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Our reference PDM:159842-1

28 September 2011

Dr Richard Chadwick
General Manager, Adjudication
Australian Competition and Consumer Commission
Level 20
175 Pitt Street
Sydney NSW 2000



FILE No:
DOC:
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Dear Dr Chadwick

Dudgeon Point Coal Export Terminal producers - Application for authorisation

We act for the applicants in this matter.

The applicants seek authorisation pursuant to sections 88(1A), 88(1) and 88(10) of the *Competition and Consumer Act 2010* (Cth) for themselves and future coal producers in relation to proposed negotiations and agreements with Dudgeon Point Project Management Pty Ltd.

The applicants also seek interim authorisation pending final authorisation.

Accordingly, we **attach**:

- Form B – Agreements affecting competition or incorporating related cartel provisions: application for authorisation;
- the applicants' supporting submission; and
- a cheque for the filing fee of \$7,500.

Please do not hesitate to contact me if you would like to discuss any aspect of the application. My direct line is 02 9270 8606.

Yours sincerely

Paul McLachlan
Partner

attachment

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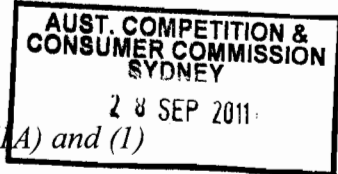
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Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)



AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91277

Carabella Resources Limited ACN 143 355 471

Macarthur Coal Limited ACN 096 001 955

Middlemount Coal Pty Limited ACN 122 348 412

New Hope Corporation Limited ACN 010 653 844

Peabody Energy Australia Pty Ltd ACN 096 909 410

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

Carabella Resources Limited

Carabella Resources Limited (**Carabella**) is an Australian public company that listed on the Australian Stock Exchange in December 2010. Carabella has focused its initial exploration activities at its flagship coking coal tenement in the Bowen Basin, Mabbin Creek. Exploration activities to date have identified a JORC resource of 95 million tonnes of coking coal at the Grosvenor West prospect. Carabella's first mine is likely to be an open cut mine with production capacity coming on stream from 2015.

Macarthur Coal Limited

Macarthur Coal Limited (**Macarthur**) is an Australian public company that listed on the Australian Stock Exchange in July 2001.

Macarthur is the world's largest producer of (seaborne) low volatile pulverised coal injection (LV PCI) coal used in steel making. As supplier to the world's leading steel producers, Macarthur exports its entire product around the globe. The company's customers have been located in Asia (Japan, Korea, Taiwan). Macarthur has also recently made its first sales of LV PCI coal to China.

Macarthur has three operating mines in the Bowen Basin, as well as an extensive portfolio of exploration tenements across the Bowen Basin, giving the company and its partners a strong pipeline of metallurgical coal projects.

Middlemount Coal Pty Limited

Middlemount Coal Pty Limited (**Middlemount**) is an incorporated joint venture between Macarthur and Gloucester Coal Ltd. Middlemount owns and operates the Middlemount Mine in the Bowen Basin, which produces low volatile PCI coal and hard coking coal. Production commenced at 1.8 million tonnes per annum in the 2010 calendar year.

New Hope Corporation Limited

New Hope Corporation Limited (**New Hope**) is an Australian public company that listed on the Australian Stock Exchange in September 2003. New Hope focuses on niche marketing of its thermal coal and exports around 80 per cent of coal production to Asia Pacific markets including Japan, Taiwan, China and Chile, with the remainder being sold domestically to customers in south-east Queensland. New Hope focuses its exploration in the Bowen Basin and the Clarence-Moreton Basin.

Peabody Energy Australia Pty Ltd

Peabody Energy Australian Pty Ltd (**Peabody**) is a wholly owned subsidiary of US-based Peabody Energy Corporation. Peabody was established in May 2001 and is primarily involved in the exploration, development and mining of coal. The company's products are distributed to the global steel industry, in particular, Japan, Europe, Taiwan, India and South America, as well as electricity generators in

Australia and around Asia. In 2010, Peabody Energy achieved total sales of 25 million tonnes primarily to steel producers.

Peabody Energy operates 8 mines in Queensland and New South Wales, which produce a broad range of metallurgical and thermal coals. Coal is exported through ports in Mackay, Brisbane, Newcastle and Wollongong.

Queensland hosts 5 of the mine sites operated by Peabody Energy Australia. Four of these, Burton, North Goonyella, Eaglefield and Millennium span the length of the Bowen Basin coalfield. The Wilkie Creek mine site operates within the Surat Basin.

- (c) Address in Australia for service of documents on the applicant:

c/o Mr Paul McLachlan

Partner

McCullough Robertson Lawyers

Level 5, Castlereagh Street, Sydney NSW 2001

2. **Contract, arrangement or understanding**

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

The parties have not yet entered into any contract, arrangement or understanding. Subject to receiving authorisation, any such contract, arrangement or understanding may involve:

1. collectively discussing and negotiating terms and conditions with Dudgeon Point Project Management Pty Ltd (**DPPM**) for the development of and access to the port facilities at the Dudgeon Point coal terminal, expansions to the terminal, associated infrastructure necessary to support the terminal and all services related to those port facilities and infrastructure for the export of coal;
2. entering into, and giving effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the terminal, associated infrastructure and services, and allocation of port capacity; and
3. discussing related matters, including price and capacity allocations, amongst themselves.

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:
(Refer to direction 4)

1. The parties have not yet entered into any contract, arrangement or understanding.
2. The parties anticipate that the aspects of any contract, arrangement or understanding that might be cartel provisions would arise as a result of the collective negotiation of capacity allocations and the price paid by each of them for access to the port facilities, the terminal, associated infrastructure and services related to those port facilities, terminal and infrastructure for the export of coal, and the conclusion (if any) of an equivalent price to be paid by each of them.
3. The parties also anticipate that the collective negotiation of the provisions identified above, and the conclusion (if any) of equivalent provisions for each party, may be anti-competitive within the meaning of section 45 of the *Competition and Consumer Act 2010* (Cth).

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

Access to port facilities and the terminal (including expansions to those facilities and the terminal), associated infrastructure and all services related to those port facilities and infrastructure for export of coal.

Capacity allocation for export of coal through those port facilities.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

15 years. Please refer to attached submission.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Dudgeon Point Project Management Pty Ltd ACN 150 261 733.

Level 15, Waterfront Place,

1 Eagle Street,

Brisbane Qld 4000

DPPM's business is primarily the development and management of Dudgeon Point coal terminal.

Pursuant to section 88(10) of the *Competition and Consumer Act 2010*, the Applicants request that any authorisation granted by expressed to apply to future

producers and users of the terminal who will similarly need to negotiate with DPPM (as set out in clause 2(a) above).

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

Not applicable.

4. Public benefit claims

- (a) Arguments in support of authorisation:
(Refer to direction 6)

Please refer to attached submission.

- (b) Facts and evidence relied upon in support of these claims:

Please refer to attached submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

Please refer to attached submission.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please refer to attached submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to attached submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

Yes.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)

Other agreements will involve future coal producers seeking access to the relevant port facilities, terminal, expansions and associated infrastructure and services. Accordingly, the party details will be different, but the terms of the agreements are likely to be consistent with those entered into pursuant to this authorisation (if granted).

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not currently known.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Coal producers seeking to export coal through the Dudgeon Point coal export terminal.

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9. Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Mr Paul McLachlan

Partner

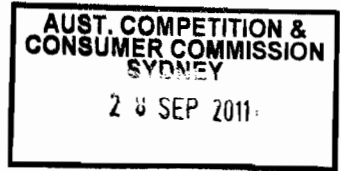
McCullough Robertson Lawyers

Level 5, Castlereagh Street, Sydney, NSW, 2001

Dated.....*28th September 2011*.....

Signed by/on behalf of the applicant


.....
(Signature)



PAUL DESMOND MCLACHLAN
.....
(Full Name)

PARTNER, McCULLOUGH ROBERTSON
.....
(Position in Organisation)

Dudgeon Point Coal Export Terminal Producers

Application for authorisation - supporting submission

Dated: 28 September 2011

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Dudgeon Point Coal Export Terminal Producers

Application for authorisation – supporting submission

Overview

1 Application for authorisation

The Applicants

- 1.1 The Applicants are the coal producers described in Schedule 1.
- 1.2 The Applicants hold mining leases and/or exploration licences for coal mines or tenements in the Bowen Basin. The Applicants need access to port capacity to export coal to overseas customers.

The Terminal

- 1.3 The Port of Hay Point is close to several of the Applicants' current mines and tenements. The North Queensland Bulk Ports Corporation (**NQBP**) holds around 1400ha of land at Dudgeon Point which is an undeveloped part of the Port of Hay Point. Dudgeon Point is intended for port development¹. Dudgeon Point Project Management Pty Ltd (**DPPM**) and Adani Mining have been awarded preferred developer rights to develop coal terminals at Dudgeon Point.
- 1.4 The Applicants are proposing to seek access to one of the new coal terminals at Dudgeon Point. In this Application, '**Terminal**' means each and any of the terminals to be developed at Dudgeon Point by DPPM to which the Applicants seek access.
- 1.5 To export coal from the port, the Applicants require access to DPPM's Terminal at Dudgeon Point, including:
 - (a) expansions to the Terminal;
 - (b) access to any other DPPM infrastructure at or around Dudgeon Point necessary to support the Terminal; and
 - (c) all services relating to such access for the purpose of exporting the Applicants' coal from the Terminal (**Port Infrastructure**).

The proposed conduct

- 1.6 The Applicants have not yet entered into any contract, arrangement or understanding. They seek authorisation under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (Cth) to enter into and give effect to a contract, arrangement or understanding between themselves to:
 - (a) collectively discuss and negotiate terms and conditions with DPPM for the development of and access to the Port Infrastructure;
 - (b) enter into and give effect to contracts, arrangements or understandings with DPPM; and

¹ North Queensland Bulk Ports Corporation website.

- (c) discuss related matters, including price and capacity allocations, amongst themselves (**Proposed Conduct**).
- 1.7 Access agreements for Port Infrastructure will be entered into by the Applicants individually.
- 1.8 Authorisation is sought for a period of 15 years. This period is appropriate given the long term nature of the infrastructure investments and the need to allow the Applicants to negotiate any changes that may be required to the long term access agreements, which are expected to be for a term in excess of 10 years.
- 1.9 Collective negotiations for the development of and access to the Port Infrastructure are likely to occur in line with the development of the Terminal. However, the parties intend to commence negotiations as soon as possible in order to provide DPPM with the commercial certainty it requires to proceed with development of the Terminal. In this regard, the Applicants note their request for interim authorisation as set out in section 11 below.
- 1.10 The Applicants will likely need to conduct ongoing collective negotiations with DPPM during the term of any access agreements, especially regarding potential price review mechanisms.
- 1.11 Authorisation is sought for the Applicants and:
 - (a) their successors, assigns, related bodies corporate, associated entities and joint venture partners; and
 - (b) any coal producers who wish to use the Terminal in the future.
- 1.12 If authorisation is not granted, the most likely counterfactual is that the Applicants (or at least some of them) will negotiate with DPPM on an individual basis.

Clear public benefits

- 1.13 Compared to the counterfactual, the Proposed Conduct is likely to result in substantial public benefits.
- 1.14 The public benefits include:
 - (a) significant transaction cost savings for DPPM and the Applicants; and
 - (b) improved efficiency in the allocation of port capacity, and hence the optimisation of capacity in the coal supply chain;
 - (c) the potential facilitation of more timely investment in the Terminal, resulting in growth in export markets;
 - (d) smaller producers will be able to leverage off the experience of the larger producers enabling their coal assets to be developed more effectively (and increasing the volume of coal exported through the coal supply chain); and
 - (e) increasing royalties, taxes and employment through the coal supply chain as a result of the factors listed above.
- 1.15 The Proposed Conduct is likely to result in minimal (if any) public detriment. To the extent that any public detriment exists, the Applicants have taken steps to minimise that detriment:
 - (a) participation in the Proposed Conduct is voluntary and there is no collective boycott activity;

- (b) the composition of the group is limited and the authorisation will extend to future prospective users of the Terminal;
 - (c) information sharing will be restricted - the Applicants will not discuss commercially sensitive information (such as coal customer identities and downstream pricing); and
 - (d) the Proposed Conduct relates only to the Port Facilities.
- 1.16 The substantial public benefits outweigh any minimal detriments. As such, authorisation should be granted for the Proposed Conduct for a period of 15 years.

Other authorisation application

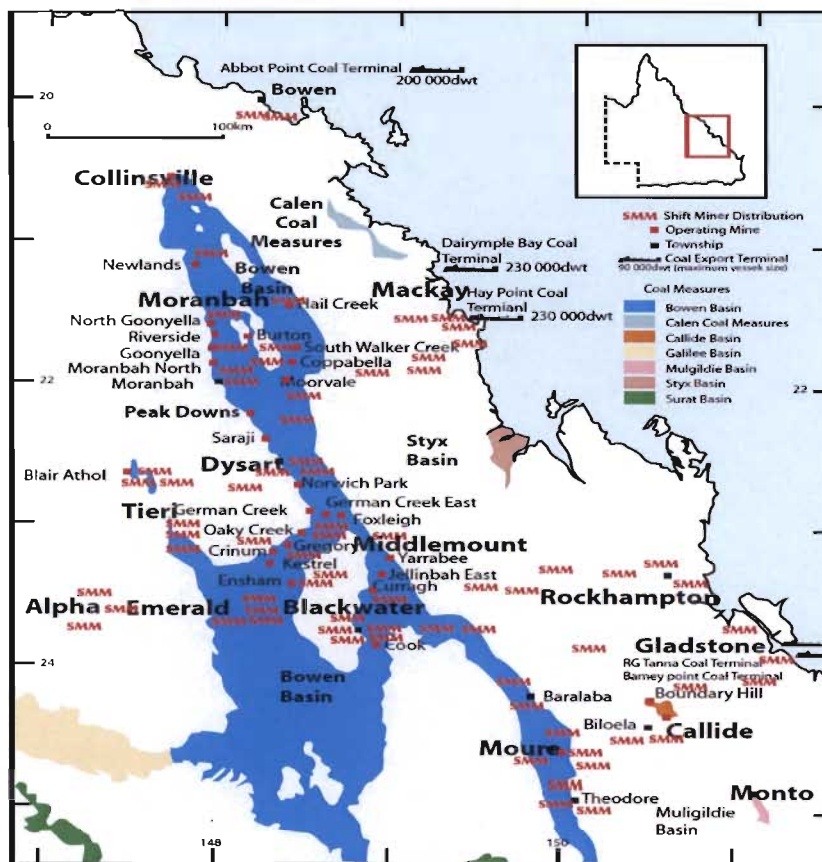
- 1.17 The Applicants are also applying separately for authorisation of similar conduct with respect to negotiation of access to below rail infrastructure between their respective mines and the Terminal.

Background information

2 The Queensland coal industry

- 2.1 Queensland coal deposits are primarily located in central Queensland.
- 2.2 The majority of operational coal mines in central Queensland are located in the Surat, Bowen and Callide Basin.
- 2.3 The Clarence-Moreton Basin (also producing coal) is further south and is not geographically relevant for the purposes of this Application. The Galilee Basin, which is adjacent to the Bowen Basin, is not currently producing coal but future production is expected from the Kevin's Corner, China First and Alpha sites. Development of the Galilee Basin will require significant infrastructure investment.

Figure: Central Queensland coal



Source: Shift Miner (2009)

- 2.4 Australia is a major global coal producer and the biggest exporter of seaborne coal. The black coal mining industry is a major source of GDP for the Australian economy, and is expected to generate revenue of ~\$57 billion in 2010-11. This is a significant increase from ~\$36 billion in 2005-06. Despite recent flooding in the major coal mining areas of Queensland, May 2011 data estimated growth in industry revenue of ~27% in 2010-11. The industry's net profit is also expected to expand strongly to ~\$18 billion in 2010-11.

- 2.5 Queensland is the largest producer of black coal in Australia. The Applicants are primarily producers of two types of black coal – thermal coal and metallurgical coal. The Queensland coal industry has expanded rapidly in recent years. This has primarily been driven by growth in the Bowen Basin. Estimates for 2010-11 predicted that Queensland would produce 53% of Australia's black coal output.
- 2.6 Industry performance is expected to improve over the next five years, as improving global economic conditions see the demand for coal surge. Strong output growth is expected through to 2015-16. Overall, industry revenue is expected to expand at an average annual rate of about 4.7% over the five years ending in 2015-16, with revenue amounting to \$72.24 billion by the end of that period. It is expected that much of the revenue increase will be driven from Queensland mines.
- 2.7 Most of the coal industry's output is exported. Domestic market revenue amounts to an expected \$7.67 billion in 2010-11, compared to \$57.32 billion in total revenue. Growth in output and exports was delayed by the global financial crisis in 2008-09, but rebounded strongly in 2009-10 as demand recovered, especially from buyers in Asia. Exports were estimated at around 291 million tonnes for 2010-11, with Japan, South Korea and the European Union making up the main export markets.
- 2.8 Approximately 86% of Queensland's coal production is exported. Many of the newer mines in Queensland are effectively dedicated to export trade (i.e. their construction is based on agreements and understandings with overseas buyers). This export focus places pressure on mine, rail and port infrastructure. Bottlenecks on rail or at the ports undermine the industry's ability to grow exports. Capacity infrastructure issues have been a problem for the industry over the past few years, and will continue to restrict the expansion of this important industry unless the supply chain is operated in the optimal fashion. It is anticipated that capacity will improve with the development of port infrastructure, including at Dudgeon Point.
- 2.9 The black coal mining industry is a major Australian employer, with about 28,400 employees in 2010-11 and a wages bill for the year estimated at \$4.27 billion.

3 Coal handling logistics

Overview of infrastructure

- 3.1 Central Queensland coal producers transport coal by rail from each mine site to coal terminals at Abbot Point, Hay Point, Dalrymple Bay and Gladstone (RG Tanna and Barney Point terminals and the proposed Wiggins Island Coal Export Terminal) for export to overseas customers. The logistics chain from the mine gate to the port involves:
- (a) below rail infrastructure (activities associated with the provision and management of rail infrastructure, including the construction, maintenance and renewal of rail infrastructure assets)²;
 - (b) above rail infrastructure (activities required to provide and operate train services such as rolling stock, train crewing, terminal provision and freight handling)³; and
 - (c) port infrastructure (activities associated with loading coal onto vessels for export).

² Refer to definitions section in Queensland Rail – Network Business Quarterly Performance Report (Q2 2010/11), dated 31 December 2010, page 4.

³ Refer to definitions section in Queensland Rail – Network Business Quarterly Performance Report (Q2 2010/11), dated 31 December 2010, page 4.

Below rail infrastructure

- 3.2 Below rail infrastructure in central Queensland is provided by QR Network Pty Limited (**QR Network**). QR Network holds a lease from the Queensland Government over the rail transport infrastructure that it operates. QR Network's rail infrastructure in central Queensland includes the Newlands, Goonyella, Blackwater and Moura coal rail systems.
- 3.3 The Applicants intend to make a separate application for authorisation in relation to certain activities regarding access to below rail infrastructure.

Port infrastructure

- 3.4 The port infrastructure is central to this application for authorisation. Central Queensland coal producers transport coal for export from each mine gate to export coal terminals at Abbot Point, Hay Point, Dalrymple Bay and Gladstone. Coal producers seek for capacity at the ports, and rail coal for export in accordance with their allotted capacity.
- 3.5 Although there have been a number of port infrastructure developments over recent years to increase port capacity in Queensland, the market for access to port infrastructure is still constrained and the development of the Terminal is crucial for the future capacity of exports in this important industry.

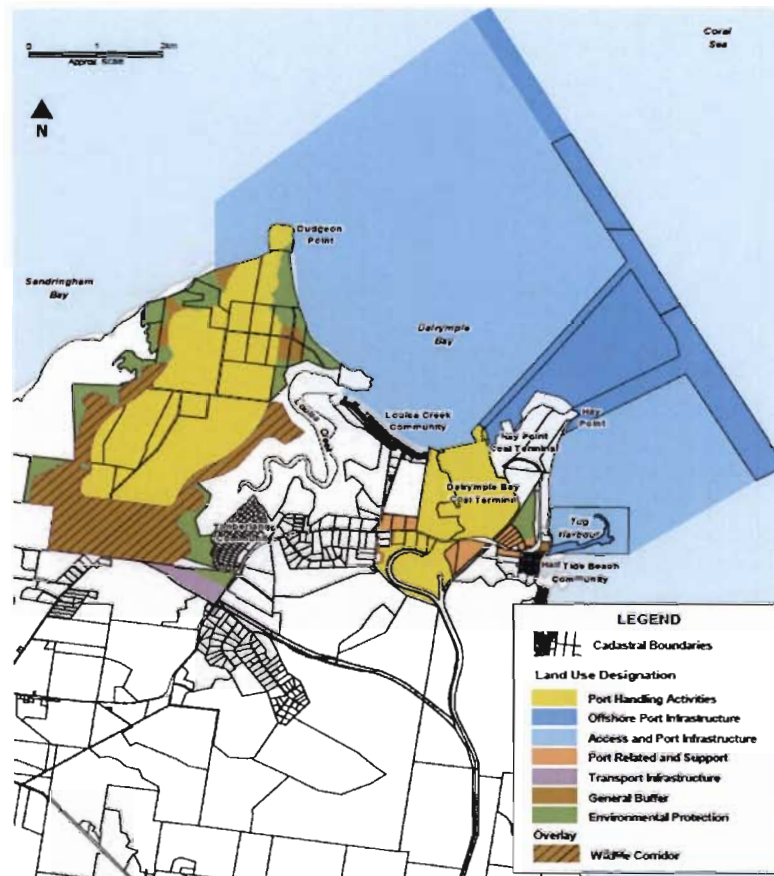
4 Dudgeon Point Terminal⁴

Port of Hay Point

- 4.1 Dudgeon Point is an undeveloped tract of land at the Port of Hay Point, adjacent to Dalrymple Bay. NQBP is the port authority responsible for the Port of Hay Point.
- 4.2 The Port of Hay Point is currently serviced by the Hay Point Coal Terminal and Dalrymple Bay Coal Terminal. Both terminals have purpose-built in-loading facilities, on-shore stockpile yards and off-shore wharves (1.5 km at Hay Point and 3.8 km at Dalrymple Bay). Development of a Terminal at Dudgeon Point will have an offshore jetty and wharf structure similar to the existing two coal terminals.

⁴ Hay Point Portal, Issue 1, dated December 2008; Issue 9, Dated April 2011; Issue 10, dated June 2011; NQBP Port of Hay Point Update, dated 23 July 2011.

Figure: Port at Hay Point



Source: NQBP Publication, August 2010

Dudgeon Point development

- 4.3 Proposed mine expansions in the Bowen Basin require further expansion of the Port of Hay Point. It is estimated that current Goonyella coal export capacity of 129 mtpa will need to double to around 250-300 mtpa over the next 5 to 10 years to meet projected industry demand.
- 4.4 Development of the Terminal at Dudgeon Point will help to satisfy increased demand for capacity. DPPM and Adani Mining have been awarded preferred developer status for Dudgeon Point and have both signed Framework Agreements with NQBP. It is proposed that the development will be privately funded by DPPM and Adani Mining in a similar arrangement to the terminals at Hay Point and Dalrymple Bay, which are privately owned or leased.
- 4.5 Adani Mining and DPPM have projected export requirements for the new Terminal development at up to 90 mtpa.
- 4.6 NQBP is preparing a Development Master Plan to guide development of the Port of Hay Point. The Draft Development Master Plan is expected to be available September/October 2011. Development of the Terminal is in a concept plan phase. Having the commercial certainty of known customers and capacity allocations is central to the progress of Terminal development.
- 4.7 Construction of the Terminal is expected to begin in 2013 if a commercial business case can be made, and approvals are granted. New or upgraded rail infrastructure needs to be delivered by 2016. First coal will be exported from the Terminal shortly thereafter.

Previous authorisations

- 4.8 On 2 December 2010, the ACCC authorised the Wiggins Island Coal Export Terminal producers to engage in collective negotiations with QR Network for the transportation of coal to the Wiggins Island Coal Export Terminal (**WICET Determination**).
- 4.9 On 29 April 2010, the ACCC authorised the North West Iron Ore Alliance to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia (**NWIOA Determination**).
- 4.10 The Application raises similar issues as to the public benefits and detriments of collective negotiation of access to infrastructure in the export of resources.

Authorisation sought

5 Conduct and scope

Conduct

- 5.1 The Applicants seek authorisation under section 88(1A) and section 88(1) of the CCA to enter into and give effect to a contract, arrangement or understanding amongst themselves to:
- (a) collectively discuss and negotiate terms and conditions with DPPM, including price, for the development of and access to the Port Infrastructure for the purpose of unloading coal at the Terminal, loading coal onto ships at the Terminal and associated services, such as stockpiling reclaiming, conveying and blending coal at the Terminal;
 - (b) discuss among themselves matters, including price and capacity allocations, relating to those discussions and negotiations; and
 - (c) enter into and give effect to contracts, arrangements or understandings with DPPM (or any successor or assignee) containing consistent terms and conditions, including price, upon which access to the Port Infrastructure will be acquired.
- 5.2 The Applicants have not yet entered into any such contract, arrangement or understanding.
- 5.3 Each Applicant will determine whether to accept the negotiated terms and conditions offered by DPPM following the collective negotiations. Each Applicant remains free to pursue independent negotiations with DPPM on any matter, including in relation to the development of and access to the Port Infrastructure.
- 5.4 As outlined in section 1.5 above, the Port Infrastructure comprises DPPM's Terminal at Dudgeon Point, including:
- (a) all expansions to the Terminal,
 - (b) access to any other DPPM infrastructure necessary to support the Terminal; and
 - (c) all services relating to such access for the purpose of transporting the Applicants' coal from the Terminal.
- 5.5 The Port Infrastructure is limited to that which is necessary to support the export of coal from the Terminal at any given time.

Scope

- 5.6 In this Application, 'Applicants' includes successors, assigns, related bodies corporate, associated entities and joint venture partners of each Applicant. This will ensure that the authorisation properly provides statutory immunity for all relevant parties.
- 5.7 Pursuant to section 88(10) of the CCA, the Applicants request that any authorisation granted by the ACCC be expressed to apply to future producers and users of the Terminal who will similarly need to negotiate Port Infrastructure access with DPPM as the development and expansion of the Terminal progresses.

- 5.8 Participation in the conduct authorised by the ACCC will be voluntary:
- (a) DPPM will not be required to negotiate collectively with the Applicants – authorisation merely provides the opportunity to do so; and
 - (b) the Applicants retain complete discretion to negotiate collectively or independently with DPPM – authorisation merely provides the opportunity to negotiate collectively.

Reasons for the conduct

- 5.9 Development of the Terminal is a significant infrastructure project in Queensland. Development of the Terminal will likely result in significant benefits to the coal industry and to the Queensland and Australian economies. The Proposed Conduct will provide expeditious confirmation of the identity of the Terminal’s customers and the allocation of capacity, which will in turn support the timely development of the Terminal.
- 5.10 Substantial public benefits are likely to result from the Proposed Conduct. This is due, in part, to the ability of the Applicants to present a uniform view to DPPM in relation to the proposed development and the services sought.

Duration

- 5.11 The Applicants seek authorisation for a period of 15 years.
- 5.12 A period of 15 years is appropriate because:
- (a) development of the Terminal is proposed to occur over a period of several years and collective negotiations are proposed to occur in line with the development;
 - (b) there are long lead times associated with this type of extensive capital investment in infrastructure and a need to deliver long term commercial certainty to the Applicants and DPPM;
 - (c) the Applicants propose to enter into access agreements with DPPM for at least 10 years and it is likely that the term will be longer if that can be successfully negotiated with DPPM; and
 - (d) it is likely to be necessary to conduct ongoing collective negotiations with DPPM during the term of any access agreements regarding any potential price review/reset mechanisms within those agreements or about initiatives to optimise system usage.
- 5.13 A period of 15 years is also consistent with the authorisation sought in relation to the below rail infrastructure that links the Terminal with several coal mines in Central Queensland.
- 5.14 As a result, the Applicants consider that a period of 15 years is appropriate in all the circumstances.

6 The test for authorisation

Weighing public benefits and detriments

- 6.1 Sections 90(5A) and 90(5B) of the CCA require that, before the ACCC authorises a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, it must be satisfied in all the circumstances that:
- (a) 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
 - (b) 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.
- 6.2 Section 90(6) sets out the test that must be applied by the ACCC when considering whether to grant authorisation for provisions of proposed contracts, arrangements or understandings which may have the purpose or effect of substantially lessening competition. This test is almost identical to the test in section 90(5A).

The meaning of public benefits and detriments

- 6.3 The term 'public benefit' is not defined in the CCA. The ACCC and the Australian Competition Tribunal (**Tribunal**) have consistently stated that the term 'public benefit' should be given its widest possible meaning⁵. More specifically, the Tribunal has found that this extends to:

'...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 economic goals of efficiency and progress⁶.'

- 6.4 The term 'public detriment' is not defined in the CCA. The Tribunal has given the concept of public detriment a wide ambit, including:

'...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency⁷.'

The counterfactual

- 6.5 In weighing the public benefits and detriments, the ACCC must apply the 'future with and without' test. That is, the ACCC must compare the likely future if authorisation were granted ('factual') with the likely future where authorisation is not granted ('counterfactual')⁸.

⁵ *Macadamia Processing Company and Suncoast Gold Pty Ltd* (1991) ATPR (Com) 50-109 at 56,101; *Dauids Limited* (1996) ATPR 50-224 at 56,458; *Du Pont (Australia) Ltd and Ors* (1996) ATPR (Com) 50-231 at 56,529.

⁶ *Re Queensland Cooperative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

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

⁸ *Australian Performing Rights Association (1999) ATPR 41-701 at 42,936 and Re Media Council of Australia (No. 2) (1987), ATPR 40-774 at 48,419.*

- 6.6 The most likely counterfactual is that, without authorisation, the Applicants or at least some of them would negotiate separately with DPPM for access to the Port Infrastructure. The parties would not proceed to negotiate collectively if authorisation were not granted.
- 6.7 Multiple, bi-partisan negotiations are likely to be significantly more time consuming for DPPM than one collective negotiation. Additionally, multiple, bi-partisan negotiations agreements would not permit the optimal supply-chain planning that would be possible through the Proposed Conduct. That outcome poses a real risk that the Port Infrastructure will not be optimally developed and utilised, leading to inefficiencies across the coal supply chain, and ultimately, a reduction in coal exports.
- 6.8 The Applicants require certainty that the Proposed Conduct does not contravene the CCA. The introduction of criminal sanctions for cartel conduct make this certainty especially important.
- 6.9 It may be theoretically possible for the Applicants to collectively negotiate with DPPM without authorisation by relying on the collective acquisition exception (s44ZZRV of the CCA). However, commercial and regulatory uncertainty means this is not a viable option for the Applicants. Proceeding without authorisation is not discussed further as a possible counterfactual in this Application.

7 Relevant markets

- 7.1 The Proposed Conduct needs to be assessed in the context of a relevant market.
- 7.2 The Applicants refer to the ACCC's decisions in relation to the applications for authorisation in relation to the supply of port terminal services to coal producers in Queensland. The Applicants understand from these decisions that the ACCC identified the following relevant markets:
- (a) the global market for coal (or at least the Asian coal market);
 - (b) the market for the provision of coal loading services for bulk coal carrying ships in the Bowen Basin; and
 - (c) the market for the provision of rail haulage services in the Bowen Basin⁹.
- 7.3 The Applicants also understand that the ACCC adopted a similar approach when defining the market for the purposes of assessing applications for authorisation in relation to the supply of coal loading services in New South Wales¹⁰. In that case, the relevant market was defined as the provision of coal handling services for coal exported from the Hunter Valley.
- 7.4 For completeness, the Applicants consider that the relevant market in this case is the market for the supply and acquisition of access to Port Infrastructure associated with the Terminal. Possible secondary markets may include the supply and acquisition of coal handling services at the Ports of Dalrymple Bay and Abbot Point (being the two most proximate open access ports), the supply and acquisition of access to below rail infrastructure associated with the Terminal and the Ports of Dalrymple Bay and Abbot Point, the supply and acquisition of above rail haulage services associated with the Terminal and the Ports of Dalrymple Bay and Abbot Point and the global market for the supply of thermal and metallurgical coal.

⁹ ACCC 'Draft Determination: Applications for authorisation lodged by Anglo Coal Australia Pty Ltd and others', 23 February 2009, p 20; and ACCC 'Determination: Application for revocation of authorisations A30239-A30241 and substitution by A91060-A91062', 29 February 2008, p 20

¹⁰ ACCC 'Determination: Applications for authorisation lodged by Port Waratah coal Services Limited, Newcastle Coal infrastructure Group and Newcastle Port Corporation', 9 December 2009, p 42

- 7.5 However, the Applicants consider that the Proposed Conduct will have little or no detrimental effect on competition, and therefore submit respectfully that the ACCC need not form a final view on the definition of the affected markets.

8 Significant public benefits

- 8.1 The Proposed Conduct is likely to result in benefits for all participants within the coal supply chain, including the Applicants and DPPM, and also above rail providers, below rail providers and end customers.
- 8.2 The main public benefits are:
- (a) significantly lower transaction costs and shortened negotiation time - DPPM and the Applicants will enjoy significant cost savings by negotiating collectively; and
 - (b) improved efficiency in the allocation of port capacity at the Terminal, allowing for the optimisation of capacity allocation at the Terminal and in the coal supply chain as well allowing the Terminal to be developed more quickly than might otherwise be the case. This will facilitate investment (in the Terminal and in associated infrastructure, such as rail and other transport) and improve growth in export markets.
- 8.3 As a result of the increased economic activity, there are also likely to be significant benefits to the local community, the State of Queensland and Australia more generally through increased royalties, taxes and employment (both directly, in the construction and operation of the Terminal, and indirectly, through a competitive and growing coal industry).
- 8.4 The Proposed Conduct will also enable smaller producers to leverage off the experience and resources of larger ones, and will improve business efficiency and commercial outcomes when engaging with DPPM.

Transaction cost savings

- 8.5 A significant benefit of the proposed conduct is transaction cost savings.
- 8.6 The Applicants will be able to collectively negotiate access to Port Infrastructure at significantly lower costs than would be the case if each Applicant were required to negotiate individually.
- 8.7 Transaction cost savings are likely to include:
- (a) decrease in number of hours spent engaging with DPPM;
 - (b) decrease in costs involved in briefing external lawyers or experts; and
 - (c) efficiencies in pooling limited resources of smaller Applicants.
- 8.8 The ACCC recognised transaction cost savings as a primary benefit in the WICET Determination and in the NWIOA Determination. For the same reasons, significant cost savings are likely to result here, when compared to a situation where the Applicants negotiate individually.

Improved efficiency in the allocation of port capacity

- 8.9 Over the last decade, one of the significant bottlenecks in the coal supply chain has been port capacity. These bottlenecks are well known to the ACCC having been the subject of several authorisation applications to the ACCC over a number of years.

- 8.10 Accordingly, it is important that the capacity across the whole coal supply chain be allocated as efficiently as possible to maximise throughput across the available infrastructure.
- 8.11 In the Applicants' experience, bilateral negotiations can lead to a focus on the interests of the parties to that negotiation, without appropriate weight being placed on the efficiencies that can be gained from appropriate allocation of capacity across the broader industry for essential infrastructure.
- 8.12 The Proposed Conduct would permit DPPM and the Applicants to take into account a broader view of the Applicants' capacity requirements, and allow DPPM to develop the Terminal and allocate capacity with that broader view in mind. The Applicants consider that this efficiency would then enable the coal supply chain to be properly utilised to nearer its optimal potential, ultimately maximising coal exports and thus the revenue generated by the industry.

Improvement in business efficiency and commercial outcomes

- 8.13 The Proposed Conduct will likely deliver additional commercial certainty to the Applicants by enabling them to secure, on a timelier basis, sufficient port infrastructure required to support their mine development projects.
- 8.14 This is not likely to impact on DPPM in a negative way, as it will also benefit from having an earlier indication of its customers and their respective capacity allocations. Indeed, the Proposed Conduct should result in the Terminal being developed in a more timely fashion than would be the case with DPPM negotiating individually with each of the Applicants, because there should be no need to respond separately to each Applicant on contractual conditions and the allocation of capacity and associated design and development processes should be easier to manage.
- 8.15 The Proposed Conduct will help to minimise the bargaining imbalance that currently exists between DPPM and each individual Applicant. Correcting this imbalance will also assist the Applicants who are smaller producers of coal to be more competitive vis-à-vis the larger established producers.

Facilitating efficient investment in infrastructure

- 8.16 Substantial public benefits are likely to result from the development of the Terminal.
- 8.17 The Terminal is yet to be constructed and is in the concept plan phase. A crucial aspect of the planning for the Terminal is to ensure that there is sufficient demand for the capacity, and efficient allocation of the available capacity. To proceed with their individual bids for capacity at the Terminal, the Applicants need to understand the terms, conditions and charges for port access. The Proposed Conduct will enable the Applicants to establish those terms, conditions and charges with DPPM in an efficient manner, and that will in turn provide DPPM with some certainty to proceed with construction of the Terminal.
- 8.18 If the Applicants were required to individually negotiate with DPPM, there would inevitably be some degree of misalignment between their interests. This would arise through differences in their operations, for example logistical capabilities such as scheduling and stockpiling. Collective negotiations will enable the Applicants to address any misalignment at an early stage and allow them to present a single considered proposal to DPPM.
- 8.19 The Applicants will also be able to identify proposals which collectively address their needs, enabling DPPM to consider and respond to a joint view.
- 8.20 This will provide investment efficiencies in both the short term and the long term. In the short term, DPPM will have accurate information about day to day investment. In the long term, the

Applicants will be able to make more accurate investment plans, cost outlines and forecasts regarding any planned future investment or production.

- 8.21 The Proposed Conduct will likely contribute to more efficient infrastructure investment along the whole coal supply chain, compared to a situation where negotiations are conducted on an individual basis. This will maximise the volume of coal that can be transported across the coal supply chain and to be exported through the Terminal. This maximisation of economic activity from the coal industry will result in a benefit to the public.

Growth in export markets, royalties, taxes and employment

- 8.22 Exports are very important for the Queensland and Australian economies. The expansion of mining activities (supported by an efficient coal supply chain, and in particular, efficient export facilities used to their optimum capacity) is a significant public benefit, as the ACCC has previously recognised.
- 8.23 The Proposed Conduct will support timely and efficient development of the Terminal. Timely development of the Terminal will ensure that export revenues are realised as soon as possible.
- 8.24 The economic benefits to the Mackay region from development of the Terminal will be significant. Total construction cost for the Terminal, offshore jetties and wharfs is estimated at between \$8-10 billion¹¹.
- 8.25 The development of the Terminal will result in more coal being transported from central Queensland mines and shipped to overseas customers. This in turn will promote job growth and new export revenue, as well provide increased royalties from the increase in coal sales. Tax revenue should also increase from the additional coal sales and increased levels of employment.
- 8.26 The Proposed Conduct will enable the Applicants to minimise any access-based delays, ensuring that any delays in additional export revenue are minimised. This will bring forward infrastructure investment, new export revenue and job growth in the region. Between 3,000 – 5,000 workers will be required during the estimated 3 year construction phase. Once the Terminal is fully operational, around 800 workers will be required on an ongoing basis¹².
- 8.27 Efficiencies in the logistics chain from the mine gate to the port enable more coal to be exported. In the current economic climate, where customer demand for coal is high, infrastructure is more likely to act as a constraint than customer demand. Presenting information to DPPM from a single source will assist in port logistics including stockpiling, loading and shipping.
- 8.28 The increased royalties, taxes and employment demand referred to in this section are axiomatically a public benefit.

Supporting development of Bowen Basin assets

- 8.29 Carabella and Middlemount are significantly smaller producers than the other Applicants. The Proposed Conduct will help them to leverage off the scale and experience of the larger producers among the Applicants.
- 8.30 The Proposed Conduct will also enable Carabella and New Hope to develop their mines in a more timely fashion. This will improve the overall development of the coal asset base in the Bowen Basin. Carabella expects its first mine to come on stream from 2015.

¹¹ NQBP Port of Hay Point Update, dated 23 July 2011.

¹² NQBP Port of Hay Point Update, dated 23 July 2011.

- 8.31 The development of new mines will result in larger export volumes, increased competition in the market and the realisation of greater export revenue.

9 Minimal (if any) detriment

- 9.1 In certain circumstances, collective bargaining arrangements can interfere with market determined price signals and create allocative inefficiencies in the market. The ACCC has recognised that the extent of the detriment and the impact on competition will depend upon the specific circumstances involved.
- 9.2 On the current facts, minimal (if any) anticompetitive detriment will result from collective negotiation with a monopoly service provider. Any potential detriment is further reduced by:
- (a) the voluntary nature of the Proposed Conduct and the absence of any collective boycott activity;
 - (b) the limited scope of the coverage and composition of the bargaining group;
 - (c) information sharing restrictions;
 - (d) the limited scope of the infrastructure proposed to be covered.

Voluntary participation

- 9.3 As outlined in part 5 above, engaging in the Proposed Conduct will be voluntary.
- 9.4 The Applicants will retain the ability to negotiate individually with DPPM. They will be free to determine for themselves whether to separately enter into the collectively negotiated arrangement.
- 9.5 The Applicants do not propose to engage in collective boycott activity, and do not seek to include boycott activities in the scope of this Application.
- 9.6 DPPM will not be bound to participate in collective negotiations with the Applicants. It will merely be able to do so.

Coverage and composition of group

- 9.7 The Applicants request that any authorisation granted by the ACCC be expressed to apply to future producers and users of the Terminal who will similarly need to negotiate Port Infrastructure access to the Terminal with DPPM.

Information sharing restrictions

- 9.8 The Applicants' interactions with each other primarily relate to the Proposed Conduct and the separate application submitted in relation to the below rail infrastructure. Information will only be shared to the extent that it is reasonably necessary for, and related to, this purpose.
- 9.9 The Applicants will not share other commercially sensitive information, for example in relation to the identity of downstream customers, downstream pricing and production costs.
- 9.10 The Applicants will continue to compete with each other in relation to the production and supply of coal.

Infrastructure covered is limited

- 9.11 The Applicants intend that the authorisation only applies to DPPM’s port infrastructure and related services required to support the Terminal.
- 9.12 The Applicants have sought to limit the scope of the Port Infrastructure to the minimum required to support the Terminal. The Proposed Conduct is limited to collective negotiations regarding terms and conditions of access to the port infrastructure.

10 Why authorisation should be granted

- 10.1 The Applicants seek authorisation to enter into and give effect to a contract, arrangement or understanding between themselves to:
 - (a) collectively discuss and negotiate terms and conditions with DPPM for access to the Port Infrastructure;
 - (b) enter into and give effect to contracts, arrangements or understandings with DPPM; and
 - (c) discuss related matters, including price and capacity allocation, amongst themselves.
- 10.2 Authorisation is sought for a period of 15 years.
- 10.3 When compared to the likely counterfactual, the Proposed Conduct is likely to result in substantial public benefits.
- 10.4 The Proposed Conduct has minimal (if any) public detriment. To the extent that any public detriment might exist the Applicants have sought to minimise any concerns.
- 10.5 Public benefits substantially outweigh any detriments and authorisation should be granted.

11 Why interim authorisation should be granted

- 11.1 The Applicants also seek an interim authorisation for the Proposed Conduct under section 91(2) of the CCA.
- 11.2 The Applicants are aware of the factors the ACCC will take into account when considering an application for interim authorisation (as set out in the ACCC’s Guide to Authorisation), and address the relevant issues below.

Highly anticompetitive conduct will require compelling reasons

- 11.3 The Applicants respectfully submit that the Proposed Conduct is not highly anti-competitive, and as set out above, any detriment is far outweighed by the public benefits likely to flow from it.
- 11.4 In particular, the Applicants draw the ACCC’s attention to section 9 above, which sets out the measures which further reduce any anti-competitive effect.
- 11.5 Accordingly, the Applicants respectfully submit that this is not a case in which ‘compelling’ reasons are required.

The extent to which the relevant market will change if interim authorisation is granted

- 11.6 The Proposed Conduct is not of a nature that will permanently change the market landscape if interim authorisation is granted.
- 11.7 Interim authorisation would permit the Applicants to commence collective negotiations with DPPM. However, if authorisation is not ultimately granted, each of the Applicants would still be required to negotiate with DPPM in order to obtain access to the Port Infrastructure. In this sense, the Applicants will be required to undertake the same activities even if interim authorisation is granted but full authorisation is not. Interim authorisation will not irrevocably change the state of the market, just the way in which the parties go about their commercial negotiations. Accordingly, no permanent harm would flow from the granting of interim authorisation.

The urgency of the need for authorisation

- 11.8 As indicated elsewhere in this document, the Terminal is currently in the preliminary concept plan phase. DPPM will be greatly assisted in its development of the Terminal by having timely finalisation of access agreements with its customers (including the Applicants). Given the public benefits that will flow from the construction of the Terminal, the Applicants submit that it is important that this process be permitted to commence as early as possible to help ensure the Terminal is constructed as early as possible.

Conclusion

- 11.9 The Applicants submit that there is significant public benefit that will flow from the Proposed Conduct. However, that public benefit is contingent on the commitment of DPPM to construct the Terminal.
- 11.10 To that end, any step which can be taken to provide DPPM with the commercial certainty it requires to proceed with construction of the Terminal is commendable in the Applicants' view.
- 11.11 Given that there is no permanent change to the market that would flow from the granting of the interim authorisation if full authorisation were later not granted, the Applicants consider that this is a case where interim authorisation is warranted.

Schedule 1 Applicants

1 Carabella Resources Limited

- 1.1 Carabella Resources Limited (**Carabella**) is an Australian public company that listed on the Australian Stock Exchange in December 2010. Carabella has focused its initial exploration activities at its flagship coking coal tenement in the Bowen Basin, Mabbin Creek. Exploration activities to date have identified a JORC resource of 95 million tonnes of coking coal at the Grosvenor West prospect. Carabella's first mine is likely to be an open cut mine with production capacity coming on stream from 2015.

2 Macarthur Coal Limited

- 2.1 Macarthur Coal Limited (**Macarthur**) is an Australian public company that listed on the Australian Stock Exchange in July 2001.
- 2.2 Macarthur is the world's largest producer of (seaborne) low volatile pulverised coal injection (LV PCI) coal used in steel making. As supplier to the world's leading steel producers, Macarthur exports its entire product around the globe. The company's customers have been located in Asia (Japan, Korea, Taiwan). Macarthur has also recently made its first sales of LV PCI coal to China.
- 2.3 Macarthur has three operating mines in the Bowen Basin, as well as an extensive portfolio of exploration tenements across the Bowen Basin, giving the company and its partners a strong pipeline of metallurgical coal projects.

3 Middlemount Coal Pty Limited

- 3.1 Middlemount Coal Pty Limited (**Middlemount**) is an incorporated joint venture between Macarthur and Gloucester Coal Ltd. Middlemount owns and operates the Middlemount Mine in the Bowen Basin, which produces low volatile PCI coal and hard coking coal. Production commenced at 1.8 million tonnes per annum in the 2010 calendar year.

4 New Hope Corporation Limited

- 4.1 New Hope Corporation Limited (**New Hope**) is an Australian public company that listed on the Australian Stock Exchange in September 2003. New Hope focuses on niche marketing of its thermal coal and exports around 80 per cent of coal production to Asia Pacific markets including Japan, Taiwan, China and Chile, with the remainder being sold domestically to customers in south-east Queensland. New Hope focuses its exploration in the Bowen Basin and the Clarence-Moreton Basin.

5 Peabody Energy Australia Pty Ltd

- 5.1 Peabody Energy Australian Pty Ltd (**Peabody**) is a wholly owned subsidiary of US-based Peabody Energy Corporation. Peabody was established in May 2001 and is primarily involved in the exploration, development and mining of coal. The company's products are distributed to the global steel industry, in particular, Japan, Europe, Taiwan, India and South America, as well as electricity generators in Australia and around Asia. In 2010, Peabody Energy achieved total sales of 25 million tonnes primarily to steel producers.

- 5.2 Peabody Energy operates 8 mines in Queensland and New South Wales, which produce a broad range of metallurgical and thermal coals. Coal is exported through ports in Mackay, Brisbane, Newcastle and Wollongong.
- 5.3 Queensland hosts 5 of the mine sites operated by Peabody Energy Australia. Four of these, Burton, North Goonyella, Eaglefield and Millennium span the length of the Bowen Basin coalfield. The Wilkie Creek mine site operates within the Surat Basin.