



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Wiggins Island Coal Export Terminal producers

to engage in collective negotiations with the owner of below rail infrastructure associated with the transportation of coal to the Wiggins Island Coal Export Terminal

Date: 2 December 2010

Authorisation no.: A91241

Public Register no.: C2010/657

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC grants conditional authorisation to various Wiggins Island Coal Export Terminal producers (the Applicants) to collectively bargain with QR Network in relation to below rail access to transport coal to the terminal. Authorisation is granted for 15 years.

A group of Queensland coal producers (through Wiggins Island Coal Export Terminal Pty Ltd) are developing the new Wiggins Island Coal Export Terminal (the 'Terminal') at the Port of Gladstone in Queensland.

In order to secure access to below rail capacity to support the transportation of coal to the new Terminal, the Applicants sought authorisation to collectively negotiate the terms and conditions of below rail access, including price, with QR Network (or any future owner of the relevant infrastructure). Authorisation was requested for a 20 year period.

The ACCC considers the primary benefits likely to result from the collective bargaining arrangements are transaction cost savings.

Given the joint development of the new Terminal by the producers, together with the potential for delayed construction of the Terminal if the Applicants are unable to secure timely access to below rail capacity, the ACCC considers the collective bargaining arrangements could also deliver additional public benefits in the form of greater commercial certainty regarding investment at the port by producers and by avoiding delays in additional export revenue.

The ACCC considers that a range of factors including the voluntary nature of the arrangements, the limited composition of the collective bargaining group and that negotiations and information exchanges would be confined to the below rail infrastructure necessary to support the transportation of coal to the Terminal, limits any potential detriment that may arise.

In light of the above, the ACCC considers that the public benefits are likely to outweigh any public detriment generated by the arrangements.

The ACCC grants authorisation subject to a condition that the Applicants provide written notice to the ACCC of any change in ownership of the relevant rail transport infrastructure during the term of the authorisation. This will assist the ACCC's assessment of the ongoing competitive impact of the arrangements over the period of authorisation.

The ACCC considers there is a reasonable degree of certainty that collective negotiations for Stages 1 and 2 of the Terminal will occur over the next 3-5 years. However, it is less clear when, and if, collective negotiations for below rail access to support any further expansion of the Terminal may be required. Therefore, to allow the Applicants to conduct initial collective negotiations and to negotiate any changes that may be required to 10 year access agreements entered into, the ACCC proposes that a 15 year period of authorisation is appropriate at this time – noting that the parties are free to seek authorisation for any future conduct at a later time.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission.
The Act	<i>Trade Practices Act 1974.</i>
Identified Rail Infrastructure and Services	Proposed collective bargaining arrangements in relation to below rail infrastructure comprising the Blackwater and Moura systems including: all expansions to these systems; access to any other rail infrastructure necessary to support the Wiggins Island Coal Export Terminal; below rail infrastructure to support the reallocation of capacity from Barney Point to the Wiggins Island Coal Export Terminal and RG Tanna Coal Terminal; and all services relating to such access for the purpose of transporting coal to the Wiggins Island Coal Export Terminal.
QR Network	QR Network Pty Ltd and, given the privatisation or sale of the relevant rail assets by the Queensland Government, any other QR Group entity or any entity which may acquire the relevant rail assets by virtue of the privatisation or sale process.
RFP	Request for Proposals document issued by QR Network.
Terminal	Proposed Wiggins Island Coal Export Terminal at the Port of Gladstone, Queensland.
WICET	Wiggins Island Coal Export Terminal Pty Ltd.

1. The application for authorisation

- 1.1. On 7 July 2010 various coal producers that will use the Wiggins Island Coal Export Terminal (the ‘**Terminal**’), to be constructed at the Port of Gladstone in Queensland, lodged application for authorisation A91241 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). 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. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.
- 1.3. Further information about the authorisation process is contained in Attachment A.
- 1.4. A chronology of the significant dates in the ACCC’s consideration of this application is contained in Attachment B.
- 1.5. Application A91241 was made 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 and
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.6. The Wiggins Island coal producers are:
 - Anglo American Metallurgical Coal Pty
 - Aquila Resources Limited
 - Bandanna Energy Ltd
 - Belvedere Coal Management Pty Ltd
 - Caledon Coal Pty Ltd
 - Capricorn Coal Pty Ltd
 - Cockatoo Coal Ltd
 - Jellinbah Resources Pty Ltd
 - Middlemount Coal Pty Ltd
 - Monto Coal 2 Pty Ltd
 - Northern Energy Corporation Ltd
 - Syntech Resources Ltd
 - Wesfarmers Curragh Pty Ltd

- West Rolleston Coal Pty Ltd
 - Xstrata Coal Queensland Pty and
 - Yancoal Australia Pty Ltd (hereafter referred to as the ‘**Applicants**’).
- 1.7. The Applicants seek authorisation to engage in collective bargaining arrangements with QR Network for the purpose of negotiating terms and conditions, including price, for access to the below rail infrastructure comprising the Blackwater and Moura systems including:
- all expansions to these systems
 - access to any other rail infrastructure necessary to support the Terminal
 - below rail infrastructure to support the reallocation of capacity from Barney Point to the Terminal and RG Tanna Coal Terminal and
 - all services relating to such access for the purpose of transporting coal to the Terminal (hereafter referred to as the ‘**Identified Rail Infrastructure and Services**’).
- 1.8. Specifically, the Applicants seek authorisation to:
- collectively discuss and negotiate terms and conditions, including price, under which access to the Identified Rail Infrastructure and Services, for the purpose of transporting coal to the Terminal, will be acquired from QR Network and
 - enter into and give effect to contracts, arrangements or understandings between QR Network and the Applicants, containing terms and conditions, including price, upon which access to the Identified Rail Infrastructure and Services will be acquired.¹
- 1.9. The application only relates to below rail infrastructure associated with transporting coal to the new Terminal, including both existing and future infrastructure to be constructed.
- 1.10. The application defines **QR Network** as meaning ‘QR Network Pty Ltd and, given the privatisation or sale of the relevant rail assets by the Queensland Government, any other QR Group entity or any entity which may acquire the relevant rail assets by virtue of the privatisation or sale process.’²
- 1.11. Participation in the collective bargaining arrangements by producers is voluntary and the Applicants do not seek authorisation for boycott activities.
- 1.12. The Terminal is proposed to be constructed in multiple stages over several years, as mines in the region are developed and the Terminal is expanded accordingly. Therefore, the Applicants submit that certain producers (‘Stage 1 producers’) will need to secure rail access at the first stage of the Terminal’s development, while other producers will need to secure rail access at future stages when their mines come on stream.
- 1.13. The Applicants sought authorisation for a period of 20 years.

¹ Application for authorisation A91241, Form B, 7 July 2010.

² Ibid.

Other parties

- 1.14. The Applicants seek authorisation ‘to allow the Applicants, their successors and assigns and/or their related bodies corporate, associated entities and joint venture partners’ to discuss amongst themselves matters relating to the above mentioned negotiations, contracts, arrangements or understanding related to access to the Identified Rail Infrastructure and Services associated with the transportation of coal to the Terminal.³
- 1.15. The application also names QR Network and any future owner of the Identified Rail Infrastructure as a result of the proposed privatisation or sale of the QR Group, or any part thereof, as a party to the proposed arrangements.
- 1.16. 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.
- 1.17. Further, pursuant to section 88(10) of the Act, the Applicants request that any authorisation granted by the ACCC be expressed to apply to Stage 2 producers and future users of the Terminal who will similarly need to negotiate below rail access as the staged development and expansion of the Terminal occurs.

Interim authorisation

- 1.18. At the time of lodging the application, the Applicants also requested interim authorisation to allow them to commence collective negotiations with QR Network as soon as possible which would assist them manage the timing of the Terminal project.
- 1.19. In particular, the Applicants submitted that interim authorisation would facilitate:
- the Applicants ascertaining what below-rail capacity is required for the purpose of supporting Stage 1 of the Terminal project
 - provide the producers with an early understanding of the overall common or shared costs for supply chain development based on the total capacity required by those Applicants that are Stage 1 producers
 - enable the parties to understand the total anticipated below rail capacity necessary to support the Terminal, while similarly understanding the capacity required in respect of above rail and port, so as to ensure alignment of contracted capacity across the entire supply chain and
 - enable QR Network to accelerate the negotiation phase with the Applicants in relation to the Terminal project which, in turn, will allow QR Network to proceed to the design and feasibility stage of its project.⁴
- 1.20. On 4 August 2010 the ACCC granted interim authorisation to the Applicants to enable them to commence collective negotiations with QR Network in relation to below rail access to transport coal to the Terminal. Interim authorisation was granted in relation to Stage 1 negotiations only and was conditional upon any access agreement entered into containing a condition precedent that final authorisation be granted by the ACCC.

³ The covering letter to application for authorisation A91241, 7 July 2010, page 3.

⁴ The Applicants’ submission to the ACCC in response to a request for further information, 27 July 2010, pages 3-4.

- 1.21. Interim authorisation does not extend to any information exchanges or negotiations regarding above rail services.
- 1.22. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or is revoked.
- 1.23. A copy of the ACCC's interim authorisation decision is available from its website www.accc.gov.au by following the Public Registers and Authorisations links.

Draft determination

- 1.24. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.25. On 1 October 2010 the ACCC issued a draft determination proposing to grant conditional authorisation to the Applicants to collectively bargain with QR Network in relation to below rail access to transport coal to the Terminal for 13 years.
- 1.26. A copy of the ACCC's draft determination is available from its website www.accc.gov.au by following the Public Registers and Authorisations links.
- 1.27. A conference was not requested in relation to the draft determination.

2. The collective bargaining arrangements

The negotiation process⁵

2.1 The Applicants submit that the negotiation process will be as follows:

- The Applicants will obtain the necessary information from QR Network (for example, a pricing model containing proposed costs, capacity volumes, rates of return etc and non-price terms and conditions) on which to assess its particular pricing and service offer.
- The detailed information will be reviewed by the Applicants acting through a representative sub-committee.
- At this time, the Applicants anticipate that the sub-committee will comprise:
 - a new entrant producer (currently Aquila Resources)
 - a small but expanding incumbent producer (currently Yancoal) and
 - an established but expanding producer (currently Xstrata Coal).⁶
- The confidentiality of the commercially sensitive information obtained from QR Network will be preserved by way of confidentiality agreements negotiated and executed between QR Network and each particular Applicant/User.⁷
- The representative sub-committee will jointly conduct negotiations based on the information provided, reporting outcomes and seeking input from each of the Applicants. Each Applicant would be free to obtain independent legal or other expert advice throughout the negotiation phase if they choose to.
- At the conclusion of the collective negotiations, the sub-committee will advise each Applicant that the agreement with QR Network is in a form that can be recommended to each Applicant for its consideration.
- Each Applicant will then independently determine whether the terms of the agreement are acceptable for its own coal operations. If an individual Applicant is willing to accept the terms, it will enter into a bilateral agreement with QR Network. If an Applicant considers that it could improve its commercial outcomes, then this will be a matter for it to pursue individually with QR Network.

Scope of collective negotiations⁸

2.2 Broadly, the Applicants seek authorisation to engage in collective negotiation for access to the Identified Rail Infrastructure and Services required by the Applicants to transport coal to the Terminal, including existing and future below rail infrastructure. More specifically, the Applicants submit the issues to be covered in the negotiations would include:

⁵ Unless stated otherwise, information appearing under this heading was obtained from the Applicants' supporting submission to application for authorisation A91241, 7 July 2010, pages 31-32.

⁶ The Applicants' submission in response to information request, 28 July 2010, page 5.

⁷ The Applicants provided this revised description of this aspect of the negotiation process on 20 October 2010, reflecting changes since the application was lodged.

⁸ Unless stated otherwise, information appearing under this heading was obtained from the Applicants' supporting submission to application for authorisation A91241, 7 July 2010, pages 21-22.

- necessary Services associated with access to below rail infrastructure (as defined in Annexure 4 to the supporting submission to the current application (A91241):⁹
 - railway track, associated track structures, over or under track structures and supports (including supports for equipment or items associated with the use of the railway)
 - bridges
 - passing loops
 - train control systems, signalling systems and communications systems
 - sidings and refuges to park rolling stock
 - maintenance and protection systems and
 - roads and other facilities which provide access to the railway line route
- service levels (including capacity of services and facilities)
- responsibilities of the Applicants
- interface coordination
- loading and unloading facilities
- rail spurs and connection points
- pricing principles
- fees and charges
- capacity allocation
- capital expenditure
- allocation rules for common use facilities
- liability and indemnity
- termination
- any statutory authorisations and
- dispute resolution.

Frequency of collective negotiations¹⁰

- 2.3 The Applicants submit that collective negotiations are likely to occur in line with the staged development of the Terminal.
- 2.4 Initially, the Applicants consider that collective negotiations with QR Network would be necessary to determine the rail capacity required for Stages 1 and 2 of the Terminal.
- 2.5 In the event there is an increase in demand for capacity at the Terminal post Stage 2, which would likely result in additional rail capacity being required to support the Terminal, the Applicants submit the collective negotiation process would likely be invoked at this time.

⁹ Submission from the Applicants, 25 August 2010, page 1.

¹⁰ The Applicants' submission in response to information request, 28 July 2010, pages 4-5.

- 2.6 The Applicants advise that, while it is uncertain what particular terms will be included in the take or pay contracts to be concluded with QR Network, it is possible (if not likely) that there will be price review/reset mechanisms throughout the proposed 20 year term for the access agreements. Therefore, the Applicants consider certain aspects of the provision of access in support of the Terminal may require ongoing collective negotiation.
- 2.7 Further, the Applicants consider it may be necessary to negotiate ‘system optimisation initiatives’ with QR Network throughout the term of the access agreements. The Applicants submit this would involve ongoing changes to below rail configurations in order to achieve throughput targets in the most efficient manner.

3. Background to the application

The Applicants

3.1. The sixteen Applicants are coal producers that are currently exporting, or will possibly export, coal through the Port of Gladstone. Further information about each of the applicant coal producers is provided below:¹¹

- **Anglo American Metallurgical Coal Pty Ltd** – Anglo is a wholly owned subsidiary of Anglo American plc and is a large producer of coal in Australia, with one wholly-owned mine, a controlling interest in another five mines, and also has undeveloped coal reserves. Its mines are located in NSW and Queensland.

Anglo's operations produce both coking coal and thermal coal with a large majority of domestic coking coal being exported for use by foreign steel manufacturers.

The majority of Anglo's thermal coal and coking coal production occurs in Queensland where the large majority of its mines are located.

- **Aquila Resources Ltd** – Aquila is an exploration company primarily searching for coal, iron ore, manganese and base metals. In 2002, Aquila acquired a suite of coal tenements covering in excess of 3 100km² in the Bowen Basin, Queensland.
- **Bandanna Energy Ltd** – Bandanna holds 16 Exploration Permits for coal in the Bowen and Galilee Basins in Queensland. In addition, Bandanna has conventional oil and gas exploration interests in the Cooper Basin of South Australia and Queensland and mineral exploration licences, primarily for oil shale in Queensland.
- **Belvedere Coal Management Pty Ltd** – Belvedere is the agent and manager of the Belvedere Coal Project on behalf of the Belvedere joint venture participants, who at the date of this application for authorisation, are Vale Belvedere Pty Ltd, Vale Belvedere (BC) Pty Ltd and BD Coal Pty Ltd. The Belvedere Coal Project is located in the southern part of the Bowen Basin region near the town of Moura in Central Queensland. Belvedere is conducting an exploration program in preparation for a feasibility study into the development of a metallurgical coal mine.
- **Caledon Coal Pty Ltd** – Caledon is a coking coal producer and explorer in the Bowen Basin, Queensland. It acquired the mothballed Cook Mine in late 2006 and has since recommissioned the operation and introduced a new underground mining methodology.

¹¹ Schedule 2 to the application for authorisation A91241, *Schedule 2 – Details of the Applicants' business activities*, 7 July 2010.

The company also purchased the nearby Minyango exploration concessions in 2006 and has conducted a number of drilling programs in preparation for a feasibility study.

- **Capricorn Coal Pty Ltd** – Capricorn is an unincorporated joint venture established between Macarthur Coal Ltd (85 per cent) and CITIC Australia Coal Pty Ltd (15 per cent) for the purpose of operating the proposed Capricorn coal mine. The proposed Capricorn coal mine is located near the township of Dingo in central Queensland. Capricorn is conducting an exploration program with a plan to commence a feasibility study into the development of the coal mine in the medium term.
- **Cockatoo Coal Ltd** – Cockatoo is a recent entrant in the Australian coal production industry. Cockatoo exports PCI metallurgical and thermal coal from the Baralaba mine in the Bowen Basin, Queensland.

In addition to the Baralaba mine, Cockatoo is developing a portfolio of advanced projects in the Surat Basin, Queensland and the Surat exploration portfolio encompasses more than 3 800km² of tenements.

Cockatoo currently plans to mobilise its assets to expand production from 500 000 tonnes per annum in 2009/10 to in excess of 9 million tonnes per annum from 2015/16.

- **Jellinbah Resources Pty Ltd** – Jellinbah is a company formed by Queensland Coal Mine Management Pty Ltd (QCMM) to develop and market coal products from QCMM coal mines in Queensland.

The Jellinbah coal mine, located in the Bowen Basin, is a majority Australian-owned joint venture between Tremell Pty Ltd (40.08 per cent) and QCMM (29.92 per cent) with equity participation by two Japanese trading companies (Marubeni Coal Pty Ltd and Catherine Hill Resources Pty Ltd). The Jellinbah mine produces three coal products – PCI coal, semi soft coking coal and thermal coal. Current production capacity is approximately 4 million tonnes per annum, however, infrastructure exists to increase current production levels if required.

- **Monto Coal 2 Pty Ltd** – Monto is an incorporated joint venture established between Macarthur Coal Ltd (approx 80 per cent) and Noble Group (approx 20 per cent) for the purpose of owning shares (currently 51 per cent) in the incorporated joint venture that owns the proposed Monto coal mine. The proposed Monto coal mine is located near the township of Monto in central Queensland. Monto is conducting a feasibility study into the development of the mine.
- **Middlemount Coal Pty Ltd** – Middlemount is an incorporated joint venture established between Macarthur Coal Ltd and Noble Group for the purpose of operating the Middlemount mine. The Middlemount mine is located 6km south west of the township of Middlemount in central Queensland. Mining operations are expected to commence in 2010 with anticipated production of 1.8 million tonnes per annum.

- **Northern Energy Corporation Ltd** – Northern Energy has interests in a portfolio of coking and thermal coal projects being progressed towards development. These projects represent a diversified suite of geographically spread resource development opportunities involving various coal types and mining methods.

Northern Energy's current portfolio includes the Colton Hard Coking coal project near Maryborough Queensland, the Elimatta Thermal Coal project (near Wandoan Queensland), the Yamala Thermal / PCI cal project (between Emerald and Blackwater Queensland) and the Ashford Hard Coking coal project north of Inverell, NSW.

- **Syntech Resources Pty Ltd** – Syntech is part of the Syntech group of companies which control mining leases in Cameby, Sefton Park, Rywung and exploration permits for coal in Cameby and Chinchilla.

Syntech is developing the Cameby Downs coal mining project in the Surat Basin. The Surat Basin forms one of the last major undeveloped export coal deposits in Australia with an estimated coal resource of approximately 4 billion tonnes and an anticipated lifespan of more than 30 years.

- **Wesfarmers Curragh Pty Ltd** – Wesfarmers is a related body corporate of Wesfarmers Resources Limited which is the resources division of Wesfarmers Limited.

Wesfarmers is a leading metallurgical coal producer with coal interests in the Curragh mine in Queensland's Bowen Basin, the Premier coal mine in Collie, WA, and a 40 per cent interest in the Bengalla mine in the Hunter Valley NSW.

- **West Rolleston Coal Pty Ltd** – West Rolleston is an unincorporated joint venture established between Macarthur Coal Ltd (90 per cent) and CITIC Australia Coal Pty Ltd (10 per cent) for the purpose of operating the proposed West Rolleston coal mine, near the township of Rolleston Queensland. West Rolleston is conducting an exploration program with a plan to commence a feasibility study into the development of the coal mine in the medium term.

- **Yancoal Australia Pty Ltd** – Yancoal engages in the exploration for coal reserves. It mines, sells, exports and markets clean and coking coal globally. Yancoal operates as a subsidiary of Yanzhou Coal Mining Co Ltd. The Australian company has two subsidiaries – Austar Coal Mine (NSW) and Felix Resources.

- **Xstrata Coal Queensland Pty Ltd** – Xstrata Coal Queensland is part of Xstrata Coal Pty Ltd (Xstrata Coal), the coal producing arm of Xstrata plc, a global diversified mining group with its headquarters in Switzerland.

In Australia, Xstrata Coal is a significant exporter of thermal coal, premium quality hard coking coal and semi-soft coal. Xstrata Coal has interests in over 30 operating coal mines in Australia, producing both thermal and coking coal, with a primary focus on the supply of thermal coal for export.

Queensland coal production

- 3.2. In 2009, total saleable coal production in Queensland was 195 million tonnes.¹² Approximately 84 per cent of Queensland's coal production is exported.¹³
- 3.3. In particular, in 2008-09 Queensland exported approximately 160 million tonnes of coal. Of this, approximately 110 million tonnes was coking coal and 50 million tonnes thermal coal.¹⁴ Over the same period, coal exports from the Port of Gladstone made up approximately 35 per cent of Queensland's exports (approximately 56 million tonnes).¹⁵
- 3.4. In 2009, the majority of Queensland's coking coal was exported to the following countries:¹⁶
- Japan – approximately 30 million tonnes
 - China – approximately 27 million tonnes
 - India – approximately 22 million tonnes and
 - Korea – approximately 11 million tonnes.
- 3.5. For the same year, the majority of Queensland's thermal coal was exported to:¹⁷
- Japan – approximately 18 million tonnes
 - Korea – approximately 13 million tonnes
 - Taiwan – approximately 10 million tonnes and
 - China – approximately 9 million tonnes.

The construction of the Terminal and other developments at the Port of Gladstone

- 3.6. Certain coal producers are funding the joint development of the Wiggins Island Coal Export Terminal (the 'Terminal') at the Port of Gladstone in central Queensland.
- 3.7. The new Terminal will be developed, financed, and owned by Wiggins Island Coal Export Terminal Pty Ltd (WICET) (a company owned and established by a group of coal producers). As at September 2010, WICET is comprised of 16 coal companies¹⁸

¹² Queensland Department of Mines and Energy website, http://www.dme.qld.gov.au/zone_files/coal_stats_pdf/cyr_09.pdf, *Queensland coal statistics 2009 calendar year*, viewed 7 September 2010.

¹³ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 14.

¹⁴ Queensland Department of Mines and Energy website, http://www.dme.qld.gov.au/zone_files/coal_stats_pdf/table_17.pdf, *Table 17 – Exports by type*, viewed 7 September 2010.

¹⁵ Ibid, http://www.dme.qld.gov.au/zone_files/coal_stats_pdf/table_20.pdf, *Table 20 – Exports by port*, viewed 7 September 2010.

¹⁶ Ibid, http://www.dme.qld.gov.au/zone_files/coal_stats_pdf/cyr_09.pdf, *Queensland coal statistics 2009 calendar year*, viewed 7 September 2010.

¹⁷ Ibid.

¹⁸ The current shareholders of WICET are: Argos (Qld) Pty Ltd (part of the Aquila Group); Bandanna Energy Ltd; Belvedere Coal Management Pty Ltd; BHP Coal Pty Ltd, BM Alliance Coal Operations Pty

- 3.8. Many of the Applicants are shareholders in WICET. The Terminal will be operated by the Gladstone Ports Corporation.
- 3.9. In October 2008 the WICET Group (which consists of WICET and WICET Holdings Pty Ltd) was granted preferred proponent status from the Queensland Government for the development of the Terminal. On 11 December 2009 WICET and the Queensland Government executed a Framework Deed in relation to the construction of the new Terminal.¹⁹
- 3.10. The Terminal will be located at Golding Point (near Wiggins Island) in the Port of Gladstone, across from the existing RG Tanna Coal Terminal. It will service Queensland's coal producers located in both the Bowen and Surat Basins.
- 3.11. One of the conditions precedent in the Framework Deed is that the Applicants must demonstrate certainty of rail access to ensure that their coal can be transported to the new Terminal.²⁰
- 3.12. It is also proposed that Gladstone Ports Corporation, who owns the land on which the Terminal is to be constructed, will lease the land to WICET, in addition to leasing or sub/leasing to WICET the areas necessary for the development and operation of the Terminal.²¹
- 3.13. The Terminal is proposed to be built in stages, to match forecast export demand. Development of Stage 1 will provide capacity of approximately 30 million tonnes per annum at the port.²² The Terminal will then be expanded in additional increments (subject to demand) to a total capacity of approximately 80 million tonnes per annum.²³
- 3.14. WICET has capacity commitments from eight Stage 1 producers totalling 27 million tonnes per annum. The Stage 1 producers for the Terminal are:²⁴
- Aquila Resources
 - Bandana Energy
 - Caledon Resources
 - Cockatoo Coal
 - Northern Energy Corporation
 - Wesfarmers Curragh
 - Yancoal and
 - Xstrata Coal.

Ltd; Caledon Coal Pty Ltd; Cockatoo Coal Pty Ltd; Felix Resources Ltd; Jellinbah Resources Pty Ltd; Macarthur Coal Ltd; Northern Energy Corporation Ltd; Qcoal Pty Ltd; Rio Tinto Coal Australia Pty Ltd; Syntech Resources Pty Ltd; Wesfarmers Curragh Pty Ltd; and Xstrata Coal Queensland Pty Ltd. [See WICET Fact Sheet: *About WICET*.]

¹⁹ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 15.

²⁰ Ibid, page 17.

²¹ Ibid, page 15.

²² Ibid, page 16.

²³ WICET Fact Sheet: *About WICET*.

²⁴ Media release, WICET, *Wiggins Island Coal Export Terminal achieves major milestone*, 30 September 2010.

- 3.15. The above capacity commitments will form the basis for WICET securing funding over the initial Terminal development, with Financial Close expected in the first half of 2011 and shipments to commence from 2014.²⁵
- 3.16. Further, the Applicants advise that on 16 July 2010 WICET commenced a Supplementary Expression of Interest Process for a potential ‘Stage 2’ expansion of the Terminal for shipments to commence from 2015 or 2016. The Stage 2 expansion is expected to align with the proposed development of the Surat Basin and significant associated below rail infrastructure expansion by QR Network and Surat Basin Rail (see paragraphs 3.22 – 3.23 for further information about the Surat Basin Rail Project).²⁶
- 3.17. Once fully developed, the Terminal will consist of:²⁷
- 4 dump stations and 4 in-loading conveyor streams to the stockyard
 - coal export stockyard and materials handling systems and
 - 4 ship-loading conveyor streams serving 4 ship loaders across 4 berths and an additional 2 berths (for other purposes).
- 3.18. Access to the Terminal facilities will be governed by a government-approved Access Policy administered by WICET. WICET intends to operate the Terminal on an open access basis.²⁸

Transfer of coal capacity to the Terminal and RG Tanna Coal Terminal

- 3.19. In response to the growing environmental concerns about coal dust from the Barney Point Coal Terminal, specified portions of port terminal services, coal handling services and coal storage facilities (Tonnage Capacity) are currently being re-allocated from the Barney Point Coal Terminal to the RG Tanna Coal Terminal (owned and operated by Gladstone Ports Corporation) and the Wiggins Island Terminal at the Port of Gladstone.
- 3.20. The ACCC granted authorisation to the above mentioned re-allocation arrangements on 21 April 2010.
- 3.21. The Applicants submit that if not taken into account, this re-allocation of Tonnage Capacity may result in insufficient existing capacity on the below rail network, or part thereof, leading into the RG Tanna Terminal and the Terminal.²⁹

Surat Basin Rail Project

- 3.22. Further, the Applicants note that a joint venture has been established between Australian Transport and Energy Corridor Pty Ltd, Xstrata Coal and QR to construct

²⁵ Ibid.

²⁶ The Applicants’ submission in response to information request, 28 July 2010, pages 3 and 4.

²⁷ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 16.

²⁸ ACCC determination of 21 April 2010 in relation to application for authorisation lodged by Gladstone Ports Corporation Ltd, WICET Holdings Pty Limited and Wiggins Island Coal Export Terminal Ltd in respect of proposed arrangements to re-allocate specific amounts of port terminal services, coal handling services and coal storage facilities from Barney Point Coal Terminal to the proposed Wiggins Island Terminal or RG Tanna Coal Terminal at the Port of Gladstone, page 5.

²⁹ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 5.

the below rail infrastructure for the Surat Basin Rail Project, which will facilitate access to the Moura System from the Surat Basin in south east Queensland.³⁰ In particular, this project will connect the Western System near Wandoan with the Moura System near Banana (near the township of Moura).³¹

- 3.23. The Applicants submit that upon completion, the Surat Basin Rail Project will facilitate a significant increase in demand for rail capacity to the Terminal to transport coal from the Surat Basin. This may also result in insufficient capacity on the Moura below rail network. Historically, thermal coal reserves in the Surat Basin have not been mined due to the lack of access to rail and a suitable port.³²

Transportation of coal in Queensland

- 3.24. Coal produced in Queensland is primarily transported to export terminals via rail. QR Network has a lease over the rail transport infrastructure it operates from the State of Queensland.³³ Both QR Network and ARTC are accredited managers for providing below rail services in Queensland.³⁴ The current application relates to transport infrastructure operated by QR Network only.
- 3.25. Figure 2.1 shows the Bowen Basin and Surat Basin coal regions in Queensland. The Blackwater rail system is located in the southern Bowen Basin. The Moura rail system is a smaller system. As noted above, coal tonnage through the Moura system is expected to increase significantly when the proposed Surat Basin Railway is completed, linking new mines in the Surat Basin with the Port of Gladstone.

Above rail

- 3.26. Asciano (via Pacific National) and QR National provide coal rail haulage services in Queensland. Pacific National commenced operations in Queensland in 2009 and currently transports coal on the Blackwater rail system, which will serve the proposed Terminal.³⁵
- 3.27. QR National provides coal haulage services on both the Blackwater and Moura rail systems. QR National currently runs approximately 24 services per day from 10 mines on the Blackwater system to the Port of Gladstone's two terminals – RG Tanna Coal Terminal and Barney Point Terminal.³⁶ On the Moura system, QR National runs around nine services per day from four mines to the Port of Gladstone.³⁷

³⁰ Ibid, page 15.

³¹ Ibid, page 5.

³² Ibid, page 6.

³³ Submission from QR Network, 29 July 2010, page 4.

³⁴ Ibid.

³⁵ Submission from Asciano, 11 August 2010, page 3.

³⁶ *Blackwater coal system*, QR National Coal, QR National website:

http://www.qrnational.com.au/CoalFreight/Documents/3_Blackwater_QRNC_fact_sheets_updated_June_2010.pdf, viewed on 9 September 2010.

³⁷ *Moura coal system*, QR National Coal, QR National website:

http://www.qrnational.com.au/CoalFreight/Documents/4_Moura_QRNC_fact_sheets_updated_June_2010.pdf, viewed on 9 September 2010.

Below rail

- 3.28. The Queensland Government has publicly stated its intention to privatise QR, including sale of the below rail assets. Since 1 July 2010, QR and QR Network have been separate enterprises due to a restructuring in preparation for the public listing of QR National, QR Network's parent company.³⁸
- 3.29. The ACCC notes reports that on 9 September 2010 a consortium of coal producers (the Queensland Coal Industry Rail Group) withdrew its bid to acquire QR Network's below rail assets.
- 3.30. On 16 April 2010 QR Network issued a Request for Proposals (RFP) document to the Applicants seeking non-binding requests for below rail capacity for the purpose of transporting coal to the new Terminal for a period of 20 years from 1 July 2013. QR Network sought initial responses from the Applicants by 4 May 2010.³⁹
- 3.31. The Applicants advise that under the terms of the RFP, QR Network proposes to proceed with the development of new rail infrastructure and/or enhancements to existing infrastructure in stages to meet the staged development of the Terminal.⁴⁰ In this regard, QR Network states that any development is subject to agreement of mutually acceptable terms.⁴¹
- 3.32. By way of example, the Applicants advise the kinds of projects that are likely to be required to upgrade the Identified Rail Infrastructure and Services for Stage 1 of the proposed Terminal include:⁴²
- one balloon loop at the port
 - third north coast line between Aldoga and WICET loop plus connection to Aldoga Yard
 - Blackwater duplications (currently propose three)
 - enhancements on south end of Goonyella System (likely to consist of two passing loops and potentially some duplication) and
 - Callemondah Feeder Station.

³⁸ Ibid, page 3.

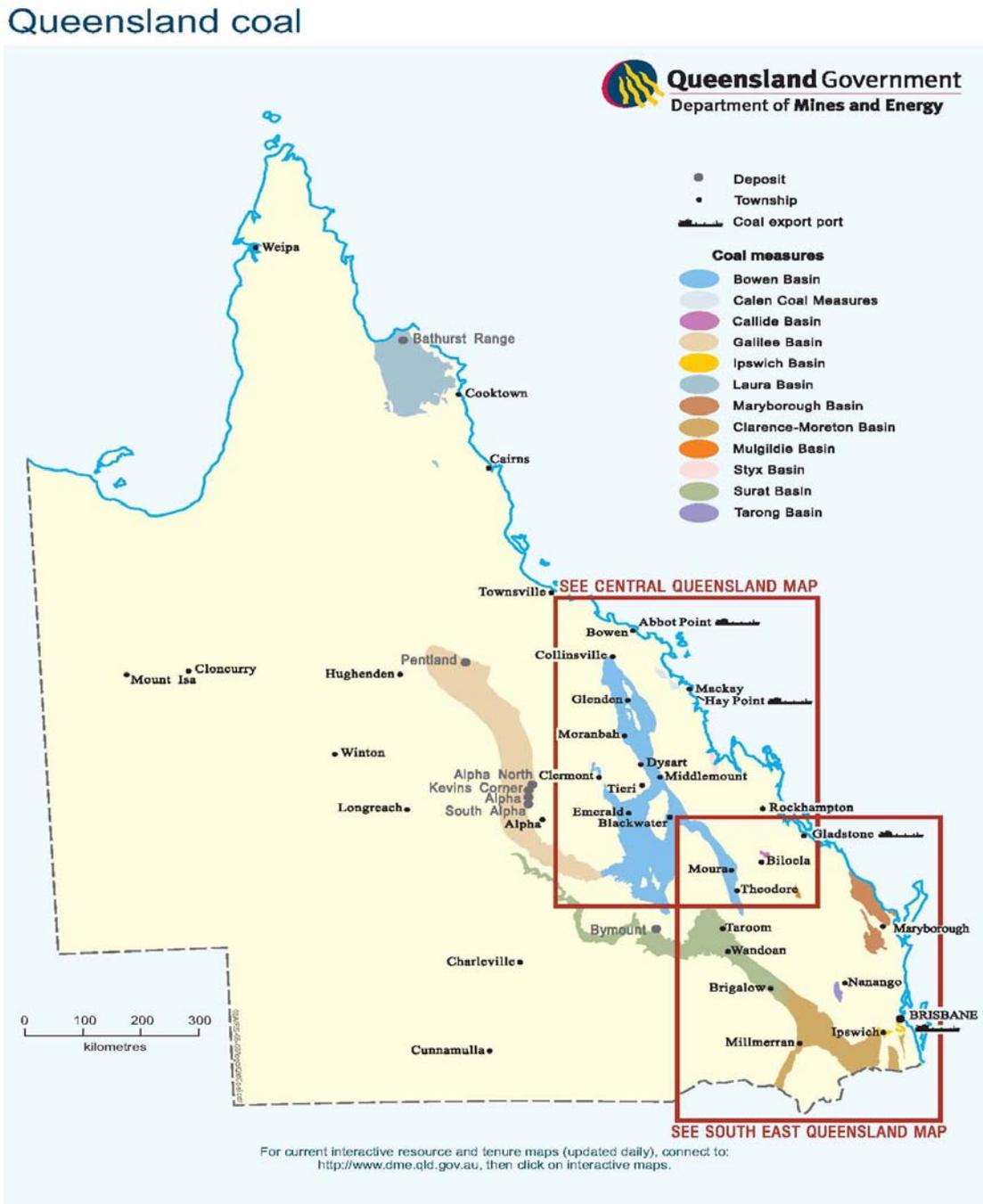
³⁹ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, pages 10-11.

⁴⁰ Ibid, page 8.

⁴¹ Submission from QR Network, 29 July 2010, page 4.

⁴² Annexure 3 to the supporting submission to application for authorisation A91241, page 7, QR Network presentation, *WICET Stage 1 – Assumed Projects*.

Figure 2.1: Queensland's mineable coal regions⁴³



⁴³

Queensland Department of Mines and Energy website:
http://www.dme.qld.gov.au/mines/publication_list.cfm viewed, 7 September 2010.

Regulatory arrangements – QR Network’s 2010 access undertaking

- 3.33. On 1 October 2010 the Queensland Competition Authority (QCA) approved QR Network’s 2010 access undertaking, which will govern access to QR Network’s below rail infrastructure. The 2010 access undertaking sets out the terms and conditions under which QR Network will provide access to rail infrastructure covered by the undertaking. The QCA’s approval of QR Network’s 2010 access undertaking follows a lengthy and comprehensive consultation process.
- 3.34. At the time of lodging the current application for authorisation, the Applicants submitted that QR Network’s access undertaking and the proposed collective bargaining arrangements will be able to operate simultaneously and not to the exclusion of one another. As such, the Applicants believed that any authorisation to collectively bargain with QR Network will not detract from the terms of any access undertaking which may ultimately be accepted by the QCA.⁴⁴
- 3.35. QR Network advised that the 2010 access undertaking is intended to provide access to its below rail infrastructure on fair and equitable terms by means of a tariff structure applicable to all users, unless particular risk factors apply.⁴⁵ In this regard, the Applicants submit that collective bargaining is an appropriate mechanism for seeking equitable terms of access.⁴⁶
- 3.36. Further, QR Network advised that its 2010 access undertaking contains provisions which relate to User Funded Expansions. The Applicants advised that where QR Network does not agree to undertake specific infrastructure investment, or where QR Network and the producers are unable to agree on terms of access, producers may separately finance infrastructure development projects as User Funded Expansions.⁴⁷
- 3.37. The Applicants anticipate that producers involved in User Funded Expansions may need to discuss and agree upon certain issues as a group – for example, the particular capacity required to be created by the expansion; construction and procurement costs and arrangements; construction scope and evaluation and value engineering; and timing of the project.⁴⁸
- 3.38. As previously noted, QR Network has issued an RFP document to producers specifically in relation to the Terminal project, seeking non-binding requests for capacity in relation to QR Network’s Identified Rail Infrastructure for the purpose of transporting coal to the Terminal for a period of 20 years from 1 July 2013. The ACCC understands that the RFP process sits alongside QR Network’s 2010 access undertaking, and that once any new rail transport infrastructure is constructed, it will form part of QR Network’s declared service.
- 3.39. As part of its RFP process for incremental capacity, QR Network has offered ‘user funding’ to those RFP respondents that it has identified as being involved in the first stage of expanding its rail infrastructure.⁴⁹ QR Network agrees that the practical

⁴⁴ Submission from the Applicants, 3 August 2010, page 4.

⁴⁵ Submission from QR Network, 29 July 2010, page 4.

⁴⁶ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 18.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Submission from QR Network, 29 July 2010, page 1.

implementation of user funding would involve discussion and agreement between the relevant producers.⁵⁰

- 3.40. QR Network submitted that its 2010 draft access undertaking submitted to the QCA committed it to undertake capacity expansions where the expected capital costs of the associated rail transport infrastructure enhancements are less than \$300 million. The terms and conditions of access to the capacity created by these enhancements are proposed to be negotiated pursuant to the QR Networks 2010 draft access undertaking. As such, QR Network submitted that there is no requirement for collective bargaining for rail transport infrastructure expansion projects below \$300 million.⁵¹
- 3.41. However, the Applicants noted that even for expansion projects below \$300 million, they seek to collectively discuss issues regarding the way in which such enhancements to support the Terminal will be provided including: specifications of the infrastructure, timing of construction activities (including integration with related projects) and any efficiency-enhancing mechanisms that the Applicants consider necessary.⁵²

Recent ACCC authorisation decisions

2010 Gladstone Port authorisation

- 3.42. On 21 April 2010 the ACCC granted authorisation to Gladstone Ports Corporation, Wiggins Island Coal Export Terminal Pty Ltd and WICET Holdings Pty Ltd to make and give effect to proposed arrangements to re-allocate specified portions of port terminal services, coal handling services and coal storage facilities from Barney Point Coal Terminal to the proposed Wiggins Island Terminal or RG Tanna Terminal at the Port of Gladstone. Authorisation was granted until 31 May 2015.
- 3.43. This application was lodged following a decision by the Gladstone Ports Corporation to cease coal exports from Barney Point and to reduce the quantity of coal dust likely to affect the residents of Gladstone. Prior to this, residents were concerned about the levels of coal dust and noise pollution from the Barney Point Terminal.
- 3.44. The ACCC noted in its Gladstone Ports decision that the proposed Wiggins Island Terminal is to have greater export capacity than the Barney Point Terminal. The ACCC concluded that the proposed arrangements were likely to result in public benefits in the form of environmental benefits and avoidance of delays in increased investment, coal export capacity and improved infrastructure and job growth in central Queensland.

North West Iron Ore Alliance authorisation – collective negotiation of rail access in the Pilbara

- 3.45. On 29 April 2010 the ACCC granted conditional authorisation to the North West Iron Ore Alliance (NWIOA) to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia. Authorisation was granted for 15 years.

⁵⁰ Ibid, page 4.

⁵¹ Ibid.

⁵² Submission from the Applicants, 3 August 2010, page 4.

- 3.46. Specifically, the proposal involved NWIOA seeking to collectively negotiate terms and conditions, including price, under which above rail haulage services and/or below rail track access will be acquired from BHP Billiton, Rio Tinto and Fortescue Metals Group and any other service provider in the future.
- 3.47. The ACCC concluded that the NWIOA's collective negotiation arrangements would be likely to deliver public benefits in the form of transaction costs savings. Additionally, the ACCC considered the proposed arrangements may facilitate improvements in the level of input the NWIOA could have in contractual negotiations for the provision of services and as such, result in a small benefit by contributing to more efficient infrastructure investment.

4. Submissions received by the ACCC

- 4.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Prior to the draft determination

- 4.2. In support of their application, the Applicants submit that the joint development of the new Terminal at the Port of Gladstone by the coal producers is a significant infrastructure project which will have substantial benefits in terms of increasing coal exports from Queensland. An important issue for the Terminal project is that producers are able to secure rail access to the Terminal in order to ensure that coal can be transported to the Terminal for export. In this regard, the Applicants submit it is necessary and appropriate for the Applicants to be able to jointly negotiate with QR Network in relation to rail access to the Terminal.⁵³
- 4.3. The ACCC sought submissions from sixteen interested parties potentially affected by the application, including QR Network, above rail operators, port corporations, industry associations and relevant government departments.
- 4.4. The ACCC received public submissions from QR Network and Asciano. Both parties generally support authorisation of the proposed collective bargaining arrangements. However, Asciano outlined several areas of potential concern.
- 4.5. The Applicants provided further submissions in response to issues raised by QR Network and Asciano.

Following the draft determination

- 4.6. On 1 October 2010 the ACCC issued a draft determination in relation to the application for authorisation (A91241).
- 4.7. A conference was not requested in relation to the draft determination.
- 4.8. The ACCC received two public submissions in response to the draft determination from:
- QR National Network Services;
 - Asciano.
- 4.9. The views of the Applicants and interested parties are outlined in further detail in the ACCC's evaluation of the collective bargaining arrangements in Chapter 5 of this determination.
- 4.10. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au by following the links to Public Registers and Authorisations.

⁵³ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 23.

ACCC evaluation

- 4.11. The ACCC's assessment of the collective bargaining arrangements is in accordance with tests found in:
- sections 90(6) and 90(7) of the Act which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
 - sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- 4.12. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

Area of competition

- 4.13. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant area of competition affected by the conduct.
- 4.14. The Applicants submit the potential areas of competition impacted by the collective bargaining arrangements are:⁵⁴
- the primary market for the provision of access to below rail infrastructure associated with the Terminal, in which QR Network is the sole provider of the services
 - the global market for the supply of coking coal, in which the Applicants supply coal to export customers and

⁵⁴ Ibid, page 28.

- the global market for the supply of thermal coal, in which the Applicants supply thermal coal to export customers.
- 4.15. The ACCC did not receive submissions from interested parties specifically commenting on this issue.
- 4.16. For the purpose of assessing this application, the ACCC considers the primary area of competition affected by the collective bargaining arrangements is the supply and acquisition of access to below rail infrastructure associated with the Terminal.
- 4.17. The ACCC considers the arrangements may also have an impact on:
- the supply and acquisition of above rail haulage services and coal handling services at the Port of Gladstone and
 - the global markets for the supply of thermal and metallurgical coal.

The counterfactual

- 4.18. 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 conduct for which authorisation has been sought.⁵⁵
- 4.19. 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’.
- 4.20. The Applicants submit that it could be considered that the collective bargaining arrangements constitute agreements between competitors to fix the price at which access to the Identified Rail Infrastructure and Services is to be acquired by them, potentially breaching the cartel provisions of the Act. In this regard, the Applicants submit that ‘any such cartel provision would relate to the price of services to be collectively acquired by the Applicants (and/or their related bodies corporate), such as to fall within the collective acquisition exception in section 44ZZRV of the TPA.’⁵⁶
- 4.21. Having said this, the Applicants submit that given the criminal sanctions and severe penalties that arise in relation to potential breaches of the cartel provisions of the Act, absent authorisation they would not collectively negotiate for the acquisition of access to below rail infrastructure. The Applicants submit individual negotiations in relation to the Identified Rail Infrastructure and Services will:⁵⁷
- result in a far less efficient, costly and likely lengthier process and

⁵⁵ *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.

⁵⁶ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 27.

⁵⁷ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 33.

- be less efficient in gauging overall capacity requirements, which could lead to some of the contracted capacity misalignments that are present in other export supply chains.

4.22. The ACCC considers that without authorisation of the collective bargaining arrangements, the producers would negotiate individually with QR Network to acquire access to the Identified Rail Infrastructure and Services.

Public benefit

4.23. 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:

...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.⁵⁸

4.24. The Applicants submit that the collective bargaining arrangements will deliver public benefits, including:

- facilitating investment in infrastructure along the coal chain associated with Wiggins Island by providing greater commercial certainty for investment in the infrastructure
- fostering business efficiency in understanding likely demand and timing requirements by coal producers using the Terminal, resulting in improved commercial outcomes particularly where this results in increased exports and enhanced international competitiveness
- helping to address the lack of contractual alignment which has existed in coal supply chains in recent years by ensuring that capacity expansions to the interlinked infrastructure occurs in a coordinated basis
- lowering transaction costs for the Applicants and QR Network, and lowering negotiation risk
- more timely growth in export markets and the volumes of coal that will be exported by Australian producers to international customers
- enabling some of the Applicants who are smaller producers of coal to be more competitive versus the larger producers, in particular, by facilitating more equal negotiating positions compared to QR Network
- benefiting the Queensland and Australian economies as a result of increased exports, which is likely to lead to increased employment opportunities being created and
- providing a number of environment and safety benefits associated with contractual alignment which may assist in reducing any vessel queues due to constrained coal supply chains in Queensland.

4.25. The ACCC's assessment of the likely public benefits from the conduct follows.

⁵⁸

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.

Transaction cost savings

- 4.26. The Applicants submit that collective bargaining arrangements will enable them to participate in negotiations for access to the Identified Rail Infrastructure and Services at significantly lower costs to each Applicant, and to the industry in general, than would be the case if each Applicant had to pursue negotiations individually. For example, the Applicants consider the following savings are likely to arise under the arrangements:⁵⁹
- the number of hours that would be required to be spent by members of senior management in engaging in lengthy negotiations with QR Network and
 - costs involved in briefing external lawyers or expert consultants from time to time.
- 4.27. QR Network is also of the view that the collective bargaining arrangements will result in transaction cost savings. Prior to the ACCC granting interim authorisation to the arrangements, QR Network noted that individual negotiations under its RFP process for Stage 1 of the proposed Terminal had commenced. It submitted that collective bargaining would accelerate this process.
- 4.28. In particular, QR Network submitted that:
- ...negotiating with Stage 1 producers in a single process...is likely to save significant amounts of time compared to six or so separate negotiations with QR Network having to go back to each party over and over as it tries to reach a consensus on key common elements.⁶⁰
- 4.29. Generally, the ACCC considers there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in a collective bargaining arrangements, relative to a situation where a series of individual negotiation processes are necessary. The ACCC considers that to the extent these transaction cost savings do arise they are likely to constitute a public benefit.
- 4.30. The ACCC considers that absent authorisation of the collective bargaining arrangements, individual negotiations regarding the terms and conditions for below rail access is likely to result in a longer and more costly negotiation process for the parties.
- 4.31. Under the collective bargaining arrangements, a sub-committee will represent the producers in a single negotiation process with QR Network. The results of negotiations will then be communicated to participating producers.
- 4.32. The ACCC considers that significant transaction cost savings are likely to result from the arrangements, compared to a situation where the Wiggins Island producers attempt to continue to negotiate individually for below rail access. Therefore, the ACCC accepts that the collective bargaining arrangements are likely to deliver a public benefit in the form of transaction cost savings.

Facilitating efficient investment in infrastructure

- 4.33. The Applicants submit that if each Applicant was required to deal with QR Network individually, it would be inevitable that expectations about prices, services to be

⁵⁹ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 38.
⁶⁰ Record of meeting with QR Network, 26 July 2010, pages 1-2.

offered, access conditions to be imposed and other contractual terms would be individualised, may be contradictory and be subject to misalignment with required Terminal capacity and staged expansions. The Applicants therefore submit that the proposed arrangements:

...would allow and would convey a joint industry view, for example in relation to the investment which industry considers necessary, to which QR Network could then respond. In the absence of this arrangement, it is likely to conceive of situations where QR Network's response to the aggregate requests of producers would lead to inefficient or inadequate infrastructure investment and provision.⁶¹

4.34. Further, the Applicants consider that presenting a joint industry view to QR Network regarding infrastructure needs will, in turn:⁶²

- provide greater certainty to QR Network regarding potential infrastructure investment and
- the producers and QR Network will have a greater ability to predict annual costs and revenue, and therefore be better placed to make long term planning decisions regarding production and investment in new mines or system upgrades.

4.35. Asciano considers that there are substantial public benefits from the arrangements. In particular, it submits that:

...there are substantial public benefits arising from the development of the Terminal and the more efficient operation of the coal supply chain in central Queensland.⁶³

4.36. The ACCC considers there are likely to be a number of factors that impact efficient infrastructure investment. The ACCC believes that collective negotiations may assist the industry in identifying proposals that seek to satisfy the needs of the relevant parties more fully. To the extent that the collective bargaining arrangements facilitate such an outcome, the ACCC considers the arrangements may contribute to more efficient infrastructure investment along the coal supply chain, compared to a situation where negotiations are conducted on an individual basis, and that this results in a benefit to the public.

Improvement in business efficiency and commercial outcomes

4.37. The Applicants are of the view that the arrangements will promote business efficiency in understanding the likely demand volumes and capacity timing requirements of Wiggins Island coal producers, which results in improved commercial outcomes and increased exports and international competitiveness.

4.38. In particular, the Applicants consider the collective bargaining arrangements will allow the producers to improve their bargaining position with QR Network 'by increasing the quality, preparedness and rigour which may be applied to the commercial negotiations on behalf of the Applicants.'⁶⁴

⁶¹ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 37.
⁶² Ibid.

⁶³ Submission from Asciano, 11 August 2010, page 1.

⁶⁴ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 37.

4.39. In this regard, QR Network considers the collective bargaining arrangements:

...may facilitate the development of mutually acceptable access-related terms and conditions with coal mining companies for the Blackwater and Moura systems and the achievement of a net public benefit.⁶⁵

4.40. Asciano considers that there are significant benefits from the collective bargaining arrangements, namely:

Collective bargaining is required in order to facilitate the financing and construction of the infrastructure required for access to the Terminal, and the public benefits created by the construction and ongoing operation infrastructure are substantial.⁶⁶

4.41. The ACCC notes that absent authorisation of the collective bargaining arrangements, individual negotiations would occur in a regulated environment, where the terms and conditions of access to below rail infrastructure would be subject to an access undertaking approved by the QCA.

4.42. However, the ACCC notes that the WICET producers will jointly own and develop the new Terminal at the Port of Gladstone. One of the conditions precedent under the Framework Deed for the Terminal project is for the producers to demonstrate access to below rail capacity to support coal exports from the Terminal. As a consequence, delays in individual producers securing below rail access could result in delayed construction of the Terminal.

4.43. Therefore, the ACCC recognises that collective bargaining arrangements could deliver additional commercial certainty to the coal producers by enabling them to secure, on a timelier basis, sufficient rail transport infrastructure to support the joint development of the proposed Terminal. To the extent this occurs, the ACCC considers this constitutes a public benefit.

Alignment of contracted volumes

4.44. The Applicants argue that the collective bargaining arrangements will facilitate the alignment of individual producers' contractual commitments across the coal supply chain, which is a public benefit.

4.45. In particular, the Applicants submit that:

Alignment of individual contracted capacity commitments (backed by take or pay obligations) will result in a more sustainable and market-based long term outlook for the supply chain and will assist in growth of coal exports from Australia...⁶⁷

4.46. In contrast, QR Network notes that it is already working closely with WICET concerning the basis on which capacity is determined and contracted in order to ensure that rail access is properly aligned. QR Network also considers that the parties are incentivised to reach contractual alignment regardless of the collective bargaining

⁶⁵ Submission from QR Network, 29 July 2010, page 1.

⁶⁶ Submission from Asciano, 11 August 2010, page 4.

⁶⁷ The Applicants' supporting submission to application for authorisation A91241, page 38.

arrangements, and does not see how the arrangements will have any impact on that process.⁶⁸

4.47. The ACCC agrees that the achievement of contractual alignment is critical to ensure the efficient operation of and efficient investment across coal supply chains. In previous authorisation decisions, the ACCC has concluded that achieving contractual alignment is dependent on:

- parties being able to enter into long term contracts to underpin investment and
- service providers contracting on the basis of the capacity of the supply chain as a whole, rather than contracting based on assessment of individual capacity.

4.48. Absent authorisation of the collective bargaining arrangements, the ACCC notes that aggregate capacity requirements at the port and in rail would still be known by the relevant service providers and infrastructure owners. The provision of each producer's contracted volumes to a central coal chain coordinator for example, would facilitate master planning of capacity expansions along the coal supply chain and the achievement of contractual alignment.

4.49. Indeed, the ACCC notes WICET's Terminal Access Policy, which envisages it working closely with relevant stakeholders and service providers to develop mechanisms to achieve contractual alignment. In particular, paragraph 8.2(b) of the Terminal Access Policy provides that:

WICET acknowledges there is an industry objective to encourage all service providers in the coal supply chain to plan and provide for, and for Gladstone Coal Producers to hold, access contracts under which each of the service providers, and the supply chain as a whole, are capable of fully delivering the aggregate contracted tonnage. WICET will, subject to confidentiality obligations, work cooperatively with Relevant Industry Stakeholders, the State and other parties as required to develop the mechanisms necessary to achieve this objective.⁶⁹

4.50. With respect to this application it is unclear to the ACCC how the collective bargaining arrangements would contribute significantly to the achievement of contractual alignment. Therefore, the ACCC is not satisfied that contractual alignment is a public benefit likely to result from the arrangements.

Growth in export markets

4.51. The Applicants submit that the expansion of mining activities and more efficient transportation of coal will result in greater exports of coal by the Applicants, which will have broader economic benefits for the Queensland and Australian economies.⁷⁰

4.52. In particular, the Applicants submit that an independent report commissioned by the Gladstone Ports Corporation in 2008, forecast that the development of the Terminal would have the following economic impacts:⁷¹

⁶⁸ Record of meeting with QR Network, 26 July 2010, page 1.

⁶⁹ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 19.

⁷⁰ The Applicants' supporting submission to application for authorisation A91241, 7 July 2010, page 39.

⁷¹ Ibid, page 39.

- demand for a construction workforce of approximately 500 employees for Stage 1 of the Terminal, 600 employees for Stage 2 and 480 for Stage 3 of the Terminal
 - coal production and exports will increase gross state product by an estimated aggregate total of \$183 billion to 2040 over base level projections once the Terminal is fully developed
 - the estimated level of economic activity that will be directly attributed to coal production and exports will be between \$6.4 billion and \$8.3 billion annually through to 2040 once the Terminal reaches full capacity in 2021. This represents an upper annual increase of 2.6 per cent in gross state product from 2021 to 2040 over base level projections and
 - an average net annual addition to gross state product of Queensland of 1.8 per cent and an average net annual increase in the gross domestic product of Australia of 0.2 per cent between 2007 to 2040.
- 4.53. Generally, the ACCC considers that arrangements which generate a growth in exports constitute a benefit to the public. In this instance, the construction of the new Terminal at the Port of Gladstone is likely to generate increased exports from the Bowen and Surat Basins.
- 4.54. As previously noted, the ACCC considers that absent authorisation of the collective bargaining arrangements, any delays in individual producers securing below rail access could delay construction of Stage 1 of the Terminal. To the extent that the collective bargaining arrangements help to prevent a delay in the construction of the Wiggins Island Coal Export Terminal, thereby bringing forward infrastructure investment and job growth in the region, the ACCC considers the arrangements are likely to provide a benefit to the public.

Environmental and safety benefits

- 4.55. The Applicants submit that the collective bargaining arrangements will provide a number of environmental and safety benefits associated with contractual alignment which may assist in reducing any vessel queues due to constrained coal supply chains in Queensland.
- 4.56. Further, the Applicants submit that exporting coal through the Terminal may assist in easing the vessel queues in relation to other Queensland export terminals such as Dalrymple Bay Coal Terminal. Where terminals are situated close to the Great Barrier Reef, this results in environmental benefits.⁷²
- 4.57. As previously noted, the ACCC is not satisfied that the collective bargaining arrangements would contribute significantly to the achievement of contractual alignment. It follows therefore, that the ACCC is not satisfied that the arrangements, through contractual alignment, will result in the environmental and safety benefits claimed by the Applicants.

⁷²

Ibid, pages 39-40.

ACCC conclusion on public benefits

- 4.58. The ACCC considers the primary benefit to the public generated by the collective bargaining arrangements are the transaction cost savings, compared to a situation where the producers negotiate individually with QR Network for below rail access.
- 4.59. Given the joint development of the new Terminal by the producers, together with the potential for delayed construction of the Terminal if the Applicants are unable to secure timely access to below rail capacity, the ACCC considers the collective bargaining arrangements could also deliver additional public benefits in the form of greater commercial certainty regarding investment at the port by the Applicants and by avoiding delays in new export revenue.

Public detriment

- 4.60. 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 society including as one of its principal elements the achievement of the goal of economic efficiency.⁷³
- 4.61. The Applicants submit the collective bargaining arrangements will generate minimal, if any, anti-competitive detriment. In this regard, the Applicants highlight that participation in the arrangements is voluntary and in particular:
- there is no requirement or obligation on QR Network to negotiate with the Applicants on a collective basis – any authorisation granted by the ACCC merely provides the opportunity to do so
 - the Applicants retain complete discretion to negotiate collectively or individually with QR Network – any authorisation granted does not oblige producers to negotiate as a group or bind them to the outcome or terms which may result from collective negotiations
 - boycott activities are not proposed under the arrangements and
 - the arrangements are unlikely to limit the ability of other producers to secure access to available capacity from QR Network. The collective bargaining is open to all coal producers in the region should they wish to participate.
- 4.62. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 4.63. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

⁷³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.64. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparty(s) on the matters to be negotiated is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage and composition of the bargaining group and
 - there is no boycott activity.
- 4.65. In this regard, the ACCC notes that in the current application, participation in the collective bargaining arrangements is voluntary and does not involve possible boycott activity. Further, participation in the collective bargaining group is limited to current and future users of the Terminal who will need to secure below rail access as the staged expansion of the Wiggins Island Coal Export Terminal occurs.
- 4.66. Potential public detriment concerns raised by interested parties in relation to the collective bargaining arrangements can be summarised as follows:
- composition of the bargaining group – collective bargaining should be restricted to those Applicants relevant to each particular stage of the development of the Terminal
 - the breadth of the Identified Rail Infrastructure and Services covered by the arrangements and
 - competition in above rail operations will be negatively impacted if the collective bargaining arrangements involve discussions in relation to above rail matters.
- 4.67. The ACCC's assessment of the likely public detriment generated by the collective bargaining arrangements follows.

Information sharing arrangements

- 4.68. Generally, the ACCC considers that the exchange of certain information among competitors, particularly in relation to prices, fees and costs, may facilitate collusion or otherwise reduce competition, resulting in increased prices or reduced quality and availability of goods or services. Outcomes of this nature can result in significant public detriment.
- 4.69. The Applicants submit that under the arrangements producers will continue to compete in relation to the production and supply of coal. While there may be some discussion amongst the producers in regards to overall production volumes, the Applicants submit the following commercially sensitive information will not be discussed between them:⁷⁴
- customer identities
 - customer pricing information

⁷⁴ Submission from the Applicants, 28 July 2010, page 6.

- information relating to profit margins
 - detailed input costs
 - details of day-to-day operational efficiencies in production and
 - individual business plans and budgets and any other information which maintains an individual producer's competitive advantage over its competitors.
- 4.70. The ACCC accepts that to some degree, information sharing is an inherent aspect of collective bargaining because in order to collectively negotiate terms and conditions with a supplier or customer, the members of the collective bargaining group must discuss their desired outcomes from negotiations and how these can best be achieved. It is difficult to imagine a collective bargaining arrangement that does not involve some form of information sharing between the members of the collective bargaining group.
- 4.71. The ACCC notes that the purpose of the arrangements is to optimise the efficient investment in the coal supply chain by considering what capacity expansions are needed to support the increased capacity demands on the supply chain as a result of the construction of the new Terminal, reallocation of capacity from the Barney Point Terminal and the completion of the Surat Basin Rail Project. The ACCC recognises that there will be information exchanged between the producers in order to achieve this outcome. The ACCC considers the above mentioned restrictions regarding issues to be discussed among the Applicant producers is likely to limit any potential detriment.
- 4.72. Importantly, the Applicants would not have immunity for any information exchanges or agreements flowing from shared information for purposes beyond collective bargaining regarding access to below rail services to transport coal to the Terminal.

Composition of the collective bargaining group

- 4.73. QR Network notes that the Terminal is proposed to be developed over several stages, with the Applicants being coal producers that are expected to participate in at least one stage of the Terminal's development. In this regard, QR Network submits that it will only negotiate terms and conditions of access to the below rail infrastructure required to support each development stage of the Terminal with the Applicants participating in the relevant stage. As such, QR Network submits that any authorisation should 'be restricted to those Applicants relevant to each particular WICET development stage.'⁷⁵
- 4.74. Having said this, QR Network also considers that:
- ...any coal mining company that wishes to obtain rail access to capacity to the Terminal, irrespective of the development stage, should be permitted to join the named Applicants subject to the Authorisation...⁷⁶
- 4.75. In response, the Applicants submit that it is envisaged that all producers be entitled to take part in collective discussions regarding issues associated with access to below rail infrastructure supporting the Terminal. The Applicants submit this will enable the industry:

⁷⁵ Submission from QR Network, 29 July 2010, page 1.

⁷⁶ Ibid page 3.

...to reach a consensus on what below rail infrastructure is required to support the Terminal, the timing of delivery of such infrastructure and general transparency relating to below rail access supporting the Terminal.⁷⁷

- 4.76. The ACCC notes that the arrangements involve a sub-committee of three to four producers representing the Applicants in negotiations with QR Network. The sub-committee will report outcomes and seek input from each of the Applicants. At the conclusion of collective negotiations, the sub-committee will advise each Applicant that the agreement with QR Network is in a form that can be recommended to each Applicant for its consideration.
- 4.77. While the broader Applicant group may be involved in general discussions with the negotiating sub-committee, the ACCC notes that only the sub-committee would be involved in direct negotiations with QR Network. Flowing from this, only producers currently involved in the relevant stage of development at the Terminal would ultimately be seeking to execute a contract for below rail access with QR Network. In any event, the ACCC notes that the arrangements are voluntary, and QR Network is not compelled to collectively negotiate below rail access with the Applicants.

Future Users

- 4.78. Pursuant to section 88(10) of the Act, the applicants have sought to extend authorisation to future users of the WICET terminal.
- 4.79. QR National Network Services sought clarification of the mechanism by which a future user of the terminal would constitute a user of WICET:

QR Network considers the authorisation should provide a streamlined mechanism for the subsequent inclusion of any other coal mining company that subsequently becomes a proposed user of WICET.⁷⁸

- 4.80. The ACCC considers it is appropriate that authorisation extend to future prospective users of the WICET terminal subject to such coal producers:
- Providing written notice to WICET of an intention to become a future user of the Terminal (of any stage); and
 - Submitting a request to QR Network for below rail access to its network, and providing WICET written advice of such request.

Breadth of the Identified Rail Infrastructure and Services

- 4.81. QR Network submits that collective negotiations should be restricted to rail transport infrastructure which is owned and controlled by QR Network. In particular, QR Network submits:

The Application extends to 'access to any other rail infrastructure necessary to support the Terminal' and 'all services relating to such access for the purpose of the Applicants [transporting

⁷⁷ Submission from the Applicants, 3 August 2010, pages 2-3.

⁷⁸ Submission from QR Network, 20 October 2010, page 2.

coal] to the terminal in Gladstone'. QR Network notes this would extend to private rail infrastructure or land controlled by coal mining companies.⁷⁹

4.82. Asciano considers the proposed terms of the application for authorisation (as outlined at paragraph 1.7) are too broad. It believes the ability to engage in collective bargaining in relation to all expansions of the Blackwater and Moura rail systems for the 20 years proposed by the Applicants, could potentially delay or prevent expansions serving users that are not among the Applicants. Therefore, it considers that authorisation should be 'limited to expansions which are demonstrably linked to rail capacity needed to service the Terminal.'⁸⁰

4.83. Further, Asciano submits that some QR above rail businesses also own and/or operate infrastructure such as sidings and rail yards which could be considered below rail assets, and potentially captured by the Identified Rail Infrastructure and Services under the application.

4.84. In response to these concerns, the Applicants confirm that the current application for authorisation is intended to apply to collective negotiations in relation to below rail infrastructure (and associated services) and not to above rail services.⁸¹ Further, the Applicants consider that the definition of Identified Rail Infrastructure and Services is not too broad and is 'intended to capture below rail infrastructure required to support the Terminal' only.⁸²

4.85. In particular, the Applicants submit that:

...the identification of expansions to the Blackwater and Moura systems, in order to support the transportation of coal to the Terminal, is not considered by the Applicants to be too broad but is in fact intended to cover below-rail infrastructure that is linked to the Terminal project.⁸³

4.86. The Applicants also submit that they do not intend to negotiate collectively for the purpose of accessing private mine-specific rail infrastructure which may be owned by a producer. They also state that it is unclear on what basis they could even undertake such negotiations with QR Network.⁸⁴

4.87. Further, the Applicants note the voluntary nature of the collective negotiation process, which 'does not compel any party to negotiate or reach any agreements if it considers it is not in its best interests or to be appropriate.'⁸⁵

4.88. Following the release of the draft determination, QR Network made a further submission stating:

Consideration should be given to amending the definition of Identified Rail Infrastructure and Services by replacing the following part of that definition:

'...below rail infrastructure comprising the Blackwater and Moura systems including all expansions to these systems...'

⁷⁹ Submission from QR Network, 29 July 2010, page 3.

⁸⁰ Submission from Asciano, 11 August 2010, page 6.

⁸¹ Submission from the Applicants, 3 August 2010, page 1.

⁸² Submission from the Applicants, 25 August 2010, page 2.

⁸³ Ibid.

⁸⁴ Submission from the Applicants, 3 August 2010, page 1.

⁸⁵ Ibid, pages 1-2.

with

‘...below rail infrastructure comprising the Goonyella, Blackwater and Moura systems including: all expansions to these systems, all extensions to these systems including the proposed new railway connecting the Surat Basin to the Moura system...’

The reason for the variation is that it is feasible that additional rail infrastructure enhancements could be required for train services that originate in either the Goonyella system or the Surat Basin and terminate at the WICET terminal...⁸⁶

- 4.89. In response to QR Network’s submission, the applicant submitted the following in relation to the definition of Identified Below Rail Infrastructure:

The applicants intention from the outset of the authorisation process has been to seek immunity for collective negotiations in relation to all below-rail infrastructure which is necessary to support the Terminal. Accordingly, the definition of Identified Rail Infrastructure is intended to include all infrastructure linked to the Terminal project and necessary to support the transportation of coal to the Terminal.

...

It appears that QR Network’s suggestion is not a substantive issue but simply seeks to provide further clarity in relation to the subject matter of the collective bargaining, in accordance with the Applicants’ underlying intentions.

...

...the following definition would be acceptable to the Applicants:

‘...below-rail infrastructure primarily comprises the Blackwater and Moura systems, as well as any other below-rail infrastructure system necessary to support the terminal, and all expansions and extensions to these systems necessary to facilitate transportation of coal to the Terminal for export. For the avoidance of doubt, this may include, from time to time, the Goonyella system, the proposed infrastructure connecting the Surat Basin to the Moura system, and below-rail infrastructure necessary to support the reallocation of capacity from Barney Point to RG Tanna and the Terminal.’⁸⁷

- 4.90. The ACCC is of the view that the conduct is appropriately narrowly defined within the application to be limited to collective negotiations regarding terms and conditions of access to the necessary below rail infrastructure to support the transportation of coal to the new Terminal. The ACCC considers this definition includes any proposed rail infrastructure from the Surat Basin to the extent it is used to transport coal to the WICET terminal.

Potential impact on above rail competition

- 4.91. Asciano is concerned that, given the vertically integrated nature of QR, competition in above rail services will be negatively impacted by the involvement of any QR above rail entities in the collective bargaining process or by QR Network discussing or negotiating above rail matters with the Applicants.⁸⁸

⁸⁶ Submission from QR Network, 20 October 2010, page 2.

⁸⁷ Submission from the Applicants, 3 November 2010, page 2.

⁸⁸ Submission from Asciano, 11 August 2010, page 5.

4.92. Accordingly, Asciano seeks that any authorisation be limited to collective bargaining in relation to infrastructure that QR Network owns and operates (or will own and operate when constructed) and not extend to:

- negotiations relating to infrastructure owned by other entities, and in particular, QR entities with an above rail business and
- negotiations relating to above rail issues with either QR Network or any other QR entity.⁸⁹

4.93. In response, the Applicants highlight that conduct for which they seek authorisation relates to:

...proposed collective negotiations in respect of access to the identified *below-rail* infrastructure necessary to support the Wiggins Island Terminal...and services associated with such *below-rail access*...⁹⁰

4.94. Following the release of the Draft Determination, Asciano made a further submission stating:

Asciano believes that the Final Determination should contain further information regarding the monitoring regime that will be in place to ensure collective negotiations relating to below rail issues do not transition into negotiations on above rail issues...⁹¹

4.95. The Applicants do not consider a monitoring regime is necessary, submitting that:

Significant penalties may be imposed by the ACCC for contraventions of the Trade Practices Act... In any event, the potential for the imposition of penalties being imposed in the event of a breach of the law, acts as sufficient incentive for the applicants... It is not appropriate for authorisations to include a monitoring mechanism to ensure parties do not go beyond the scope of any authorisation...⁹²

4.96. The ACCC notes that the normal processes available under the Act would apply to any conduct engaged in by any parties to the proposed collective negotiations that is outside of the conduct authorised that may potentially breach the Act. As such, the ACCC does not consider a formal monitoring regime is appropriate in this instance.

4.97. The ACCC confirms that the conduct for which authorisation is sought does not include collective negotiations in relation to above rail services. Accordingly, the ACCC considers the collective bargaining arrangements are unlikely to result in a lessening of competition in relation to above rail haulage services.

ACCC conclusion on public detriments

4.98. The ACCC considers that the voluntary nature of the arrangements, the limited composition of the collective bargaining group and that bargaining and information exchanges between producers will be restricted to below rail services necessary to support the Terminal only, limits any potential detriment that may arise.

⁸⁹ Ibid.

⁹⁰ Submission from the Applicants, 25 August 2010, page 1.

⁹¹ Submission from Asciano, 20 October 2010, page 1.

⁹² Response to submissions by QR National and Asciano, 3 November 2010, page 3.

Balance of public benefit and detriment

- 4.99. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.100. In the context of applying the net public benefit test in section 90(8)⁹³ of the Act, the Tribunal commented that:
- ...something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁹⁴
- 4.101. For the reasons outlined in this chapter the ACCC considers significant public benefits are likely to result from the conduct in the form of transaction cost savings. Given the joint development of the new Terminal by coal producers, together with the potential for delayed construction of the Terminal if the Applicants are unable to secure timely access to below rail capacity, the ACCC considers the collective bargaining arrangements could also deliver additional public benefits in the form of greater commercial certainty regarding investment at the port by the Applicants and by avoiding delays in additional export revenue.
- 4.102. The ACCC considers that a range of factors including the voluntary nature of the arrangements, the limited composition of the collective bargaining group and that negotiations and information exchanges would be confined to the below rail infrastructure necessary to support the transportation of coal to the Terminal, limits any potential detriment that may arise.
- 4.103. Accordingly, the ACCC considers the public benefit that is likely to result from the collective bargaining conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) of the Act are met.

Condition

- 4.104. The Act allows the ACCC to grant authorisation subject to conditions.⁹⁵ Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the period of authorisation.
- 4.105. The ACCC notes that the terms of the current application for authorisation does not limit the target of the collective bargaining group. In particular, authorisation is sought to collectively bargain with QR Network for access to the Identified Rail Infrastructure and Services or any *future owner* of the Identified Rail Infrastructure and Services as a result of the proposed privatisation or sale of the QR Group, or any part thereof.
- 4.106. While there is likely to be a change in ownership of the relevant below rail assets in the future, the ACCC notes that the subject matter of the collective negotiations is clearly defined – namely, access to the Identified Rail Infrastructure and Services. Further, the

⁹³ 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.

⁹⁴ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

⁹⁵ Section 91(3).

ACCC understands that any future owner of the Identified Rail Infrastructure and Services will be required to submit an access undertaking to the QCA for approval.

4.107. Having said this, the ACCC considers it is possible that changes to the target service provider may affect the competitive impact of the collective negotiation proposal, particularly in circumstances where the Applicants have requested a 20 year authorisation period.

4.108. In its draft determination, the ACCC proposed to grant authorisation subject to the condition that the applicants provide written notice of any change in ownership or control of the Identified Rail Infrastructure and Services during the term of the authorisation.

4.109. Asciano supported this condition, adding:

...that in the event of the ACCC receiving such a notice that they consult with interested parties in order to establish whether the change in ownership raises any concerns.⁹⁶

4.110. In response to Asciano's submission, the Applicants submitted that it is not necessary to include a specific condition requiring the ACCC to consult in the event that a change in ownership of QR Network is notified to the ACCC, arguing:

Regardless of the identity of the owner of the Identified rail infrastructure, the public benefit as outlined in the Supporting Submission will also arise through the collective bargaining process with a future owner and that minimal impact on competition will occur.⁹⁷

4.111. The ACCC will consult with interested parties if it considers any change in ownership may affect the balance of benefits and detriments from the conduct. Further, any party is free to notify the ACCC of any concerns they may have with a change or proposed change in ownership at any time.

4.112. Therefore, to assist the ACCC's assessment of the ongoing competitive impact of the arrangements over the proposed period of authorisation the ACCC proposes to grant authorisation subject to the condition that the Applicants provide written notice of any change in ownership or control of the Identified Rail Infrastructure and Services during the term of the authorisation.

Length of authorisation

4.113. The Act allows the ACCC to grant authorisation for a limited period of time.⁹⁸ 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.

4.114. In this instance, the Applicants have sought authorisation to collectively negotiate in relation to the terms and conditions of access to the Identified Rail Infrastructure, and to enter into and give effect to agreements entered into with QR Network for the acquisition of access to the Identified Rail Infrastructure and Services for 20 years.

⁹⁶ Submission from Asciano, 20 October 2010, page 2.

⁹⁷ Response to submissions by QR National and Asciano, 3 November 2010, page 3.

⁹⁸ Section 91(1).

4.115. The Applicants submit this proposed 20 year period is necessary because:⁹⁹

- the RFP issued by QR Network proposes a term of 20 years
- the development of the Terminal is proposed to occur in stages over a period of several years. As such, certain ‘Stage 1’ producers will need to secure rail access at this early stage, while other producers will need to secure rail access at future stages of the development of the Terminal
- of the long lead times associated with infrastructure investment, the extensive capital investment and the need to deliver long term commercial certainty to both the Applicants and QR Network and other access providers in the supply chain associated with such infrastructure
- rail access agreements (and Terminal access agreements) are typically entered into for periods of at least 10 years, on a take or pay basis, therefore, it is contemplated that contracts or arrangements will be in effect for at least 10 years, although potentially longer and
- the impact of the proposed 20 year term of authorisation on competition is expected to be minimal, if any, in relation to the Terminal project and there will be no negative impact on the global markets for the supply of coking or thermal coal.

4.116. Interested parties have expressed concern that the duration of authorisation proposed by the Applicants may be too long.

4.117. QR Network believes there is no link between the proposed duration of authorisation and the 20 year term under its RFP process, as this was calculated for the determination of capital recovery charges from customers using QR Network-funded infrastructure. Also, QR Network considers there is no link between the requested authorisation period and 10 year take or pay access agreements.¹⁰⁰

4.118. As such, QR Network submits that:

The Authorisation should not extend beyond a period reasonably expected to allow for the negotiation and agreement of the terms and conditions of multiples stages of the terminal development, not the expected life of the agreements themselves.¹⁰¹

4.119. While recognising the period of any authorisation needs to be sufficiently long to support the staged development of the Terminal and to allow long term contracts to underpin this development, Asciano notes that the collective bargaining arrangements primarily relate to rail access negotiations with QR Network. Rail access agreements are typically ten years.¹⁰²

4.120. As such, Asciano considers:

...the authorisation period should be either ten years or, alternatively, should be aligned with the duration of the rail access agreement, but in any event should not be more than twenty years.¹⁰³

⁹⁹ The Applicants’ supporting submission to application for authorisation A91241, 7 July 2010, page 10.

¹⁰⁰ Submission from QR Network, 29 July 2010, page 4.

¹⁰¹ Ibid.

¹⁰² Submission from Asciano, 11 August 2010, page 7.

¹⁰³ Ibid.

- 4.121. In response, the Applicants submit that it is not practical for any authorisation not to extend for the entire duration of the rail access agreements entered into with QR Network. In this regard, the Applicants submit that:

...they require the ability to collectively discuss and negotiate ongoing issues such as system optimisation initiatives relating to the below-rail infrastructure supporting the Terminal, amongst themselves and with QR Network throughout the term of any access agreements...This may involve ongoing changes to below-rail configurations in order to achieve throughput targets in the most efficient manner...discussions of this nature may occur intermittently, outside of the discrete periods for negotiations regarding access relating to particular development stages of the Terminal.¹⁰⁴

- 4.122. Following the release of the Draft Determination, QR Network made a further submission relating to the duration of the proposed authorisation:

QR Network believes that this proposed duration [until 31 December 2025] is too long and should be restricted to the period of negotiation of access-related and funding-related terms relevant to each WICET development stage.¹⁰⁵

- 4.123. In response to QR Network's submission, the applicant responded by referring to their previous submissions in which they provided detailed reasons for the proposed 20 year duration, but also noted:

... To the extent that the ACCC is not minded to grant either a 15 or 20 year authorisation, the duration should not be less than 13 years, as proposed in the Draft Determination.¹⁰⁶

ACCC's view

- 4.124. As previously noted in Chapter 2 of this determination, the ACCC understands that the collective negotiations are likely to occur in line with the staged development of the Terminal, including Stages 1 and 2.
- 4.125. Regarding the timing of Stage 2 of the Terminal, the ACCC understands that WICET commenced a supplementary Expression of Interest process with producers in July 2010 to determine capacity required for Stage 2.
- 4.126. The Applicants have also advised the ACCC that in the event there is an increase in demand for capacity at the Terminal post Stage 2, the collective negotiation process would likely be invoked at this time.
- 4.127. The ACCC now understands that negotiations are likely to occur over a 3-5 year period rather than the 2-3 year period set out in the Draft Determination.
- 4.128. Further, the ACCC notes that the Applicants believe it may be necessary to conduct ongoing collective negotiations with QR Network during the term of any access agreements regarding any potential price review/reset mechanisms within those agreements or about 'system optimisation initiatives'.
- 4.129. The ACCC considers there is a reasonable degree of certainty that the Applicants will seek to engage in collective negotiations for below rail access to support both Stages 1 and 2 of the Terminal over the next 3-5 years. However, as noted above, it is unclear at

¹⁰⁴ Submission from the Applicants, 3 August 2010, page 3.

¹⁰⁵ Submission from QR Network, 20 October 2010, page 1.

¹⁰⁶ Response to submissions by QR National Network Services and Asciano, 3 November 2010, page 1.

this time when and if collective negotiations for below rail access to support any further expansion of the Terminal may be required.

- 4.130. Given the long term nature of the staged infrastructure investments and to allow the Applicants to negotiate any changes that may be required to the 10 year access agreements, the ACCC proposes that a 15 year period of authorisation is appropriate in this instance. In particular, the ACCC considers this proposed duration of authorisation would deliver sufficient certainty to the Applicants looking to negotiate below rail access to the expanding Terminal over the next 5 years, particularly for Stages 1 and 2, and to give effect to any agreements entered into for an initial ten year term.
- 4.131. Should the Terminal proceed to Stage 3 or beyond at some time in the future, the parties are free to seek authorisation for any associated collective bargaining conduct at that time.
- 4.132. Therefore, the ACCC grants authorisation to the collective bargaining arrangements for 15 years, until the end of 2025.

5. Determination

The application

- 5.1. On 7 July 2010 various coal producers that will use the Wiggins Island Coal Export Terminal (the '**Terminal**'), to be constructed at the Port of Gladstone in Queensland, lodged application for authorisation A91241 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. The coal producers are: Anglo American Metallurgical Coal Pty; Aquila Resources Limited; Bandanna Energy Ltd; Belvedere Coal Management Pty Ltd; Caledon Coal Pty Ltd; Capricorn Coal Pty Ltd; Cockatoo Coal Ltd; Jellinbah Resources Pty Ltd; Middlemount Coal Pty Ltd; Monto Coal 2 Pty Ltd; Northern Energy Corporation Ltd; Syntech Resources Ltd; Wesfarmers Curragh Pty Ltd; West Rolleston Coal Pty Ltd; Xstrata Coal Queensland Pty; and Yancoal Australia Pty Ltd (the '**Applicants**'). The Applicants include their successors, assigns and/or their related bodies corporate, associated entities and joint venture partners.
- 5.3. Application A91241 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made 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 and
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.4. The Applicants seek authorisation to engage in collective bargaining arrangements with QR Network for the purpose of negotiating terms and conditions, including price, for access to the below rail infrastructure comprising the Blackwater and Moura systems including:
- all expansions to these systems
 - access to any other rail infrastructure necessary to support the Terminal
 - below rail infrastructure to support the reallocation of capacity from Barney Point to the Terminal and RG Tanna Coal Terminal and
 - all services relating to such access for the purpose of transporting coal to the Terminal (referred to as the '**Identified Rail Infrastructure and Services**').

5.5. Specifically, the Applicants seek authorisation to:

- collectively discuss and negotiate terms and conditions, including price, under which access to the Identified Rail Infrastructure and Services, for the purpose of transporting coal to the Terminal, will be acquired from QR Network and
- enter into and give effect to contracts, arrangements or understandings between QR Network and the Applicants, containing terms and conditions, including price, upon which access to the Identified Rail Infrastructure and Services will be acquired.¹⁰⁷

5.6. The application defines QR Network as:

QR Network Pty Ltd and, given the privatisation or sale of the relevant rail assets by the Queensland Government, any other QR Group entity or any entity which may acquire the relevant rail assets by virtue of the privatisation or sale process.¹⁰⁸

The net public benefit test

5.7. For the reasons outlined in Chapter 5 of this determination, and subject to the condition below, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

5.8. The ACCC therefore **grants** authorisation to application A91241 **on condition that** the Applicants provide written notice of any change in ownership of the Identified Rail Infrastructure and Services during the term of the authorisation.

Conduct for which the ACCC grants authorisation

5.9. The ACCC grants authorisation to the Applicants to:

- collectively discuss and negotiate terms and conditions, including price, under which access to the Identified Rail Infrastructure and Services, for the purpose of transporting coal to the Terminal, will be acquired from QR Network (or any future owner of the Identified Rail Infrastructure and Services) and
- enter into and give effect to contracts, arrangements or understandings between QR Network (or any future owner of the Identified Rail Infrastructure and Services) and the Applicants, containing terms and conditions, including price, upon which access to the Identified Rail Infrastructure and Services will be acquired,

until 31 December 2025.

5.10. The ACCC grants authorisation to the applicants and pursuant to section 88(10) of the Act, authorisation also applies to:

- Any stage 1 or stage 2 coal producers; and
- Any coal producer who provides notice in writing to WICET of an intention to become a future user of the Terminal (of any stage) and who has submitted a

¹⁰⁷ Application for authorisation A91241, Form B, 7 July 2010.
¹⁰⁸ Ibid.

request to QR Network for below rail access to its network, and provides WICET written advice of such request.

- 5.11. This determination is made on 2 December 2010.
- 5.12. Section 90(4) of the Act requires the ACCC to state in writing its reasons for a determination. The attachments form part of the written reasons for this determination.

Conduct not authorised

- 5.13. The authorisation does not extend to:
- any information exchanges or collective negotiations in relation to above rail services
 - negotiations regarding below rail infrastructure that does not support the transportation of coal to the Wiggins Island Coal Export Terminal and
 - collective boycott activity by the Applicants.
- 5.14. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

Interim authorisation

- 5.15. At the time of lodging the application, the Applicants requested interim authorisation to allow them to commence collective negotiations with QR Network as soon as possible. The ACCC granted interim authorisation on 4 August 2010.
- 5.16. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

- 5.17. This determination is made on 2 December 2010. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 24 December 2010.

The authorisation process

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.

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’.

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.

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.

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

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.

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.

Chronology of ACCC assessment for application A91241

The following table provides a chronology of significant dates in the consideration of this application.

DATE	ACTION
7 July 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
21 July 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
4 August 2010	The ACCC granted interim authorisation to the Applicants to enable them to commence collective negotiations with QR Network in relation to below-rail assets to transport coal to the Terminal. Interim authorisation was granted in relation to Stage 1 negotiations only and was conditional upon any access agreement entered into containing a condition precedent that final authorisation be granted by the ACCC.
11 August 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
25 August 2010	Submission received from the Applicants in response to interested party submissions on the substantive application.
1 October 2010	Draft determination issued.
15 October 2010	Deadline for the Applicants or interested parties to request a conference in response to the draft determination. A conference was not requested.
20 October 2010	Closing date for interested parties to provide a written submission in response to the draft determination.
3 November 2010	The Applicants provide a submission in response to issues raised by interested parties following the draft determination.
2 December 2010	Final determination issued.

The tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or

- (c) the proposed conduct were engaged in;
 - as the case may be.
- (7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.
- (8) The Commission shall not:
 - (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;
 - unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or
 - (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.
- (9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.
- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
 - (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
 - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

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

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.¹⁰⁹

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.¹¹⁰

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.

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). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹¹¹

Future and other parties

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 future¹¹²
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹¹³

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹¹⁴. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

¹⁰⁹ *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.

¹¹⁰ *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.

¹¹¹ Section 91(3).

¹¹² Section 88(10).

¹¹³ Section 88(6).

¹¹⁴ Section 90(10A)

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹¹⁵ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.¹¹⁶

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.¹¹⁷ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹¹⁸

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.¹¹⁹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.¹²⁰

¹¹⁵ Subsection 91A(1)
¹¹⁶ Subsection 87ZD(1).
¹¹⁷ Subsection 91B(1)
¹¹⁸ Subsection 91B(3)
¹¹⁹ Subsection 91C(1)
¹²⁰ Subsection 91C(3)