



Australian
Competition &
Consumer
Commission

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: 29 February 2008

Commissioners: Samuel
Sylvan
King
Martin

Authorisation no.: A91060 –
A91062

Public Register no.: C2007/1782

Summary

The ACCC has decided to grant authorisation to a queue management system at Dalrymple Bay Coal Terminal until **31 December 2008** as a transition period to enable a long-term solution to excessive vessel queues 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 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 applications 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 an 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 the coast at 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

The ACCC considers that the continued operation of the QMS has the potential to result in the following detriments:

- impact upon investment in the Goonyella coal chain
- reduced incentive to develop a long-term solution and
- reduced likelihood of competitive entry in above rail haulage services.

In the short term however, the ACCC is satisfied that the operation of the QMS will provide the Goonyella participants with the opportunity to focus on the development of a long-term solution to contracting and capacity issues in the 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
- reducing environmental risks associated with a large number of bulk cargo vessels and
- other efficiencies and facilitating reinvestment in the Bowen Basin coal industry.

Balance of public benefit and detriment

The ACCC considers that the continued operation of the QMS, in the long-term, has the potential to impact upon investment, delay competitive entry in above rail haulage services, and reduce incentives to develop a long-term solution to contracting and capacity issues in the Goonyella coal chain.

The ACCC has significant doubts as to whether the current QMS is likely to result in a net public benefit beyond December 2008. The ACCC considers that, without evidence that a long-term solution is being developed, the continued operation of the QMS has the potential to result in significant public detriment in the form of insufficient investment and substantial losses in export revenues.

In the short term, the ACCC is satisfied that 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 from large vessel queues, and providing the opportunity for the Goonyella coal chain participants to develop a long-term solution.

On balance, and in the short term only, the ACCC considers the public benefits are likely to outweigh the public detriments.

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 QMS has been in place since April 2005 as a *transitional measure* and the underlying issues with the Goonyella coal chain remain. As such, the ACCC grants authorisation to extend the operation of the QMS until **31 December 2008** as a transition period to enable a long-term solution to the vessel queue to be developed and implemented.

Developing a long-term solution

The ACCC considers that proposed solutions to queuing problems have, until now, focused on minimising demurrage costs while capacity expansions come on line. The ACCC has always considered that queue management systems are appropriate as short-term transitional measures only.

The ACCC has become increasingly concerned that the underlying coal chain issues are not being addressed and that capacity expansions alone will not solve the problem.

There are a number of factors that appear to be contributing to coal chain issues including, service providers contracting based on their individual capacities without reference to the coal chain as a whole, and insufficient commercial drivers to provide the required capacity to maximise supply chain throughput.

The ACCC notes that some progress has been made towards implementing the recommendations in the O'Donnell Review, including, the commencement of a business improvement program across the supply chain, the procurement of locomotives, the appointment of people to coordination roles, and a rail contract renewal process.

Going forward, the ACCC considers that the contractual framework that underpins the functions of the Goonyella coal chain needs to better reflect the operation realities (i.e. the capacity of each element in the coal chain is reliant upon the others) and provide sufficient certainty to underwrite necessary investment.

Interim authorisation

The ACCC granted interim authorisation on 17 October 2007.

Interim authorisation will remain in place until the date the ACCC's determination comes into effect.

1. INTRODUCTION.....	1
AUTHORISATION	1
THE APPLICATION FOR REVOCATION AND SUBSTITUTION	1
INTERIM AUTHORISATION	2
DRAFT DETERMINATION	3
CHRONOLOGY	3
2. BACKGROUND TO THE APPLICATION	4
3. THE APPLICATIONS FOR AUTHORISATION.....	10
<i>Management of coal loading entitlement.....</i>	<i>14</i>
4. SUBMISSIONS RECEIVED BY THE ACCC	16
PRIOR TO THE DRAFT DETERMINATION	16
FOLLOWING THE DRAFT DETERMINATION	16
5. THE NET PUBLIC BENEFIT TEST	17
6. ACCC EVALUATION	20
THE MARKET.....	20
THE COUNTERFACTUAL.....	21
PUBLIC DETRIMENT.....	22
Potential detriment – restriction of aggregate coal exports from the Goonyella coal chain	22
Potential detriment – reduced likelihood of competitive entry in above rail haulage services.....	23
Potential detriment – impact upon investment in the Goonyella coal chain.....	24
Potential detriment – reduced incentive to develop a long-term solution	26
ACCC conclusion on public detriments.....	29
PUBLIC BENEFIT.....	30
Reducing deadweight demurrage costs.....	30
Reducing inefficient coal stockpiling and associated costs	32
Improving the reputation of the Goonyella coal chain, and the Terminal	33
Reducing the environmental risks associated with a large number of bulk cargo vessels.....	34
Other efficiencies and facilitating reinvestment in the Bowen Basin coal industry	34
ACCC conclusion on public benefits	34
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	35
LENGTH OF AUTHORISATION.....	37
VARIATIONS TO THE TERMINAL REGULATIONS.....	37
7. DETERMINATION.....	38
THE APPLICATION	38
THE NET PUBLIC BENEFIT TEST.....	38
CONDUCT FOR WHICH THE ACCC GRANTS AUTHORISATION.....	38

INTERIM AUTHORISATION	39
DATE AUTHORISATION COMES INTO EFFECT	39

List of abbreviations

Amended QMS	The only amendment to the existing QMS is to the termination clause
Babcock and Brown	BBI (DBCT) Management Pty Ltd – owner of Dalrymple Bay Coal Terminal
BMA	BHP Billiton Mitsubishi Alliance
DBCTPL	Dalrymple Bay Coal Terminal Pty Ltd – operator of the Terminal
DITR	former Australian Government Department of Industry, Tourism & Resources, now the Australian Government Department of Resources, Energy and Tourism
Entitlement	The tonnage amount allocated to a User under the QMS
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	<i>Trade Practices Act 1974</i>
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 its 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:
- a. completion of Phase Two and Phase Three of the expansion and
 - b. 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.

Draft determination

1.15 On 20 December 2007 the ACCC issued a draft determination proposing to grant authorisation to the QMS for a transitional period of 12 months.

Chronology

1.16 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
25 January 2008	Closing date for submissions from interested parties in relation to the draft determination
29 February 2008	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 Brown¹. 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.

2.4 The major functions performed by DBCTPL are:²

- 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 The operations and maintenance contract is effective until March 2009, with the capacity for a further extension until 2014. DBCTPL supporting submission, 26 September 2007, p17

² 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 Queensland Government by Babcock and Brown³.
- 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 49.97mt⁴.
- 2.9 The handling of coal through the Terminal is governed by the *Dalrymple Bay Coal Terminal Queue Management System Amendments to Terminal*. Producers agree to abide by the Terminal Regulations as part of their long-term take-or-pay contracts for coal loading 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. 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 Terminal⁵

	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

³ The lease has a 50 year term, with an option to extend this by an additional 49 years

⁴ DBCTPL submission, 26 September 2007, p13

⁵ Information provided by DBCTPL, December 2007

Terminal expansion

- 2.12 Babcock and Brown, as owner of the Terminal, has developed a Master Plan to increase the capacity of the Terminal from 54mtpa in 2005 to 85mtpa by the end of 2008.
- 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 2008.
- 2.14 Modification, enhancements or new plant and equipment are proposed for all major areas of the Terminal during the three 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**⁶.

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.

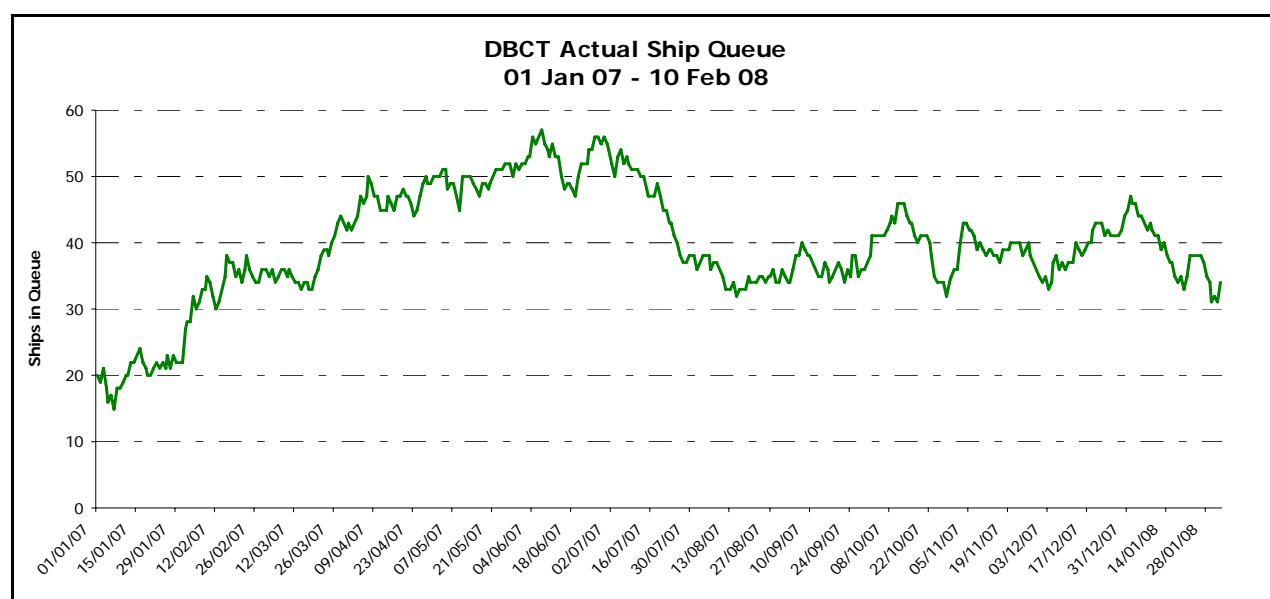
⁶ The Forecast System Capacity for the Goonyella Coal Chain – DBCT Component, Independent Expert – Bruce Martin, November 2007.

- 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 At various times during 2007 there has been a significant queue of vessels at the port (numbering more than 50 in June and July 2007). The average size of the queue for 2007 was 38 vessels.
- 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 10 February 2008.

Figure 2.2: Number of vessels in the queue at DBCT: 1 Jan 07 – 10 Feb 08



- 2.25 At the time of lodging their application for 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 19 February 2008, there were 37 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 The Goonyella Coal Chain Capacity Review, prepared by Stephen O'Donnell, **(the O'Donnell Review)** was jointly commissioned by the Queensland Government and the Queensland Resources Council representing those coal producers that make use of the system. The first report was completed on 29 July 2007.
- 2.30 The broad objectives of the O'Donnell Review were to⁷:
- 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 O'Donnell Review were as follows⁸:
- 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 On 14 January 2008, the second and final report in the O'Donnell Review was released. The second report considers longer term planning issues with a focus on maximising the effectiveness of the coal chain from mine to port. The report recommends the appointment of a planning coordinator and more cooperation between industry and government.
- 2.33 In January 2008, Ross Dunning (former Central Queensland Ports Authority and Port of Brisbane Corporation Chairman) was appointed as the central coordinator for the Goonyella coal chain.
- 2.34 Further information on the O'Donnell Review is contained in Chapter 6, ACCC evaluation.

⁷Queensland 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.

⁸Ibid, page 4-5

3. The applications for authorisation

3.1 DBCTPL seeks re-authorisation of their QMS⁹ 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 advises 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 does 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:

⁹ 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 future¹⁰.
- 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 facility¹¹.

¹⁰ DBCTPL submission, 23 October 2007, p1

¹¹ Clause 3, Terminal Regulations, pp 6-7.

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 (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 QRN. 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)¹².

3.19 DBCTPL then notifies the declared System Capacity to Babcock and Brown and each coal producer within five business days of receiving the Independent Expert's determination in writing.¹³

¹² DBCTPL submission, Authorisations A30239-A30241, 2 August 2005, p10

¹³ Clause 4.1(d) of the Terminal Regulations

- 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 the Independent Expert to determine a ‘Queue Adjustment’ System Capacity for one or more months.¹⁴
- 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.¹⁵
- 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.¹⁶
- 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.¹⁷

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.¹⁸
- 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.¹⁹
- 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.²⁰
- 3.27 A producer’s monthly coal loading entitlement is calculated as follows:²¹

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

- 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:

¹⁴ Clause 4.2(b) of the Terminal Regulations

¹⁵ Clause 4.2(a) of the Terminal Regulations

¹⁶ Clause 4.3(a) of the Terminal Regulations

¹⁷ Clause 4.3(c) of the Terminal Regulations

¹⁸ DBCTPL supporting submission to the application, 5 April 2005, p26

¹⁹ Ibid

²⁰ Ibid

²¹ Clause 5.5 of the Terminal Regulations

- the actual time of arrival of the vessel occurs in that month
 - the actual time of arrival of the vessel occurs in the first five days of the succeeding month (allowed to request one vessel per month)
 - 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.²²
- 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.²³
- 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.²⁴
- 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.²⁵
- 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.²⁶

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.²⁷
- 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.²⁸
- 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.²⁹

²² Clause 5.3(a) of the Terminal Regulations

²³ Ibid.

²⁴ Clause 5.3(b) of the Terminal Regulations

²⁵ Clause 5.3(e) of the Terminal Regulations

²⁶ Ibid

²⁷ DBCTPL supporting submission to the application, 5 April 2005, p26

²⁸ Clause 5.4(a) of the Terminal Regulations

²⁹ Clause 5.4(a) of the Terminal Regulations

- 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.³⁰
- 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.³¹
- 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.³²
- 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.³³
- 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.³⁴
- 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.³⁵
- 3.43 If the producer is not in a position to use its entitlement, it may trade entitlement with other producers.³⁶
- 3.44 **Order of loading vessels:** Generally, DBCTPL loads vessels in the order of their actual time of arrival at the Terminal, subject to:³⁷
- 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.³⁸

³⁰ Clause 5.4(c) of the Terminal Regulations

³¹ Clause 5.4(d) of the Terminal Regulations

³² Clause 5.4(b) of the Terminal Regulations

³³ Clause 5.4(c) of the Terminal Regulations

³⁴ DBCTPL submission, Authorisations A30239-A30241, 2 August 2005, p14

³⁵ DBCTPL supporting submission to the application, Authorisations A30239-A30241, 5 April 2005, p27

³⁶ DBCTPL submission, Authorisations A30239-A302412, August 2005, p14

³⁷ Clause 6.1(a) of the Terminal Regulations

³⁸ Clause 6.1(b) of the Terminal Regulations

4. Submissions received by the ACCC

Prior to the draft determination

- 4.1 DBCTPL provided a supporting submission with its application for revocation and substitution.
- 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.

Following the draft determination

- 4.4 On 20 December 2007 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation to the QMS for a transitional period of 12 months.
- 4.5 A conference was not requested in relation to the draft determination.
- 4.6 The ACCC received one public submission in response to the draft determination from Pacific National Pty Ltd.
- 4.7 The views of interested parties are outlined in the ACCC's evaluation of the QMS in Chapter 6 of this determination. Copies of public submissions 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.³⁹
- 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.*⁴⁰
- 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:

³⁹ *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.

⁴⁰ *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.⁴¹

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.⁴²

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.⁴³

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.⁴⁴

Conditions

5.22 The Act also allows the ACCC to grant authorisation subject to conditions.⁴⁵

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 future⁴⁶
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁴⁷

⁴¹ 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.

⁴² Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁴³ 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.

⁴⁴ Section 91(1)

⁴⁵ Section 91(3)

⁴⁶ Section 88(10)

⁴⁷ 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, Pacific National has advised that it is actively seeking to enter the coal rail haulage market in Queensland and has had commercial discussions with multiple coal producers⁴⁸. The ACCC considers that the operation of the QMS is a necessary consideration 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 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.

⁴⁸ Pacific National submission, 25 January 2008, p2

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. As at 19 February 2008 there were 37 vessels in the queue with Entitlement.
- 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 68mtpa, whereas the forecast capacity of the coal chain for the 2008 calendar year is only 54.5mt⁴⁹.
- 6.13 DBCTPL submits 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 In the absence of the QMS, DBCTPL suggests that 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 queue⁵⁰.
- 6.15 The ACCC notes that when the capacity balancing system at the Port of Newcastle was turned off in early 2007 there was a notable increase in the vessel queue there. In the short-term the ACCC considers that without authorisation, and therefore the QMS, an increased queue would be likely to reform at Dalrymple Bay and as a result, Australian coal producers would incur increased demurrage costs.

⁴⁹ The Forecast System Capacity for the Goonyella Coal Chain – DBCT Component, Independent Expert – Bruce Martin, November 2007

⁵⁰ 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 6.7 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 has identified the following detriments from the continued operation of the QMS:

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

6.19 An assessment of these potential public detriments follows.

Potential detriment – restriction of 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 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.

6.23 The Australian Government Department of Industry Tourism & Resources (**DITR**) noted that the level of coal throughput at the Terminal was 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.

6.24 DITR submitted 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 the 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 conclusion

6.25 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 on 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.

6.26 In the short term, based on the information provided by interested parties and the flexibility measures that mitigate against the potential detriment that might otherwise exist, the ACCC is satisfied that the operation of the QMS is unlikely to lead to a reduction in the amount of coal that is exported from the Goonyella coal chain.

6.27 In the longer term the ACCC considers that there is the real potential for export volumes to be significantly affected by insufficient capacity expansions. This issue is discussed further at paragraphs 6.43-6.49 below.

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

ACCC's view in the draft determination

6.28 The ACCC considered that the continued operation of the QMS may have the potential to reduce the likelihood of competitive entry by above rail haulage providers. This issue was particularly relevant in light of speculation surrounding the entry of Pacific National as an alternative provider of rail services in the Bowen Basin⁵².

Issues arising from the draft determination

6.29 In response to the draft determination, Pacific National advised that it is actively seeking to enter the coal haulage market in Queensland and has had commercial discussions with multiple coal producers⁵³.

6.30 Pacific National submits that the QMS, whilst not preventing entry, does make entry more challenging for a new above rail operator, for the following reasons:

⁵¹ DITR submission, November 2007, p6

⁵² See for example, 'Qld Rail confident of contracts': The Australian Financial Review, 29 October 2007, p5

⁵³ Pacific National submission, 25 January 2008, p2

- the fact that port capacity is rationed creates uncertainty around the level of actual versus contracted tonnes that the new entrant will haul and
- the fact that in the early years [of a new entrant] contracted tonnes will be greater than actual tonnes hauled, meaning that entry is more expensive as there will be assets that have to be acquired (due to the indivisibility of asset acquisition) that will not be fully utilised whilst a queuing system is in operation.

6.31 Pacific National submits that any further extension of the current QMS beyond the next 12 months will have an increasing and significant impact upon the above rail haulage market as contracted rail haulage tonnages become less relevant the longer a port only capacity system is in place⁵⁴.

6.32 With regard to rail haulage contracts, the O'Donnell Review noted that:

In the situation where the export capacity is constrained, individual rail contracts will have little relevance other than the rate to be charged. The volume railed will be set by the QMS and there will always be fertile ground to argue who is actually to blame for the shortfall in export volumes.

ACCC's conclusion

6.33 The ACCC understands that significant infrastructure costs (e.g. locomotives, wagons, operating yards, maintenance and fuelling facilities) create high barriers to entry in the provision of above rail haulage services. These barriers become higher if there is uncertainty around the amount of return (from hauled tonnages) that new entrants can expect to receive on their assets (many of which are depreciated over long periods of time).

6.34 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, by contributing to uncertainty over tonnage volumes contained in rail haulage contracts. This has the potential to stall new entry, resulting in anti-competitive detriment.

6.35 The ACCC considers that the development of a long-term solution to Goonyella coal chain issues needs to consider the competitive entry of additional providers of above rail haulage services to the Bowen Basin. A solution that offers long-term certainty over the commercial operations of the coal chain is more likely to give new entrants the opportunity to determine whether it is possible to recover the costs associated with competitive entry.

Potential detriment – impact upon investment in the Goonyella coal chain

Submissions prior to the draft determination

6.36 Both DBCTPL and QR National (QRN) made submissions in support of the ongoing investment in the Goonyella coal chain:

⁵⁴ Pacific National submission, 25 January 2008, p1

- DBCTPL identified Phase One expansion, scheduled for completion in early 2008 and expected to increase Terminal capacity to 68mtpa, and Phase Two/Three expansions, scheduled for completion by the end of 2008 and expected to increase Terminal capacity to 85mtpa.
- QRN identified its five-year \$1.4 billion rolling stock investment program that commenced in 2005. In October 2007, QRN announced its intention to purchase a further \$650 million worth of rolling stock, including 40 locomotives and 1190 wagons to be delivered in the next three years.⁵⁵

ACCC's view in the draft determination

- 6.37 In the draft determination, the ACCC stated that it was satisfied that the QMS had not hindered investment in the Goonyella coal chain, noting the significant contributions made by DBCTPL and QRN.
- 6.38 However, the ACCC was concerned that the underlying causes of the vessel queue were not being addressed. At the time of granting authorisation in 2005, the QMS was considered as a short term measure to manage the vessel queue while investment and capacity expansions took place.
- 6.39 The ACCC considered that, despite significant investments in the Goonyella coal chain (including Terminal capacity expansions and rolling stock purchases), it was not clear that investment alone was enough to address the imbalance between contracted demand and the capacity of the coal chain.

Issues arising from the draft determination

- 6.40 In January 2008, the second and final O'Donnell Report noted the misalignment in investment in the Goonyella coal chain:

A coordinated approach to master planning of infrastructure is essential. The situation where investments are being made without concurrent investment in other parts of the supply chain and then additional forecast tonnages are contracted out should never be allowed to happen again. The regulatory frameworks that underpin the governance of the supply chain should support this approach⁵⁶.

- 6.41 The ACCC notes that upon completion of Phase One expansion (in early 2008), the Terminal will have an estimated capacity of 68mtpa. By contrast, the System Capacity forecast for the 2008 calendar year is only 54.5mt. The O'Donnell Review suggested that following Phase Two/Three expansions at the Terminal (by the end of 2008) there may be insufficient System Capacity to match coal producer's contracted port tonnages of 85mtpa.
- 6.42 The ACCC understands that Babcock and Brown is currently undertaking a feasibility study for expansion of the Terminal above 85mtpa. However, such expansion would only proceed if there was sufficient underlying demand and appropriate coordination with other Goonyella coal chain participants to ensure that System Capacity is aligned.

⁵⁵ 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

⁵⁶ The Goonyella Coal Chain Capacity Review (second and final report), Stephen O'Donnell, 10 January 2008, p7

ACCC's conclusion

- 6.43 The ACCC notes the recent expansion activities in the Goonyella coal chain over the past three years. The ACCC considers that this indicates that the existence of the QMS has not removed the incentive for investment in the Goonyella coal chain and, therefore, the QMS is unlikely to give rise to public detriment, in the short term.
- 6.44 However, these investments appear to have focused on individual components of the coal chain. The ACCC considers that this may indicate that the QMS has reduced the incentive to develop a long-term, coordinated solution to the problem of constrained coal chain capacity. This is discussed further in paragraphs 6.63-6.73 below.
- 6.45 The ACCC is concerned that the QMS has now been operating since April 2005 and, despite significant investments, there is still an imbalance between the contracted demand for coal loading services and the capacity of the Goonyella coal chain, (including the Terminal).
- 6.46 At a time when 85mt of port capacity has already been contracted, and there is an unprecedented overseas demand for Australian coal, the ACCC would be concerned if there were any impediments to further capacity expansions in the Goonyella coal chain. In particular, the ACCC considers that a lack of certainty around the delivery of tonnage amounts contained in coal producers' contracts with port and rail service providers has the potential to distort market signals and affect investment decisions.
- 6.47 The ACCC considers that the operation of the QMS, with its focus on Terminal contracts, does not provide the appropriate commercial incentives for investment in additional System Capacity. Service providers should be able to capture the benefits from investments in capacity expansions, and should also face the consequences if they cause reductions in the capacity of the coal chain.
- 6.48 While the ACCC is satisfied that investment in the coal chain has continued with the QMS in place, it considers that a lack of certainty going forward has the real potential to delay long-term investment; such as decisions to further increase rail capacity and expand the Terminal beyond 85mtpa. That said the ACCC considers that investment alone is not enough to address the underlying issues in the Goonyella coal chain.
- 6.49 The ACCC has requested that DBCTPL continue to report on the operation of the QMS and investment in the Goonyella coal chain. Further details on DBCTPL's reporting requirements are included at paragraph 6.115 below.

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

Submissions prior to the draft determination

- 6.50 Interested parties considered that the current QMS was a temporary transitional measure to address demurrage costs while additional infrastructure and capacity expansions took place.
- 6.51 DBCTPL submitted that it was evident that an overhaul of the whole Goonyella coal chain (and in particular rail capacity) was 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.

6.52 DBCTPL considered 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.⁵⁷

6.53 Several interested parties identified the similarities between DBCT and the Port of Newcastle and suggested that a potential solution may include changes to the QMS Terminal Regulations such that System Capacity is referenced in the individual contracting arrangements of various service providers.

ACCC's view in the draft determination

6.54 The ACCC considered that port and rail service providers have an incentive to enter contracts based on their individual capacities without reference to the capacity of the coal chain as a whole. Given that System Capacity will be less than any one of the individual components of the coal chain, this has resulted in service providers contracting for volumes greater than the system can deliver. Therefore, despite the operation of the QMS, contracted demand has continued to exceed System Capacity, and therefore excessive vessel queues have persisted.

6.55 The ACCC was concerned that, with the current QMS in operation, there may be a reduced incentive for stakeholders to develop a long-term solution to issues with the Goonyella coal chain that are causing excessive vessel queues at Dalrymple Bay.

Issues arising from the draft determination

6.56 The O'Donnell Review noted that as long as the desired export volume exceeds the capacity of the port and rail system, some capacity allocation system will have to prevail for at least the next three years until the completion of the Jilalan upgrade and the commissioning of sufficient rolling stock to meet demand.⁵⁸

6.57 Pacific National submitted that it did not believe that the QMS was the best system to use for the whole period [the next three years] and would seriously question whether the QMS was sustainable beyond 2008 without significantly increased detriments.⁵⁹

6.58 In addressing potential solutions to issues at Dalrymple Bay, a number of interested parties have recognised the need for an overhaul of the contracting framework that currently exists.

6.59 Pacific National suggested that a recurring issue for the coal producers is their desire to have rail contracts that provide long term certainty of adequate rail capacity to match port contracted entitlements, but also a desire to share risk of capacity constraints in the coal chain.⁶⁰

6.60 The O'Donnell Review proposes a restructuring of rail haulage contracts to include:

- penalties for when a supplier's total installed capacity falls below a pre-determined figure, and

⁵⁷ DBCTPL submission, 26 September 2007, p34

⁵⁸ The Goonyella Coal Chain Capacity Review (second and final report), Stephen O'Donnell, 10 January 2008, p3

⁵⁹ Pacific National submission, 25 January 2008, p2

⁶⁰ Ibid

- take-or-pay arrangements whereby coal producers carry the volume risk associated with production issues and above rail operators carry the volume risk associated with their performance⁶¹.

- 6.61 A range of consultation on a new rail haulage contracting regime is expected to commence in late October 2008.
- 6.62 In January 2008, consistent with a recommendation in the O'Donnell Review, a central coordinator was appointed to identify ways to enhance the capacity and reliability of the Goonyella coal chain⁶². The ACCC understands that a memorandum of understanding between industry stakeholders sets out the details of this role, and is close to being finalised. A Dalrymple Bay Coal Chain Board has also been established.

ACCC's conclusion

- 6.63 The ACCC notes that the QMS has been in operation for a number of years, and industry is yet to develop a solution to address the underlying issues responsible for the imbalance between the demand for coal loading services and the capacity of the coal chain. The ACCC is concerned that the longer the QMS is in place, the greater the likelihood that the operation of the QMS will reduce the incentives for industry to develop and implement strategies for addressing contracting issues and capacity constraints.
- 6.64 As already noted, at the time of granting authorisation in 2005, the QMS was proposed as a short term solution while investment and capacity expansions took place.
- 6.65 The approach to date has, in essence, been one of seeking to minimise demurrage costs and allocate scarce capacity fairly while capacity expansions take place. Given that all new capacity is fully contracted in excess of the additional System Capacity it will deliver (and before the new capacity comes on line) this approach does not appear to address the current contracted demand/supply imbalance. It appears that industry participants are now alive to this issue and intend to address it through a coordinated approach to investment.
- 6.66 However, the ACCC would be concerned if a requirement on service providers to contract for tonnage amounts that reflect System Capacity (rather than their individual capacities) removed the incentive to invest in additional capacity. Under the current arrangements, the ability to sell off an increase in capacity, at least at the Terminal, has provided the incentive for continued investment in Terminal expansions.
- 6.67 The ACCC considers that coal producers' contracts with port and rail service providers should reflect (as accurately as possible) the tonnage amounts that service providers are able to deliver, taking total System Capacity into account. Going forward, producers are in the best position to anticipate the demand for coal, and are therefore best placed to carry the risk associated with future capacity expansions, through long-term contracting.

⁶¹ The Goonyella Coal Chain Capacity Review (second and final report), Stephen O'Donnell, 10 January 2008, p4

⁶² Australian Mining website, 14 January 2008: http://www.miningaustralia.com.au/articles/Goonyella-coal-chain-report-released_z141766.htm

- 6.68 The ACCC notes that some progress has been made towards implementing the recommendations in the O'Donnell Review, including the commencement of a business improvement program across the supply chain, the procurement of locomotives, the appointment of people to coordination roles, and a rail contract renewal process.
- 6.69 The ACCC understands that Ross Dunning⁶³ has been appointed as the central coordinator for the Goonyella coal chain to optimise the throughput of the current coal chain, and to identify governance processes that lead to coordinated management of resources across the supply chain.
- 6.70 The ACCC also notes a recommendation in the O'Donnell Review for the central coordinator to review and recommend commercial frameworks to better align the interests of system stakeholders to help ensure that the necessary commercial drivers are in place to provide the required assets to maximise the supply chain throughput.⁶⁴
- 6.71 The ACCC considers that the contractual framework that underpins the functions of the coal chain needs to better reflect the operational realities (i.e. the capacity of each element in the coal chain is reliant upon the others) and provide sufficient certainty to underwrite necessary investment.
- 6.72 In respect of plans for a new above rail haulage contracting regime in the Goonyella system, the ACCC notes that these plans need to consider the competitive entry of additional rail providers, and that rail contracts need to be addressed as a matter of priority.
- 6.73 The ACCC is of the view that, while some progress has been made in long-term planning to address contracting issues and capacity constraints, the existence of the QMS may reduce incentives to address the issues. The ACCC considers that the QMS is likely to generate public detriment for this reason.

ACCC conclusion on public detriments

- 6.74 The ACCC considers that the continued operation of the QMS has the potential to result in the following detriments:
- impact upon investment in the Goonyella coal chain
 - reduced incentive to develop a long-term solution and
 - reduced likelihood of competitive entry in above rail haulage services.
- 6.75 In the short term however, the ACCC is satisfied that the operation of the QMS will provide the Goonyella participants with the opportunity to focus on the development of a long-term solution to contracting and capacity issues in the coal chain.

⁶³ Ross Dunning is a former chairman of the Central Queensland Ports Authority and the Port of Brisbane Corporation

⁶⁴ The Goonyella Coal Chain Capacity Review (second and final report), Stephen O'Donnell, 10 January 2008, p3

Public benefit

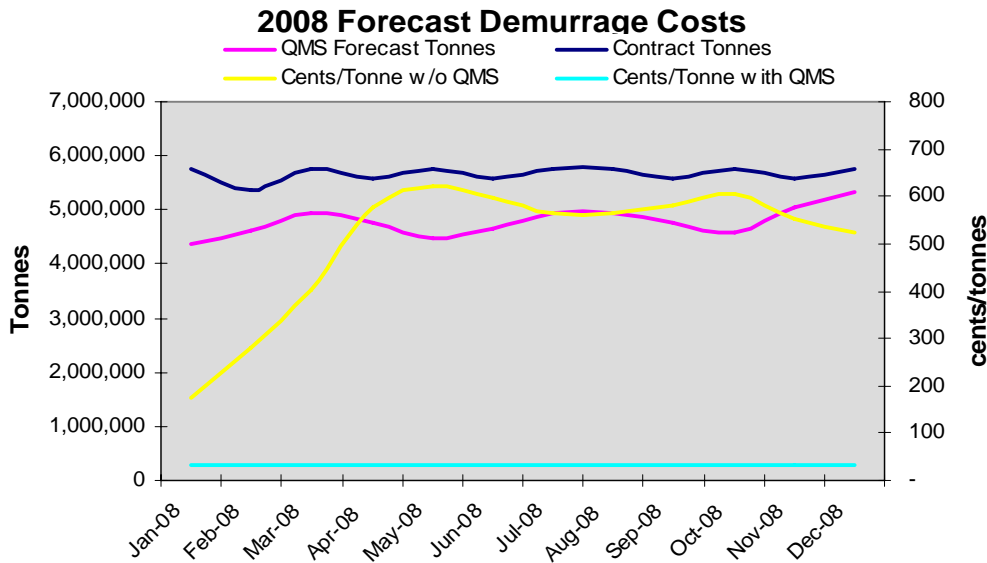
- 6.76 DBCTPL submits that the continued operation of the QMS will deliver public benefits, including:
- reducing deadweight demurrage costs by approximately A\$273 million for 2008 – if the queue is reduced to 15 vessels
 - reducing inefficient coal stockpiling and associated costs by providing greater 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
 - 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 and
 - other efficiencies and facilitating reinvestment in the Bowen Basin coal industry.
- 6.77 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.
- 6.78 No interested party provided a substantial submission in response to the public benefit conclusions in the ACCC's draft determination of 20 December 2007.

Reducing deadweight demurrage costs

- 6.79 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 for ship loading.
- 6.80 If the queue is reduced to 15 vessels under the Amended QMS, DBCTPL estimates that demurrage costs will be approximately A\$16.8 million, resulting in a saving of approximately A\$273.2 million.
- 6.81 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 nominated vessel size of 87 000 tonnes.⁶⁵

⁶⁵ DBCTPL submission, 26 September 2007, Schedule 2, p43

Table 6.1 – DBCTPL 2008 forecast demurrage costs



6.82 DBCTPL submit 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 6.2 – estimated demurrage costs in the absence of the QMS⁶⁶

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

6.83 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.

6.84 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.

6.85 In response to the potential demurrage savings claimed by DBCTPL, DITR submitted that the cost savings may be at the high end, given the range of factors that can impact upon the length of vessel queues. Notwithstanding these reservations, DITR considered that an extension of the QMS was likely to contribute to reductions in vessel queue lengths, waiting times, and demurrage costs.

⁶⁶ Ibid

ACCC conclusion

- 6.86 The ACCC 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 is reduced.
- 6.87 However, the ACCC considers that DBCTPL's estimate of total demurrage savings for 2008 of A\$273.2 million appears to be at the higher end of likely outcomes, at best.
- 6.88 The ACCC notes that during the last 12 months, with the QMS in place, the queue has consistently been in excess of 30 vessels (see paragraph 2.23). At the time of lodging the application in September 2007, DBCTPL advised that the operation of a Queue Adjustment, as provided for in the QMS, was reducing the vessel queue and was expected to further reduce the vessel queue over the next few months. In November 2007, a further Queue Adjustment was announced when it was anticipated that the queue may reach 45 vessels⁶⁷.
- 6.89 It appears that there are a number of factors (e.g. weather conditions, system maintenance, capacity expansions) that make it difficult to accurately predict fluctuations in System Capacity, and consequently the size of the vessel queue. The ACCC considers that it may be some time before the queue is reduced to 15 vessels, and therefore delivers the estimated demurrage savings.
- 6.90 In any event, and irrespective of an exact dollar value, the ACCC considers that, in the short term, producers would be likely to face higher demurrage costs without the QMS in place and, as such, any resultant demurrage savings constitute a public benefit.

Reducing inefficient coal stockpiling and associated costs

- 6.91 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 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.*⁶⁸

- 6.92 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 conclusion

- 6.93 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

⁶⁷ The Forecast System Capacity for the Goonyella Coal Chain – DBCT Component, Independent Expert – Bruce Martin, November 2007.

⁶⁸ DBCTPL submission, 26 September 2007, p32

them to more accurately forecast their production levels and maintain optimal stockpiling levels.

- 6.94 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 there is less certainty about the size of the vessel queue.
- 6.95 The ACCC notes that it does not have enough information to properly assess the size of this benefit.

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

- 6.96 DBCTPL submits that the long vessel queue having a negative impact on the reputation national an 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.⁶⁹

ACCC conclusion

- 6.97 The ACCC considers that increased certainty with regard to coal deliveries and cost savings as a result of reduced waiting times (in vessel queues) would appear to be factors that influence the purchasing decisions of overseas buyers.
- 6.98 The Global Port Congestion Index⁷⁰ provides an overview of delays at major ports around the world as well as a breakdown of delays on a port by port basis. As at 8 February 2008, the average number of days delay at Dalrymple Bay was 30-35 days, which appears large when compared with other ports in Australia and around the world. The ACCC also notes that delays at Dalrymple Bay have recently been exacerbated by heavy rains and flooding.
- 6.99 The ACCC considers that excessive vessel queues at Dalrymple Bay are not new and have been a problem, at least, since the QMS was first introduced in 2005. It is therefore likely that overseas coal buyers are familiar with the sorts of delays that occur when purchasing coal that is loaded at DBCT. The ACCC has not seen evidence that these delays have significantly affected the overseas demand for coal from producers in the Goonyella region.
- 6.100 It appears unlikely that the QMS will result in a significant improvement in the reputation of the Goonyella coal chain in the short term and, as such, the ACCC does not consider this to be a significant public benefit.

⁶⁹ DBCTPL submission, 26 September 2007, p32

⁷⁰ Global Ports Congestion Index, 8 February 2008: http://www.g-ports.com/gp_Congestion.aspx

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

6.101 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.⁷¹

6.102 The ACCC considers that reducing the environmental risks associated with a large number of bulk cargo vessels anchored near the Great Barrier Reef is 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 may deliver a public benefit. The ACCC also notes that throughout the last 12 months there have been excessive vessel queues at Dalrymple Bay.

Other efficiencies and facilitating reinvestment in the Bowen Basin coal industry

6.103 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, and specifically funding System Capacity investment.⁷²

6.104 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. While the ACCC does not accept that the QMS will increase investment incentives, it notes that demurrage savings and other efficiencies could be used by the Goonyella coal chain participants to invest in System Capacity.

ACCC conclusion on public benefits

6.105 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
- reducing environmental risks associated with a large number of bulk cargo vessels and
- other efficiencies and facilitating reinvestment in the Bowen Basin coal industry.

⁷¹ DBCTPL submission, 26 September 2007, p34

⁷² Ibid, p33

Balance of public benefit and detriment

- 6.106 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the continued operation of the QMS is likely to result in a public benefit that will outweigh any public detriment.
- 6.107 In the context of applying the net public benefit test at section 90(8)⁷³ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁷⁴
- 6.108 The ACCC considers that continued operation of the QMS, in the long-term, has the potential to impact upon investment, delay competitive entry in above rail haulage services, and reduce incentives to develop a long-term solution to contracting and capacity issues in the Goonyella coal chain.
- 6.109 The ACCC has significant doubts as to whether the current QMS is likely to result in a net public benefit beyond December 2008. In the event that there is no evidence of the development of a long-term solution before this time, the ACCC considers that the continued operation of the QMS has the potential to result in significant public detriment in the form of insufficient investment and substantial losses in export revenues.
- 6.110 In the short term, the ACCC is satisfied that 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 from large vessel queues, and providing the opportunity for the Goonyella coal chain participants to develop a long-term solution.
- 6.111 On balance, and in the short term only, the ACCC considers the public benefit is likely to outweigh the public detriment.

Long-term solution to Goonyella coal chain issues

- 6.112 A key consideration in the ACCC's assessment is the benefit in maintaining the status quo with the QMS in place. The ACCC considers that the continued operation of the QMS will deliver a net benefit by assisting the participants of the Goonyella coal chain to focus on the development of a long-term solution to vessel queues at Dalrymple Bay, rather than having to concentrate on queuing and demurrage issues in the short-term.
- 6.113 The ACCC expects that any long-term solution, requiring authorisation, would be provided well in advance of the expiry of the current QMS in December 2008. Any subsequent application for authorisation from Goonyella coal chain participants would need to allow enough time for sufficient consultation with all interested parties, prior to any decision by the ACCC.

⁷³ 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.

⁷⁴ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

6.114 Similarly, the ACCC notes that it will only grant interim authorisation in special circumstances. A key factor for consideration is the urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether it was realistically possible for an application to have been lodged sufficiently early to have made the request for interim authorisation unnecessary.

Reporting

6.115 Consistent with Authorisations A30239-A30241, DBCTPL provided an annual report to the ACCC in February 2007, which detailed the following information⁷⁵:

- 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.

6.116 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
- any planned expansions to occur at the Terminal or in the Goonyella coal chain in the year in which the report is provided.⁷⁶

⁷⁵ DBCTPL submission, Authorisations A30239-A30241, 2 December 2005, pp6-7

⁷⁶ Ibid, p7

6.117 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 the 2007 calendar year, by the end of February 2008.

Length of authorisation

6.118 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.

6.119 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 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.

6.120 In its draft determination, the ACCC proposed 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.

6.121 Following the draft determination, few comments were made regarding the length of authorisation. The O'Donnell Review noted that some capacity allocation would be necessary for at least the next three years. Pacific National questioned whether the QMS was sustainable beyond 2008, without significantly increased benefits.

6.122 As already noted, the ACCC has significant doubts as to whether the current QMS is likely to result in a net public benefit beyond December 2008. The ACCC is concerned that the current QMS does not address the underlying causes of the vessel queue.

6.123 Therefore, the ACCC grants authorisation to the Amended QMS for a transition period until **31 December 2008**, to enable a long-term solution to the vessel queue to be developed and implemented.

6.124 Should a new solution be developed early in 2008, parties can seek to implement it immediately. The ACCC notes that the period of authorisation does not require the current QMS to remain in place until 31 December 2008.

Variations to the Terminal Regulations

6.125 The ACCC notes that any amendments to the *Dalrymple Bay Coal Terminal Queue Management System Amendments to Terminal Regulations* the term of this authorisation would not be covered by the authorisation.

7. 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, A61061, and A91062 with the Australian Competition and Consumer Commission (**the ACCC**).
- 7.2 The application for revocation and substitution was made under section 91C of the *Trade Practices Act 1974* (**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 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 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 **grants** authorisation to applications A91060, A91061, and A91062 until **31 December 2008**.

Conduct for which the ACCC grants authorisation

- 7.7 Authorisation extends to DBCTPL to operate the *Dalrymple Bay Coal Terminal Queue Management System Amendments to Terminal Regulations* (**Terminal Regulations**) until 31 December 2008.

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

7.9 This determination is made on **29 February 2008**.

Interim authorisation

7.10 At the time of lodging the application, DBCTPL requested interim authorisation for the Amended QMS.

7.11 The ACCC granted interim authorisation on 17 October 2007.

7.12 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

Date authorisation comes into effect

7.13 This determination is made on 29 February 2008. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on **22 March 2008**.