding the operation of the QMS, please see the ACCC's final determination for applications A30239-A30241, 15 December 2005.

The [Amended] *QMS will terminate on the later of:*

(i) completion of Phase Two and Phase Three of the Terminal expansion and

(ii) 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).

*but in any event no later than **31 December 2010** when System Capacity expansion is expected to have occurred.*

3.9 DBCTPL has advised that no particular quantitative measure has been attributed to the term 'sustained' in the existing QMS or in the proposed amendment for which DBCTPL is seeking authorisation. The term 'sustained' is intended, to have its ordinary dictionary meaning and describes a situation which has been constant for a period of time and is capable of being maintained for the foreseeable future[9].

3.10 The continued operation of the QMS potentially raises concerns under the anti-competitive conduct provisions of the Act. Consequently, DBCTPL has lodged an application for revocation of existing authorisations and their substitution by new authorisations with the ACCC.

3.11 The ACCC notes that DBCTPL has requested that authorisation apply to DBCTPL, DBCTPL's shareholders, Babcock and Brown and all current and future users of the Terminal. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

The Queue Management System

3.12 The QMS is designed to address the imbalance between the demand for coal loading services at the Terminal and the capacity of the Goonyella coal chain. The key objectives of the QMS are to:

- ensure a fair, equitable and transparent allocation of System Capacity (and where applicable Queue Adjustment System Capacity) from time to time between Users
- achieve and maintain a Working Queue, so as to minimise deadweight demurrage costs to all Users while maximising exports from the Terminal
- maximise utilisation of System Capacity, hence maximising Coal exports from the Terminal and
- restore and maintain the reputation of the Terminal as a reliable and low demurrage facility[10].

3.13 The primary function of the QMS is to assist DBCTPL to reduce the length of the vessel queue and then to maintain the queue at a workable length

[9] DBCTPL submission, 23 October 2007, p1
[10] Clause 3, Terminal Regulations, pp 6-7.

(approximately 15 vessels). 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.

3.14 In this regard, the QMS has the following three key steps:

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

Annual contract tonnages of producers

3.15 Coal producers each have agreed annual contract tonnages under their existing User Agreements with Babcock and Brown for varying number of financial years beyond 2007.

3.16 Coal producers' User Agreements currently attract a take or pay obligation on annual contract tonnage, payable to Babcock and Brown.

Capacity declaration by Independent Expert

3.17 For each month the Independent Expert declares System Capacity and the resulting desired volume of the working queue.

3.18 In determining System Capacity the Independent Expert consults with the participants in the Goonyella coal chain, including Babcock and Brown, coal producers, DBCTPL, QR Network Access and QR National. The process for declaring System Capacity requires the Independent 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 inloading 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 as expansion works and maintenance)[11].

3.19 DBCTPL then notifies the declared System Capacity to Babcock and Brown and each coal producer within 5 business days of receiving the Independent Expert's determination in writing.[12]

3.20 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

[11] DBCTPL submission, Authorisations A30239-A30241, 2 August 2005, p10
[12] Clause 4.1(d) of the Terminal Regulations

the Independent Expert to determine a 'queue adjustment' System Capacity for one or more months.[13]

3.21 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 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 Independent Expert to either reduce or increase the queue to a working queue by the end of that period.[14]

3.22 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 Independent Expert, DBCTPL may request the Independent Expert to re-determine any previously determined System Capacity to re-determine coal loading entitlements for the relevant period.[15]

3.23 If a re-determination reduces System Capacity (or 'queue adjustment' system capacity) it will take effect after DBCTPL provides six weeks notice to producers.[16]

Demand adjustment and allocation of coal loading entitlement

3.24 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.[17]

3.25 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.[18]

3.26 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.[19]

3.27 A producer's monthly coal loading entitlement is calculated as follows:[20]

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

3.28 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

[13] Clause 4.2(b) of the Terminal Regulations
[14] Clause 4.2(a) of the Terminal Regulations
[15] Clause 4.3(a) of the Terminal Regulations
[16] Clause 4.3(c) of the Terminal Regulations
[17] DBCTPL supporting submission to the application, 5 April 2005, p26
[18] Ibid
[19] Ibid
[20] Clause 5.5 of the Terminal Regulations

- 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)

- 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.[21]

3.29 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.[22]

3.30 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.[23]

3.31 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.[24]

3.32 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.[25]

Management of coal loading entitlement

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

3.34 **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.[26]

3.35 **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.[27]

3.36 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.[28]

3.37 DBCTPL must record each swap arrangement and deal with the relevant producers on the revisions to their entitlements arising out of the notified swap.[29]

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[21] Clause 5.3(a) of the Terminal Regulations
[22] Ibid.
[23] Clause 5.3(b) of the Terminal Regulations
[24] Clause 5.3(e) of the Terminal Regulations
[25] Ibid
[26] DBCTPL supporting submission to the application, 5 April 2005, p26
[27] Clause 5.4(a) of the Terminal Regulations
[28] Clause 5.4(a) of the Terminal Regulations
[29] Clause 5.4(c) of the Terminal Regulations

3.38 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.[30]

3.39 **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.[31]

3.40 DBCTPL records each pooling arrangement and deals directly with producers on the revisions to their entitlements arising out of the notified pooling arrangement.[32]

3.41 **New entrants**: New producers (those that enter into a User Agreement with Babcock and Brown) automatically receive coal loading entitlement under the QMS.[33]

3.42 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.[34]

3.43 If the producer is not in a position to use its entitlement, it may trade entitlement with other producers.[35]

3.44 **Order of loading vessels**: Generally, DBCTPL loads vessels in the order of their actual time of arrival at the Terminal, subject to:[36]

- 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.[37]

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30 Clause 5.4(d) of the Terminal Regulations
31 Clause 5.4(b) of the Terminal Regulations
32 Clause 5.4(c) of the Terminal Regulations
33 DBCTPL submission, Authorisations A30239-A30241, 2 August 2005, p14
34 DBCTPL supporting submission to the application, Authorisations A30239-A30241, 5 April 2005, p27
35 DBCTPL submission, Authorisations A30239-A302412, August 2005, p14
36 Clause 6.1(a) of the Terminal Regulations
37 Clause 6.1(b) of the Terminal Regulations

4. Submissions received by the ACCC

4.1 DBCTPL provided a supporting submission with its application and has since provided further information regarding the QMS arrangements in response to queries from interested parties and the ACCC.

4.2 The ACCC sought submissions from around 30 interested parties potentially affected by the application, including Queensland and Australian Government, coal producers, coal buyers, industry groups and rail service providers.

4.3 The ACCC received public submissions from:

- the Australian Government Department of Industry Tourism & Resources and
- the Queensland Government Minister for Transport, Trade, Employment & Industrial Relations, Hon John Mickel MP.

4.4 Both submissions supported re-authorisation of the QMS.

4.5 ACCC staff also met with representatives from Babcock and Brown, DBCTPL, QR National, the Queensland Government Departments of Transport and Infrastructure, Xstrata and the Independent Expert.

4.6 The views of DBCTPL and interested parties are outlined in the ACCC's evaluation of the QMS in Chapter 6 of this draft determination. Copies of public submissions and meeting minutes are available from the ACCC website (http://www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

5. The net public benefit test

5.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person whom the authorisation was granted or another person on behalf of such a person.

5.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1).

5.3 Broadly under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

5.4 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91060

5.5 DBCTPL lodged application for authorisation A91060 under section 88(1) of the Act 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 Act.

5.6 The relevant test is found in section 90(8) of the Act.

5.7 Section 90(8) states that the ACCC shall not authorise 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 should be authorised.

Application A91061

5.8 DBCTPL lodged application for authorisation A91061 under section 88(1) of the Act 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 Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.

5.9 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise 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 A91062

5.10 DBCTPL lodged application A91062 under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply. The relevant test for this application is found in section 90(8) of the Act.

5.11 Section 90(8) states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

Application of the tests

5.12 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

5.13 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.[38]

5.14 However, the Tribunal has previously stated that regarding 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.*[39]

5.15 Consequently, when applying either test, the ACCC can take most, if not all, public detriments 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.

5.16 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 also applicable to section 90(7).

Definition of public benefit and public detriment

5.17 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

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[38] *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

[39] 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.

…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.[40]

5.18 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

…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.[41]

Future with-and-without test

5.19 The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.[42]

5.20 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'.

Length of authorisation

5.21 The ACCC can grant authorisation for a limited period of time.[43]

Conditions

5.22 The Act also allows the ACCC to grant authorisation subject to conditions.[44]

Future and other parties

5.23 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future[45]
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.[46]

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[40] Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.
[41] Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.
[42] Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.
[43] Section 91(1)
[44] Section 91(3)
[45] Section 88(10)
[46] Section 88(6)

6. ACCC evaluation

6.1 The ACCC's evaluation of the QMS is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.

The market

6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.

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

6.4 DBCTPL submits that there are potentially two markets of relevance: the market for coal handling and ship loading services in the northern Bowen Basin, and either the Asian or global market for coal.

6.5 Alternative coal ship loading service providers in the region are:

- Hay Point Coal Terminal – located less than 1km from DBCT and operated by BMA
- Abbot Point Coal Terminal
- Barney Point and RG Tanna coal terminals (operated by the Gladstone Port Authority).

6.6 QR National (**QRN**) is currently the only rail provider in the region. However, there has been recent speculation surrounding the potential entry of Pacific National as an alternative provider of rail haulage services in the Bowen Basin[47]. It appears likely that the operation of the QMS would be a necessary concern for any above rail provider looking to offer services as part of the Goonyella coal chain.

6.7 The ACCC therefore considers that the areas of competition that are most likely to be affected by the operation of the QMS are:

- the global market for coal (or at least the Asian coal market)
- the market for the provision of coal loading services for bulk coal carrying ships in the Bowen Basin and
- the market for the provision of rail haulage services in the Bowen Basin.

[47] See for example 'Qld Rail confident of contracts': The Australian Financial Review, 29 October 2007, page 5

The counterfactual

6.8 As noted in Chapter 5 of this draft 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'.

6.9 In granting authorisation to the Existing QMS until 31 December 2008 the ACCC was of the view that a vessel queue was likely to re-form absent authorisation, since the QMS would not be operating. The ACCC considered that the return of an excessive vessel queue would give rise to substantial demurrage costs.

6.10 On 17 October 2007, the ACCC granted interim authorisation to DBCTPL to extend the operation of the QMS while the ACCC considered the merits of the substantive application. At the time it was considered that the granting of interim authorisation would:

- provide some certainty that the QMS would continue to operate beyond early 2008 (the expected completion of Phase One Expansion)
- help to maintain the market status quo and
- reduce the prospect of any further increase in the number of vessels in the queue at Dalrymple Bay.

6.11 At the time the current application was lodged with the ACCC there was reported to be approximately 33 vessels in the queue at the Terminal resulting in substantial demurrage costs to coal producers.

6.12 The ACCC notes that despite recent investment in expanding the Terminal (Phase One expansion), there will still be an imbalance between demand for coal loading services and the capacity of the Goonyella coal chain. DBCTPL has advised that the estimated capacity of the Terminal after Phase One expansion will be 68 mtpa, whereas the forecast capacity of the coal chain for the 2008 calendar year is only 54.5mt[48].

6.13 DBCTPL advises that unless the QMS is extended, the queue is estimated by producers to lead to substantial demurrage costs of approximately A$290 million for 2008.

6.14 DBCTPL submits that in the absence of the QMS the queue is likely to be capped at 60 vessels as this is the nominal point where the impact of diminishing returns naturally manages the size of the queue[49].

6.15 In light of recent events in early 2007 at the Port of Newcastle when its queue management system was turned off, in the short-term the ACCC considers that without authorisation, and therefore the QMS, a queue of up to 60 vessels would be likely to reform at Dalrymple Bay. As a result, Australian coal producers would incur substantial demurrage costs.

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[48] The Forecast System Capacity for the Goonyella Coal Chain – DBCT Component, Independent Expert – Bruce Martin, November 2007

[49] DBCTPL submission, 26 September 2007, Schedule 2

6.16 Without authorisation, and in the medium-term, the ACCC considers that coal producers would be motivated to address the underlying issues in the Goonyella coal chain, which may cause a reduction in the number of vessels in the queue with resulting demurrage savings.

Public detriment

6.17 As noted at paragraph 6.6 above the ACCC considers the three most relevant areas of competition for assessing the authorisations are:

- the global market for coal (or at least the Asian coal market)
- the market for the provision of coal loading services for bulk coal carrying ships in the northern Bowen Basin and
- the market for the provision of rail haulage services in the Bowen Basin.

6.18 Following discussions with interested parties, the ACCC considers that the potential detriments worth considering from the ongoing operation of the QMS are:

- restriction of aggregate coal exports from the Goonyella coal chain
- impact on shipment sizes
- impact on investment in the Goonyella coal chain
- reduced likelihood of competitive entry in above rail haulage services and
- reduced incentive to develop a long-term solution.

6.19 An assessment of the public detriment generated by the continued operation of the QMS follows.

Potential detriment – impact on aggregate coal exports from the Goonyella coal chain

6.20 Any reduction in the volume of coal moved through the Goonyella coal chain as a result of the QMS would constitute a detriment to the public, in the form of lost coal exports.

6.21 DBCTPL submits that the purpose of extending the term of the QMS is to ensure that the Terminal continues to operate at full System Capacity, while facilitating better management of the vessel queue. This will mean that there should not be any overall reduction in exports as a result of the QMS continuing until 2010.

6.22 DBCTPL suggest that in considering the impact of the QMS on the throughput of the Goonyella coal chain it is important to distinguish between allocation and capacity:

Producers will receive allocations which, in aggregate (especially taking account of 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. This is why DBCTPL proposes to maintain a working queue of approximately 15 vessels. This allows a buffer for under-use of allocation without the coal chain operating at less that maximum capacity.

6.23 DBCTPL has suggested that individual producers may argue that the QMS has the effect of reducing the amount of coal they would export without the QMS:

It may be that some coal producers would be able to ship more coal than their pro-rata reduction without the QMS, and perhaps even their full Annual Contract Tonnage. However, this is not a factor of their competitiveness or efficiency, but simply their ability to push more of their tonnes through the congested Goonyella coal chain. For example, they may have been able to nominate more vessel arrivals sooner than others. However, because of the capacity constraints, that producer's ability to ship more tonnes will be at the expense of another producer who, despite the pro-rata reduction of their forecast demand, may find that the QMS allows them to ship more actual tonnes because of the more equitable and non-discriminatory distribution of capacity shortfalls.[50]

6.24 DBCTPL submits that any reduction in exports for an individual coal producer will not be a public detriment where the overall level of exports remains the same, which is what the QMS is designed to achieve. To date, DBCTPL has not been provided with any evidence of the QMS reducing the overall level of exports.

6.25 The Australian Government Department of Industry Tourism & Resources (DITR) notes that the level of coal throughput at the Terminal is largely the product of the physical capacity, the operational efficiency of the various infrastructure components, and the effectiveness of the interfaces between each network component. DITR submits that the QMS arrangements should retain measures that promote economic efficiency and maximise throughput:

…These include features that enhance the redistribution of unused allocations, including the flexibility provisions and the ability to trade quotas. In addition, given the high cost of any lost potential exports, DITR supports arrangements whereby QMS operating arrangements err on the side of over allocating capacity by maintaining an operating goal of a queue of 15 vessels to help minimise potential under use of terminal capacity.[51]

ACCC's view

6.26 As noted above, one of the key objectives of the QMS is to maximise utilisation of System Capacity, thereby maximising coal exports from the Terminal. The ACCC understands that the QMS operates by allocating System Capacity (as determined by the Independent Expert) to coal producers based upon their contracted tonnages with Babcock and Brown. The QMS also allows for a working queue of ships, and pooling and/or swapping of entitlement by producers. In this regard, the ACCC notes that these measures are aimed at maintaining flexibility in the QMS, and ensuring that all available capacity is utilised.

6.27 Based on the information provided by interested parties, and flexibility measures that mitigate against the potential detriment that might otherwise exist, the ACCC does not consider that the operation of the QMS has led to a reduction in the amount of coal that is exported from the Goonyella coal chain.

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[50] DBCTPL supporting submission, 26 September 2007, p36
[51] DITR submission, November 2007, p6

Potential detriment – impact on shipment sizes

6.28 Previously, interested parties raised concerns that monthly (rather than quarterly) allocations under the QMS may limit the flexibility for producers to schedule vessels in time to utilise any spare capacity. It was suggested that this lack of flexibility may lead to smaller ships being scheduled, increasing the need for multi-parcelling at the Terminal, which would reduce System Capacity.

6.29 The ACCC notes the information provided by DBCTPL in its supporting submission which demonstrates that there have not been significant changes in vessel size, parcel size or the number of parcels per vessel since the introduction of the QMS[52].

Potential detriment – impact on investment in the Goonyella coal chain

6.30 The ACCC considers that any negative impact on investment in the Goonyella coal chain resulting from the operation of the QMS would constitute a detriment.

6.31 In discussions with interested parties, the ACCC was keen to determine whether the QMS had impacted upon investment in the Goonyella coal chain, including investment in above rail capacity. On the whole, interested parties did not consider that the QMS had resulted in a lack of investment, sighting examples of capital works at the Terminal (Phase One and Phase Two/Three expansions), and investments in additional rolling stock. The ACCC understands that further expansions to Terminal capacity, beyond Phase Two/Three to 95-100mtpa, are being considered.

6.32 In discussions with the ACCC, QR National (**QRN**) stated that they had made a number of large investments in rolling stock, sighting their five-year $1.4 billion program that commenced two years ago. QRN has also recently announced $650 million for investment in rolling stock, including 40 locomotives and 1190 wagons to be delivered within the next three years.[53]

6.33 DITR submits that there is considerable investment taking place in increasing the capacity of the Goonyella coal rail system to meet the expected increase in port terminal capacity. They suggest that it does not appear that the QMS has been a serious impediment to investment in expanding system wide infrastructure capacity to meet forecast demand. DITR also note that:

> *… if the ACCC approves an extension of the QMS, then the QMS requirement that the applicant report annually on a range of operational and investment issues including the performance of the supply chain and the level of progress in increasing the capacity of the infrastructure supply chain to cater for future demand for coal, should continue. This will provide the ACCC with further information to monitor the potential impact of the QMS on future infrastructure investment.*[54]

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[52] DBCTPL submission, 26 September 2007, p37-38
[53] QR National website**:** http://www.qrnational.com.au, *Major $650 million investment in locomotives and wagons to support growth of Queensland coal exports*, 11 October 2007
[54] DITR submission, November 2007, p6

ACCC's view

6.34 As already noted, there has been significant investment at the Terminal, with Phase One expansion due to be completed in early 2008 (increasing capacity to 68mtpa), and Phase Two/Three expansions expected to be completed by end 2009 (increasing capacity to 85mtpa). The ACCC understands that further expansions at the Terminal (to 95-100mtpa) are being considered.

6.35 The ACCC considers that QR has made significant investments in new rolling stock and increasing rail capacity while the QMS has been operating. In addition, the ACCC notes that the O'Donnell Review did not identify the QMS as having impacted upon investment in the Goonyella coal chain.

6.36 The ACCC considers that DBCTPL should provide an annual report on the operations of the QMS and investment in the Goonyella coal chain. Further details on DBCTPL's reporting requirements are covered at paragraph 6.104 below.

6.37 The ACCC is satisfied that the QMS has not hindered investment in the Goonyella coal chain.

Potential detriment – reduced incentive to develop a long-term solution

The QMS as a transitional measure

6.38 The ACCC considers that the operation of the QMS for an extended period may reduce incentives for Goonyella coal chain participants to develop a long-term solution to address the imbalance between the demand for coal loading services at the Terminal and the capacity of the Goonyella coal chain, resulting in potential detriment.

6.39 DBCTPL acknowledge that the Amended QMS will not solve the problem of demand outstripping the capacity of the Goonyella coal chain. However, it suggests that:

> *The continuation of the QMS, by removing immediate concerns as to spiralling demurrage costs, will facilitate a significantly improved environment to consider long term investment decisions consistent with the recommendations of the O'Donnell Review.*[55]

6.40 DBCTPL advise that at the time of preparation of the QMS in 2005, it was not envisaged that rail and associated coal chain issues would remain post Phase One expansion to 68mtpa (which was estimated to be completed between July 2007 and end 2007, but is now estimated to be completed between late 2007 and early 2008), let alone Phase Two and Phase Three expansions to an estimated 85mtpa by the end of 2009.

6.41 DBCTPL submits that:

> *It is now evident that an overhaul of the whole Goonyella coal chain (and in particular rail capacity) is required to remedy the coal chain capacity constraints which exist and it is the view of industry that such expansion is unlikely to occur before the end of 2010. It is also evident that, in the interim, it is necessary that the QMS continues beyond the*

[55] DBCTPL submission, 26 September 2007, p 34

completion of Phase One expansion to operate until further expansion is completed and the imbalance between demand and coal chain capacity is remedied.[56]

6.42 In discussions with the ACCC, a number of interested parties recognised that extending the operation of the QMS was a temporary measure to allow parties to address the long-term constraints on the capacity of the Goonyella coal chain.

6.43 DITR submits that:

The implementation of the queue management system should only be seen as a temporary transitional measure pending additional system infrastructure capacity being brought on line. Investment in additional infrastructure capacity (and/or improving the operational efficiency and capacity of existing infrastructure) is the only option to optimise economic outcomes and ensure Australia takes full advantage of the continuing strong growth in the international demand for coal. The QMS should therefore be terminated at the earliest opportunity.[57]

6.44 In discussions with the ACCC, interested parties noted that the current application for authorisation was aimed at avoiding the risk of a period of uncertainty (without the operation of the QMS). The situation in 2007 at the Port of Newcastle (where users voted to discontinue their queue management system) demonstrated what can happen when there is uncertainty and no system in place to manage the vessel queue. Some parties considered that the operation of the QMS was necessary to allow coal chain participants the opportunity to develop a long-term solution.

Port and rail contracts

6.45 The O'Donnell Review (see paragraph 2.29 above) was commissioned to address some of the long-term strategic and operational issues of the Goonyella coal chain. In addition to noting that the export coal market had experienced a sustained increase in demand in excess of the capacity of the supply chain, the O'Donnell Review found that export shipments from DBCT have been below port and rail contracted tonnages over the last twelve months, leading to significant concern on the part of coal producers.

6.46 The O'Donnell Review noted that:

Rail contracts were entered into prior to 2003/04 at a time when cost was the prime requirement of coal producers. These contracts pre-dated the lift in global prices. Contracts were structured to minimise the required amount of rolling stock. However, this had the effect of reducing total system capacity due to lack of flexibility in meeting the typical variations that the supply chain experiences.[58]

6.47 The O'Donnell Review also noted that approximately 30 per cent of QRN's business will be off contract in three years' time. The Review recommended that QRN commence a process, including negotiating commercial contracts with users, to purchase additional train sets to allow it to meet projected volumes.

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[56] Ibid, p5
[57] DITR submission, November 2007, page 7
[58] The Goonyella Coal Chain Capacity Review, Stephen O'Donnell, 29 July 2007, p2-3

6.48 DBCTPL does not believe the QMS has had any negative impact on rail capacity expansion. It suggests that the lag in investment in additional rolling stock compared to investment in terminal expansion has arisen due to a disparity between tonnes contracted with the above rail operator QRN and tonnes contracted with Babcock and Brown as the Terminal lessee.

6.49 DBCTPL submits that:

QRN makes its investment decisions on the basis of contracted capacity through the QR network and maintains that the lag in rail capacity expansion has resulted from a mismatch between the recent port contracting framework and the rail contracting framework which has a historical base.[59]

6.50 DBCTPL suggest that in future this will be addressed through re-alignment of contracts and assumptions between the ports and the rail.

6.51 In discussions with the ACCC, QRN submitted that it is committed to delivery of contractual throughputs for its customers, and has taken steps to bring on additional capacity to cater for market variation. QRN also indicated that they were in the process of negotiating new rail contracts with coal producers that better reflect the operating methodology of the port.

6.52 In the context of a longer term solution, the O'Donnell review commented that:

…an important piece of work that needs to be quickly completed is an assessment of the capacity of the coal supply chain after the completion of the DBCT port expansion to 85mtpa. There is a strong view amongst coal producers that the actual capacity figure may be much lower than 85mtpa when the interface with the rail system is taken into account. This is a potentially serious issue for the producers given that they have contracted port tonnages up to the full 85mtpa.[60]

6.53 Several interested parties have identified the similarities between DBCT and the Port of Newcastle[61] and suggested that a possible solution may include a re-alignment of port and rail contracts, and potentially even contracts that take account of System Capacity rather than just one component of the coal chain.

ACCC view

6.54 The ACCC is keen to ensure that the continued operation of the QMS does not reduce the incentives for coal chain participants to address the issues preventing the Goonyella coal chain from delivering the tonnage amounts contracted by coal producers.

6.55 The ACCC notes that under the QMS coal producers' allocation of System Capacity is proportioned according to their port contracts (User Agreements with Babcock and Brown for coal loading services at the Terminal). System Capacity is determined by the Independent Expert in consultation with all participants in the Goonyella coal chain. This arrangement appears to somewhat displace the commercial agreements that coal producers have with their service providers (both port and rail).

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[59] DBCTPL submission, 26 September 2007, p37
[60] Ibid, p5
[61] Refer to Authorisations A91068-A91070 lodged by Pacific National & Ors on 16 November 2007

6.56 The ACCC considers that service providers have an incentive to enter contracts with coal producers based on their individual capacity, rather than taking into account System Capacity. For example, contracts for the sale of coal loading services are based upon the capacity of the Terminal, rather than the amount of coal that is likely to be delivered to the Terminal via the coal chain. Under these circumstances, service providers appear to have an incentive to contract for volumes greater than the system can deliver, given that System Capacity is likely to be less than any one of the individual components of the coal chain (see paragraph 2.15).

6.57 The ACCC understands that the DBCT Producer Working Group is seeking to develop changes to the QMS Terminal Regulations such that System Capacity is reflected in the individual contracting arrangements of various service providers. The ACCC would encourage these changes to take place as soon as possible.

6.58 The ACCC is concerned that the longer the QMS is in operation, there may be a greater likelihood that normal market signals will be distorted and that there are reduced incentives to address long-term issues that exist in the Goonyella coal chain.

Potential detriment – reduced likelihood of competitive entry in above rail haulage services

6.59 The ACCC considers that the long-term operation of the QMS has the potential to reduce the likelihood of competitive entry by above rail haulage providers, resulting in detriment.

6.60 The ACCC is aware of recent speculation surrounding the entry of Pacific National as an alternative provider of rail haulage services in the Bowen Basin[62]. The ACCC considers that any development of a long-term solution to Goonyella coal chain issues would need to consider the potential competitive entry by additional providers of above rail haulage services.

6.61 The ACCC would welcome a response from interested parties on this issue.

ACCC conclusion on public detriments

6.62 No significant detriments were raised by interested parties in response to DBCTPL's application to extend the term of the QMS. However, the ACCC is concerned that the operation of the QMS for an extended period may hinder the development of a long-term solution to address contracting issues that exist within the Goonyella coal chain.

6.63 The ACCC notes comments in the O'Donnell Review which suggest that even after Phase Two/Three expansions at the Terminal there may be insufficient System Capacity to match coal producer's contracted port tonnages of 85mtpa.

6.64 The ACCC considers that the longer the QMS is in place the greater the potential for detriments to occur.

[62] See for example 'Qld Rail confident of contracts': The Australian Financial Review, 29 October 2007, page 5

Public benefit

6.65 DBCTPL submits that the continued operation of the QMS will deliver public benefits, including:

- reducing deadweight demurrage costs by approximately A$273 million for 2008 – if the vessel queue is reduced to 15 ships
- reducing inefficient coal stockpiling and associated costs by providing greater certainty as to when a particular shipment of coal will be loaded and the volume of coal they will be able to load in a month
- improving the reputation of the Australian coal industry, the Goonyella coal chain, and the Terminal
- facilitating more efficient investment and re-investment in the Bowen Basin coal industry, and specifically funding investment in the capacity of the Goonyella coal chain
- reducing the environmental risks associated with a large number of bulk cargo vessels queuing adjacent to the Great Barrier Reef, with positive flow-on effects for Queensland and Australia in tourism and other industries.

6.66 In considering public benefits – particularly cost savings from increases in productive efficiency from conduct proposed for authorisation – the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

6.67 The ACCC received a limited response from interested parties on the public benefit claims submitted by DBCTPL.

6.68 An assessment of the public benefits claimed by DBCTPL follows.

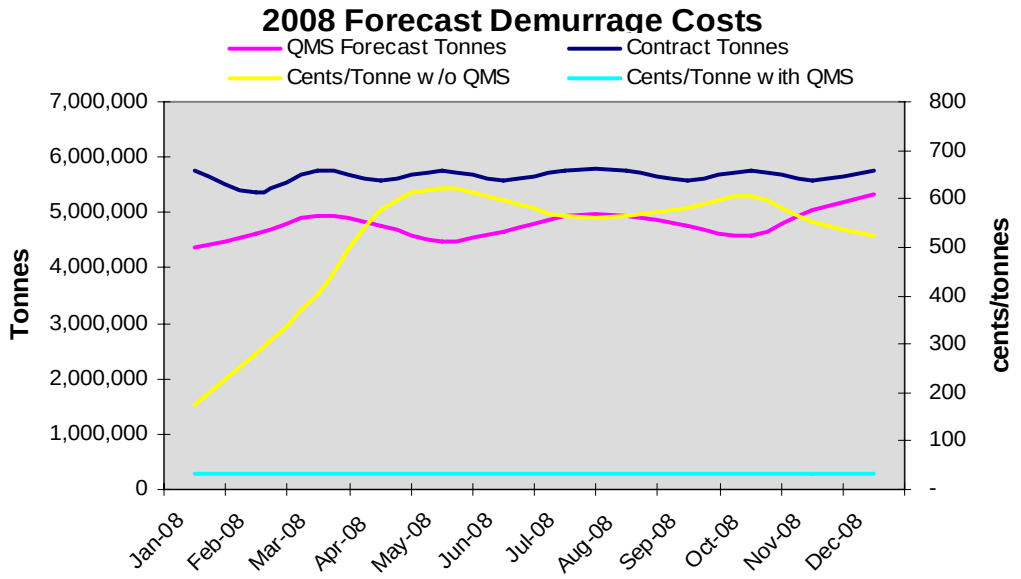
Reducing deadweight demurrage costs

6.69 DBCTPL estimates that the Amended QMS will reduce demurrage costs by approximately A$273.2 million annually. It is estimated that coal producers using the Terminal will pay A$290 million in demurrage charges in 2008 for vessels queued at the Terminal waiting ship loading. If the vessel queue is reduced to 15 vessels under the Amended QMS, demurrage costs are estimated to be approximately A$16.8 million, resulting in a saving of approximately A$273.2 million for 2008.

6.70 The following chart illustrates DBCTPL's estimate of demurrage costs for 2008. These estimates have been calculated based upon a demurrage charge of $17,000 per vessel per day and a nominal vessel size of 87,000 tonnes.[63]

[63] DBCTPL submission, 26 September 2007, Schedule 2, p43

Table 6.2 – DBCTPL 2008 forecast demurrage costs



6.71 DBCTPL submits that in the absence of the Amended QMS, and assuming that a level of approximately 59 vessels will remain queued for the balance of 2008, demurrage costs are estimated to be as follows:

Table 6.3 – estimated demurrage costs in the absence of the QMS[64]

	Cost ($)
Per Tonne	509 cents/tonne
Daily	$793,177
Monthly	$24,191,894
Annual:	$290,302,732

6.72 DBCTPL advises that the estimate of the size of the vessel queue without the Amended QMS in place is based on the difference between the Independent Expert's Forecast of System Capacity and coal producers' Annual Contract Tonnage.

6.73 DBCTPL advises that the size of the vessel queue has been capped at 60 vessels as this is the nominal point where the impact of diminishing returns naturally manages the queue.

6.74 In response to the demurrage savings submitted by DBCTPL, DITR suggest that:

These estimated cost savings may be at the high end given, as acknowledged in the DBCT application, that a range of factors, including system capacity limitations,

[64] Ibid

weather, higher than expected vessel arrival rates etc. all impact on the length of the vessel queues. This is highlighted by the fact that despite the operation of the QMS the vessel queue has remained higher than the desired operating level throughout 2007. The demurrage savings identified by DBCTPL are also based on a best case scenario for the QMS and a worst case scenario for the open market approach. An outcome somewhere in between appears more likely.[65]

6.75 Notwithstanding the reservations on DBCTPL's estimated cost savings, DITR considers that the extension of the QMS is likely to contribute to reductions in vessel queue lengths, waiting times and demurrage costs.

ACCC's view

6.76 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.

6.77 The ACCC considers that DBCTPL's estimate of total demurrage savings for 2008 of approximately A$273.2 million to be at the higher end of likely outcomes, at best.

6.78 The demurrage savings estimated by DBCTPL are based upon there being a stable queue of approximately 15 vessels for 2008. At the time of lodging the applications for authorisation there were 33 vessels in the queue. The Weekly System Management Report issued on 4 December 2007 indicated that there were 34 ships in the queue with entitlement. The ACCC notes that extraneous coal chain issues at the beginning of 2007 (see paragraph 2.23) combined with recent expansion works at the Terminal have contributed to the current size of the vessel queue, while the QMS has been operating. However, even with a steady reduction in the queue over the coming months, the ACCC considers that it could be some time before the queue would be reduced to 15 vessels, and therefore deliver the estimated demurrage savings.

6.79 The ACCC notes the advice from DBCTPL that, without the QMS, the size of the vessel queue would be in the vicinity of 60 ships, as this is the number where the impact of diminishing returns naturally manages the queue. However, absent authorisation, the ACCC would expect the size of the vessel queue to fluctuate over time in the same way as it has with the QMS in place.

6.80 In any event, and 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 and, as such, the resultant demurrage savings constitute a public benefit.

Reducing inefficient coal stockpiling and associated costs

6.81 DBCTPL submits that:

Reducing the vessel queue (or at the very least preventing it from increasing which would occur absent the QMS) will give exporters and buyers of coal greater certainty as to when a particular shipment of coal will be loaded and how much coal they will be

[65] DITR submission, November 2007, p7

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.[66]

6.82 In discussions with the ACCC, QRN noted that the QMS can lead to more even shipping throughout the year and enable increased total throughput and greater discipline to coal chain operations.

ACCC's view

6.83 The ACCC considers that the continued operation of 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.

6.84 However, the ACCC considers that producers will make individual commercial decisions regarding production and stockpiling in order to take advantage of the flexibility measures contained in the QMS. As such, the ACCC considers that the QMS is likely to reduce stockpiling costs for most producers compared to a situation where the queue persists. However, the ACCC notes that it does not have enough information to properly assess the size of this benefit.

Improving the reputation of the Australian coal industry, the Goonyella coal chain, and the Terminal

6.85 DBCTPL submits that the long vessel queue is having a negative impact on the reputation nationally and internationally of the coal producers and the Goonyella coal chain, including the Terminal. DBCTPL suggest that:

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. This would be aggravated without the extension of the term of the QMS, because the queue would persist and increase.[67]

ACCC's view

6.86 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. The ACCC is also aware of ongoing concerns by overseas buyers regarding the length of queues at Australia's coal ports.

6.87 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 continued operation of the QMS, through the reduction of any such queue, provides a benefit to the public by improving the reputation of the Australian coal industry, the Goonyella coal chain, and the Terminal. However, the ACCC considers that plans to increase the capacity of the Goonyella coal chain are more likely to generate improvements in reputation.

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[66] DBCTPL submission, 26 September 2007, p32
[67] Ibid, p33

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

6.88 DBCTPL submits:

> *With a greater ability to predict annual costs and revenue, coal producers are better placed to make long-term plans and decisions, particularly with respect to production and investment. This in turn will allow the producers to operate more efficiently. In particular, the amounts saved in demurrage and stockpiling charges are available to be reinvested in the Bowen Basin coal industry, and specifically funding System Capacity investment.*[68]

6.89 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.

6.90 As already noted, the ACCC considers that investment in the Goonyella coal chain has continued, despite the operation of the QMS. In addition, the ACCC considers that any efficiency gains as a result of the QMS would be a benefit to the public. The ACCC notes that demurrage savings and other efficiencies could be used by the Bowen Basin coal industry to invest in System Capacity.

Reducing the environmental risks associated with a large number of bulk cargo vessels

6.91 The Terminal is situated adjacent to the Great Barrier Reef. DBCTPL notes its enormous environmental importance to Australia and the world, in addition to the flow-on economic benefits for Queensland and Australia in tourism and other industries. DBCTPL submits:

> *While the environmental risk associated with bulk cargo vessels can be managed, efficiently managing the vessel queue to reduce its length to a working queue of approximately 15 vessels is a positive benefit in this unique environment.*[69]

6.92 The ACCC considers that reducing the environmental risks associated with a large number of bulk cargo vessels anchored near the Great Barrier Reef would be a benefit to the public. To the extent that the QMS decreases this risk, by reducing the size of the vessel queue, the ACCC accepts that the QMS is likely to deliver environmental benefits.

ACCC conclusion on public benefits

6.93 The ACCC considers that the continued operation of the QMS is likely to result in the following public benefits:

- reducing deadweight demurrage costs
- reducing inefficient stockpiling and associated costs

[68] DBCTPL submission, 26 September 2007, Schedule 2, p33
[69] Ibid, p34

- improving the reputation of the Australian coal industry, the Goonyella coal chain, and the Terminal
- other efficiencies and facilitating re-investment in the Bowen Basin coal industry and
- reducing the environmental risks associated with a large number of bulk cargo vessels.

Balance of public benefit and detriment

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

6.95 In the context of applying the net public benefit test at section 90(8)[70] of the Act, the Tribunal commented that:

> *…something more than a negligible benefit is required before the power to grant authorisation can be exercised.*[71]

6.96 The ACCC is concerned that the continued operation of the QMS for an extended period may hinder the development of a long-term solution to address contracting issues that exist within the Goonyella coal chain. The ACCC notes comments in the O'Donnell Review which suggest that even after Phase Two/Three expansions at the Terminal there may be insufficient System Capacity to match coal producer's contracted port tonnages of 85mtpa.

6.97 The ACCC is concerned that the current QMS does not address the underlying issues associated with the Goonyella coal chain and, in particular, the propensity for various service providers to enter contracts based on individual capacity without reference to the whole of System Capacity.

6.98 The ACCC considers that the longer the QMS is in place the greater the potential for detriments to occur.

6.99 However, the ACCC is satisfied that, in the short term, the continued operation of the QMS is likely to result in net public benefit by reducing deadweight demurrage costs and improving economic efficiency, relative to a situation where an excessive vessel queue persists. The ACCC is also mindful of the benefits associated with reducing environmental risks and improving the reputation of the Australian coal industry.

6.100 Based on DBCTPL's estimates, the ACCC considers that without the QMS the queue is likely to be in the vicinity of 60 vessels. However, given the number of vessels currently in the queue and its tendency to fluctuate, the ACCC considers that DBCTPL's estimate of A$273.2 million in demurrage savings is at the higher end, at best.

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[70] The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

[71] Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

6.101 Nevertheless, the ACCC is satisfied that coal producers would be likely to face higher demurrage costs without the QMS in place and that the resultant demurrage savings constitute a public benefit.

6.102 On balance, the ACCC considers the public benefit in the short term is likely to outweigh the public detriment.

Reporting

6.103 The Australian Government Department of Industry Tourism & Resources (DITR) has recommended that DBCTPL continue to report annually on operational and investment issues including the performance of the supply chain and the level of progress in increasing the capacity of the infrastructure supply chain to cater for future demand for coal.

6.104 Consistent with authorisations A30239–A30241, DBCTPL provided an annual report to the ACCC in February 2007 which detailed 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 amount of entitlement not consumed in the 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 and
- 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.[72]

6.105 As part of its annual report, DBCTPL also provided 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 and

[72] DBCTPL submission, Authorisations A30239-A30241, 2 December 2005, pp 6-7

- any planned expansions to occur at the Terminal or in the Goonyella coal chain in the year in which the report is provided.[73]

6.106 The ACCC considers that reporting on the information outlined above helps to ensure transparency and accountability for the operation of the QMS. The ACCC requests that DBCTPL provide a similar report for 2007, by the end of February 2008.

Length of authorisation

6.107 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.

6.108 In this instance, DBCTPL seeks authorisation until the later of:

i) Completion of Phase Two and Phase three of the expansion and

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

but in any event no later than **31 December 2010** when System Capacity expansion is expected to have occurred.

6.109 DITR believes that the QMS should be extended until the **earlier** of either the date that it is determined that System Capacity exceeds system demand on a sustainable basis or 31 December 2010.

6.110 The ACCC is concerned that the current QMS does not address the underlying causes of the vessel queue. The ACCC understands that the DBCT Producer Working Group intends to develop a system that addresses these issues.

6.111 In any event, the ACCC is concerned that the QMS has been in place since April 2005 and these issues have still not been addressed. As such, the ACCC proposes to grant authorisation to extend the operation of the QMS for **12 months** as a transition period to enable a long-term solution to the vessel queue to be developed and implemented.

[73] Ibid, p7

7. Draft determination

The application

7.1 On 26 September 2007, Dalrymple Bay Coal Terminal Pty Ltd (**DBCTPL**) lodged an application for revocation of authorisations A30239, A30240, and A30241 and their substitution by new authorisations A91060, A91061, and A91062 with the Australian Competition and Consumer Commission (**the ACCC**).

7.2 The application for revocation and substitution were made under section 91C of the Act using Form FC Schedule 1, of the Trade Practices Regulations 1974. The application was 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 Act (A91060)
- 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 Act (A91061) and
- to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply (A91062).

7.3 The applications relate to DBCTPL's 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.

The net public benefit test

7.4 For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit in the short term that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

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

7.6 The ACCC therefore **proposes to grant** authorisation to applications A91060-A91062 until 31 December 2008.

Conduct for which the ACCC proposes to grant authorisation

7.7 The ACCC proposes to grant authorisation to DBCTPL to operate their QMS and Terminal Regulations until **31 December 2008**.

7.8 Further, the proposed authorisation is in respect of the QMS and the Terminal Regulations as they stand at the time authorisation is granted. Any changes to the QMS and the Terminal Regulations during the term of the proposed authorisation would not be covered by the proposed authorisation.

7.9 This draft determination is made on 20 December 2007.

Interim authorisation

7.10 At the time of lodging the application, DBCTPL requested interim authorisation for the Amended QMS. The ACCC granted interim authorisation on 17 October 2007.

7.11 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

7.12 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.