



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Application for authorisation A91277**

**lodged by**

Carabella Resources Limited  
Macarthur Coal Limited  
Middlemount Coal Pty Limited  
New Hope Corporation Limited  
Peabody Energy Australia Pty Limited  
(the **Applicants**)

**to**

**collectively bargain with Dudgeon Point Project Management**

**Date: 15 December 2011**

**Authorisation no.: A91277**

**Public Register no.: C2011/821**

**Commissioners:** Sims  
Schaper  
Court  
Dimasi  
Walker  
Willett

## Summary

The ACCC proposes to grant authorisation for 15 years to the Applicants, and any other coal producers which wish to negotiate access to the DPPM Terminal proposed for Dudgeon Point, to:

- (a) collectively bargain with Dudgeon Point Project Management (DPPM) on the terms and conditions, including price, for:
  - (i) the development of and access to the port facilities at DPPM's proposed Dudgeon Point coal terminal (DPPM Terminal),
  - (ii) expansions to the DPPM Terminal,
  - (iii) associated infrastructure necessary to support the DPPM Terminal; and
  - (iv) all services related to those port facilities and infrastructure for the storage, handling and loading of coal for export;
- (b) enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity; and
- (c) discuss related matters, including price and capacity allocations, amongst themselves.

### The application

On 28 September 2011, Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited (the Applicants) completed lodgement of authorisation application A91277 to:

- (a) collectively bargain with Dudgeon Point Project Management (DPPM) on the terms and conditions, including price, for:
  - (i) the development of and access to the port facilities at DPPM's proposed Dudgeon Point coal terminal (DPPM Terminal);
  - (ii) expansions to the DPPM Terminal;
  - (iii) associated infrastructure necessary to support the DPPM Terminal; and
  - (iv) all services related to those port facilities and infrastructure for the receipt, storage, handling and loading of coal for export;
- (b) enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity; and
- (c) discuss related matters, including price and capacity allocations, amongst themselves.

The Applicants seek authorisation for a period of 15 years and have requested that authorisation also extend to future users of the DPPM Terminal. The Applicants also requested interim

authorisation to allow them to commence collective negotiations with DPPM. The Applicants note that participation in the collective bargaining arrangements will be voluntary and will not involve collective boycotts.

On 27 October 2011, the ACCC decided to grant interim authorisation to allow the Applicants to:

- (a) collectively bargain with DPPM on the terms and conditions, including price, for the development of and access to the port facilities at the Dudgeon Point coal terminal (the DPPM Terminal), expansions to the DPPM Terminal, associated infrastructure necessary to support the DPPM Terminal and all services related to those port facilities and infrastructure for the export of coal; and
- (b) discuss related matters, including terminal access price and capacity allocations, amongst themselves.

Interim authorisation did not extend to allowing the Applicants to enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity.

This application and A91275 and A91278 are part of a series of expected applications involving Queensland export coal producers.

### **The Applicants**

The Applicants are coal producers which hold mining leases and/or exploration licences for coal mines or tenements in the Bowen Basin in Queensland. Coal produced by the Applicants from the Bowen Basin is exported. This requires the transportation of coal by rail from each mine site to coal terminals at ports. The Applicants have formed a group in order to facilitate access to the facilities (including the DPPM Terminal) required by the Applicants to export their Bowen Basin coal through Dudgeon Point. A map depicting Dudgeon Point, relative to coal deposits and coal export terminals is at **Attachment D**.

In order to export coal from Dudgeon Point, the Applicants require access to the DPPM Terminal, including:

- (a) expansions to the DPPM Terminal;
- (b) access to any other DPPM infrastructure at or around Dudgeon Point necessary to support the DPPM Terminal; and
- (c) all services relating to such access for the purpose of exporting the Applicants' coal from the DPPM Terminal.

### **Public benefit**

The ACCC considers the primary benefit to the public likely to be generated by the collective bargaining arrangements is the transaction cost savings, compared to a situation where the producers negotiate individually with DPPM for access to the DPPM Terminal. The ACCC considers the collective bargaining arrangements could also deliver additional public benefits through:

- ensuring that DPPM and the Applicants develop an accurate and uniform view of the Applicants' development and capacity needs in relation to the DPPM Terminal, which may lead to improvements in business and infrastructure investment efficiency; and

- avoiding unnecessary delays in the construction of the DPPM Terminal, and thus delays in any resulting benefits that may flow from its construction.

### **Public detriment**

The ACCC considers that the collective bargaining arrangements are unlikely to lead to any significant public detriments due to:

- the voluntary nature of the collective bargaining arrangements;
- the limited composition of the collective bargaining group; and
- the restriction upon collective bargaining and information exchanges between producers to that related to the DPPM Terminal, which is not to include commercially sensitive information.

### **Balance of public benefit and detriment**

The ACCC considers that, in all the circumstances, the conduct for which authorisation is sought is likely to result in a benefit to the public that will outweigh the detriment to the public which is constituted by any lessening of competition that will result or is likely to result from the collective bargaining arrangements.

### **Length of authorisation**

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances. In this instance, the ACCC considers that the authorisation period will need to accommodate both an initial 3-5 year period during the development of the DPPM terminal and the likely term of the access agreement with DPPM (of at least 10 years). Accordingly, the ACCC proposes to grant authorisation of the collective bargaining arrangements for 15 years as sought.

### **The next steps**

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

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## List of abbreviations

Act	the <i>Competition and Consumer Act 2010</i>
Applicants	Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited.
DBCT 2008 Final Determination	2008 Dalrymple Bay Coal Terminal Pty Limited - revocation and substitution - A91060-A91062, granted by the ACCC on 29 February 2008 for one year.
DBCT 2009 Draft Determination	Authorisation applications A91107 - A91109, withdrawn after the ACCC published a draft determination on 23 February 2009 which proposed to deny authorisation. The Applicants were seeking authorisation of a maximum six month extension of the authorisation granted by the ACCC in relation to the queue management system at Dalrymple Bay Coal Terminal (DBCT Determination).
Consortium Terminal	Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Ltd's proposed coal terminal development at the Port of Abbot Point.
DPPM	Dudgeon Point Project Management, proposed developers of a coal terminal at Dudgeon Point, in the Port of Hay Point, Queensland.
DPPM Terminal	The coal terminal proposed to be developed by Dudgeon Point Project Management at Dudgeon Point, in the Port of Hay Point, Queensland.
GAP Project	QR National's project to upgrade and expand the rail infrastructure between Goonyella and Abbot Point.
NQBPC	North Queensland Bulk Ports Corporation
QR Network	QR Network Pty Ltd
Rio Tinto	Rio Tinto Coal Australia Pty Limited
Rio Tinto Terminal	Rio Tinto's proposed coal terminal development at the Port of Abbot Point.
WICET Determination	Authorisation A91241 granted by the ACCC on 2 December 2010 to various Wiggins Island Coal Export Terminal producers allowing collective bargaining with QR Network in relation to below rail access to transport coal to the terminal at Wiggins Island in the Port of Gladstone, Queensland.

# 1. The application for authorisation

## The application

- 1.1 On 28 September 2011, Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited (the Applicants) lodged application for authorisation A91277 with the ACCC to:
- (a) collectively bargain with Dudgeon Point Project Management (DPPM) on the terms and conditions, including price, for:
    - (i) the development of and access to the port facilities at DPPM’s proposed Dudgeon Point coal terminal (DPPM Terminal);
    - (ii) expansions to the DPPM Terminal;
    - (iii) associated infrastructure necessary to support the DPPM Terminal; and
    - (iv) all services related to those port facilities and infrastructure for the receipt, storage, handling and loading of coal for export;
  - (b) enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity; and
  - (c) discuss related matters, including price and capacity allocations, amongst themselves.
- (the Proposed Conduct)
- 1.2 The Applicants sought interim authorisation and substantive authorisation for a period of 15 years and have requested that authorisation also extend to future users of the DPPM Terminal.
- 1.3 Authorisation is a transparent process where the ACCC may grant statutory protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (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. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC’s consideration of this application is contained in Attachment B.
- 1.4 Application A91277 was made under:
- section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.

- 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.
- section 88(1A) of the Act to make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 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).

## **Interim authorisation**

- 1.5 The ACCC decided to grant interim authorisation to allow the Applicants to commence collective negotiations with DPPM. Interim Authorisation allowed the Applicants to:
- (a) collectively bargain with DPPM on the terms and conditions, including price, for the development of and access to the port facilities at the DPPM Terminal, expansions to the DPPM Terminal, associated infrastructure necessary to support the DPPM Terminal and all services related to those port facilities and infrastructure for the export of coal; and
  - (b) discuss related matters, including terminal access price and capacity allocations, amongst themselves.
- 1.6 Interim authorisation did not extend to allowing the Applicants to enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity.
- 1.7 Interim authorisation commenced on 27 October 2011, and will remain in place until the date the ACCC's final determination regarding the authorisation application A91277 comes into effect or interim authorisation is revoked by the ACCC.

## **Other parties**

- 1.8 The Applicants have requested that authorisation also extend to future users of the proposed DPPM Terminal. The ACCC notes that Rio Tinto Australia Pty Limited is a likely potential future user.
- 1.9 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.
- 1.10 Further, pursuant to section 88(10) of the Act, the ACCC may grant authorisation to future users of the DPPM Terminal.



## **2 Background to the application**

### **The Applicants**

- 2.1 The Applicants are coal producers which hold mining leases and/or exploration licences for coal mines or tenements in the Bowen Basin in Queensland.

#### **Carabella Resources Limited (Carabella)**

- 2.2 Carabella is a \$39 million company that listed on the Australian Stock Exchange in December 2010. Carabella has focused its initial exploration activities at its coking coal tenement in the Bowen Basin at Mabbin Creek.

#### **Macarthur Coal Limited (Macarthur)**

- 2.3 Macarthur is a \$1, 793 million company that listed on the Australian Stock Exchange in July 2001. Macarthur's principal product is low volatile pulverised injection coal used in the production of steel. Macarthur's major assets are a 73.3% share in Coppabella Mine and Moorvale Mine (both located in the Bowen Basin). Macarthur is currently being acquired by Peabody Energy Australia Pty Limited.

#### **Middlemount Coal Pty Limited (Middlemount)**

- 2.4 Middlemount is an incorporated 50:50 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 semi-hard coking coal.

#### **New Hope Corporation Limited (New Hope)**

- 2.5 New Hope is a \$2, 340 million company that listed on the Australian Stock Exchange in September 2003. New Hope focuses on niche marketing of its thermal coal and exports around 65 per cent of its coal production to Asia Pacific markets including Japan, Korea 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 Limited (Peabody)**

- 2.6 Peabody is a wholly owned subsidiary of the US-based Peabody Energy Corporation, worth around \$US11, 363 million. Peabody was established in May 2001 and is primarily involved in the exploration, development and mining of coal. Peabody operates 8 mines in Queensland and New South Wales, which produce a broad range of metallurgical and thermal coals. Four of these, Burton, North Goonyella, Eaglefield and Millennium span the length of the Bowen Basin coalfield.

### **Coal Export Industry**

- 2.7 The coal produced by the Applicants in the Bowen Basin is exported. This requires the transportation of coal by rail from each mine site to coal terminals at ports. The logistics chain from the mine gate to port involves:
- below rail infrastructure – activities associated with the provision and management of rail infrastructure, including the construction, maintenance and renewal of rail infrastructure assets;

- above rail infrastructure – activities required to provide and operate train services such as rolling stock, train crewing, terminal provision and freight handling; and
  - port infrastructure – activities associated with receiving and loading coal onto vessels for export.
- 2.8 Dudgeon Point is located within the Port of Hay Point, Queensland. There are no existing coal terminals at Dudgeon Point, although there are coal terminals within the larger Hay Point port area including at Dalrymple Bay. Approximately 105 million of Queensland’s 200 million tons per annum of coal exports currently passes through the Port of Hay Point.
- 2.9 North Queensland Bulk Ports Corporation Limited (NQBPC) is overseeing the development of the Dudgeon Point addition to the Port of Hay Point. NQBPC has announced that DPPM and the Adani Group are the preferred developers of the two new coal terminals proposed for Dudgeon Point.
- 2.10 The Applicants’ group was formed for the purpose of facilitating the access to the facilities and infrastructure required by the Applicants to export their Bowen Basin coal through Dudgeon Point. The Applicants are currently seeking capacity at the DPPM Terminal for this purpose. A map depicting Dudgeon Point, relative to coal deposits and coal export terminals is at **Attachment D**.

## **Relevant ACCC authorisation decisions**

### **2010 Wiggins Island Coal Export Terminal producers authorisation – collective negotiation with QR Network regarding below rail access to the Wiggins Island Terminal**

- 2.11 Authorisation A91241 was granted by the ACCC on 2 December 2010. The authorisation enabled various Wiggins Island Coal Export Terminal producers to collectively bargain with QR Network in relation to below rail access to transport coal to the terminal at Wiggins Island in the Port of Gladstone, Queensland (WICET Determination). Authorisation was granted for 15 years.

### **2009 Anglo Coal Australia Pty Ltd & Ors - Authorisations - A91107 - A91109**

- 2.12 Authorisation applications A91107 - A91109 were withdrawn after the ACCC published a draft determination on 23 February 2009 which proposed to deny authorisation (DBCT 2009 Draft Determination). The Applicants were seeking authorisation of a maximum six month extension of the authorisation granted by the ACCC in relation to the queue management system at Dalrymple Bay Coal Terminal (DBC Terminal), in the Port of Hay Point.

### **2008 Dalrymple Bay Coal Terminal Pty Limited - revocation and substitution - A91060-A91062**

- 2.13 On 29 February 2008, the ACCC granted a one year extension to its previous three year authorisation. The authorisation covered a queue management system which was designed to address the imbalance between demand for coal loading services at the DBC Terminal and the capacity of the Goonyella coal chain, including at the DBC Terminal (DBCT 2008 Final Determination).

## **Current related applications**

- 2.14 The Applicants and Rio Tinto have lodged two applications for authorisation to collectively bargain with QR Network in relation to the below rail infrastructure associated with coal terminal access, at the Port of Abbot Point, Queensland (A91275) and at Dudgeon Point (A91278). The ACCC issued a draft determination regarding A91275 on 8 December 2011 and issued a draft determination regarding A91278 on 15 December 2011.

## **3 Submissions received by the ACCC**

- 3.1 The ACCC tests the claims made by applicants 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.
- 3.2 Broadly, the Applicants submit that the Proposed Conduct will lead to reduced transaction costs and encourage efficient investment in the coal logistics chain while causing minimal if any detriment due to the voluntary and limited scope of the collective bargaining arrangements.
- 3.3 The ACCC sought submissions from 25 interested parties potentially affected by the application, including the target of the collective bargaining (DPPM), as well as coal producers, above rail providers, competing coal export terminals and relevant state and federal government agencies.
- 3.4 No public submissions were received by the ACCC in relation to this matter.

## **4 ACCC evaluation**

- 4.1 The ACCC's evaluation of the Proposed Conduct is in accordance with:
- 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.

4.2 For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

## **The market**

4.3 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

4.4 The Applicants submit the relevant area of competition is the market for the supply and acquisition of access to port infrastructure associated with the DPPM Terminal. The Applicants identified possible secondary markets as:

- the supply and acquisition of coal handling services at Dalrymple Bay in the Port of Hay Point and the Port of Abbot Point (being the two most proximate open access ports);
- the supply and acquisition of access to below rail infrastructure associated with the Port of Hay Point (including Dalrymple Bay and Dudgeon Point) and the Port of Abbot Point;
- the supply and acquisition of above rail haulage services associated with the Port of Hay Point (including Dalrymple Bay and Dudgeon Point) and the Port of Abbot Point; and
- the global markets for the supply of thermal and metallurgical coal.

4.5 In the DBCT 2008 Final Determination and DBCT 2009 Draft Determination, the ACCC found that the relevant geographic markets for coal loading services and rail haulage services comprised the entire Bowen Basin area. Further, QR National's Goonyella to Abbot Point (GAP) expansion project is likely to further integrate the central Queensland coal logistics chains (completion projected for mid-2012).

4.6 Given the information gathered during the previous DBCT matters and the GAP project, the ACCC considers that the geographic area of competition for terminal services and rail services may encompass the central Queensland coal areas and all terminals that service that area. However, the ACCC considers that its assessment of this application is unlikely to be affected by the adoption of the narrower or broader market definition.

## The counterfactual

- 4.7 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.<sup>1</sup>
- 4.8 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’.
- 4.9 The Applicants submit 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 DPPM Terminal. The Applicants have provided no information regarding why some of them might not negotiate separately with DPPM.
- 4.10 The ACCC considers that the most likely counterfactual is that, without authorisation, the Applicants would negotiate separately with DPPM for access to the DPPM Terminal.

## Public benefit

### Background to public benefit considerations

- 4.11 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.<sup>2</sup>
- 4.12 The Applicants submit the Proposed Conduct will deliver public benefits, including:
- transaction cost savings
  - improved efficiency in the allocation of port capacity
  - improvement in business efficiency and commercial outcomes
  - facilitation of efficient investment in infrastructure
  - growth in export markets, royalties, taxes and employment
  - support of development of Bowen Basin assets
- 4.13 The ACCC’s assessment of the likely public benefits from the proposed conduct follows.

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<sup>1</sup> *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.

<sup>2</sup> *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**

- 4.14 The main benefit submitted by the Applicants is transaction cost savings. The Applicants submit that they will be able to collectively negotiate access to the DPPM Terminal at a significantly lower total cost than the cost of individual negotiations. The Applicants submit that the decreased costs are likely to include:
- a decrease in the number of hours spent negotiating with DPPM;
  - a decrease in the cost of legal and expert advisors; and
  - efficiencies in the pooling of the limited resources of the smaller Applicants.
- 4.15 As noted by the Applicants, the ACCC recognised transaction cost savings as the primary benefit in the WICET Determination. The Applicants submit that, for the same reasons as recognised in the WICET Determination, significant cost savings are likely to result from collective as opposed to individual negotiations for access to the DPPM Terminal.
- 4.16 The ACCC considers there are transaction costs (including time related costs) associated with contracting. These transaction costs can be lower where a single negotiating process is employed, such as in 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.

## **Facilitating efficient business outcomes and investment**

- 4.17 The Applicants submit the Proposed Conduct is likely to improve business efficiency by:
- giving the Applicants and DPPM a broader view of the Applicants' capacity requirements, allowing DPPM to better allocate terminal capacity;
  - reducing the delay in securing access rights and thus avoiding unnecessary delays in the development of the DPPM Terminal;
  - helping to minimise the bargaining imbalance between DPPM and each individual applicant; and
  - assisting smaller Applicants to be more competitive with larger producers.
- 4.18 The Applicants submit that the Proposed Conduct will lead to investment efficiencies:
- in the short term, by providing DPPM with accurate information to inform its proposed investment in the DPPM Terminal; and
  - in the long term, by allowing the Applicants to make more accurate investment plans, cost outlines and forecasts regarding any planned future investment or production.
- 4.19 In general, the ACCC considers that there are likely to be a number of factors that impact efficient infrastructure development. The ACCC considers that collective negotiations may assist the industry in identifying proposals that seek to satisfy the needs of the relevant parties more fully. Thus, the ACCC considers the arrangements may contribute to more efficient business outcomes and infrastructure investment along the coal supply chain, compared to a situation where negotiations are conducted on an individual basis, and that this would be a public benefit.

## **Growth in export markets**

- 4.20 The Applicants submit that exports are very important for the Queensland and Australian economies and that the ACCC has previously recognised the significant public benefits that flow from any export expansion. The Applicants submit that the Proposed Conduct will enable the Applicants to minimise any delays in expansion of coal exports related to access to the DPPM Terminal.
- 4.21 Generally, the ACCC considers that arrangements which generate a growth in exports constitute a benefit to the public. In this instance, the DPPM Terminal is likely to generate increased exports from the Bowen Basin.
- 4.22 The ACCC considers that absent authorisation of the collective bargaining arrangements, individual negotiations could delay construction of the DPPM Terminal. To the extent that the collective bargaining arrangements help to avoid unnecessary delay in the development of the proposed coal terminals, the ACCC considers the arrangements are likely to provide a benefit to the public.

## **ACCC conclusion on public benefits**

- 4.23 The ACCC considers the primary benefit to the public generated by the collective bargaining arrangements is the transaction cost savings, compared to a situation where the Applicants negotiate individually with DPPM for access to the DPPM Terminal. The ACCC considers the collective bargaining arrangements could also deliver additional public benefits through:
- ensuring that DPPM and the Applicants develop an accurate and uniform view of the Applicants' development and capacity needs in relation to the DPPM Terminal, which may lead to improvements in business and infrastructure investment efficiency; and
  - avoiding unnecessary delays in the construction of the DPPM Terminal, and thus delays in any resulting benefits that flow from its construction.

## **Public detriment**

### **Public detriment considerations**

- 4.24 Public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>3</sup>
- 4.25 The Proposed Conduct involves both collective bargaining and information sharing between competitors. 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.

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<sup>3</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

## Potential loss of allocative efficiencies

- 4.26 In order to engage in the collective bargaining, the Applicants also propose to share certain information between themselves. 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 are associated with significant public detriment.
- 4.27 Generally, 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.
- 4.28 The Applicants submit that the Proposed Conduct will lead to minimal if any detriment. In particular, the Applicants note that:
- (a) participation in the collective bargaining arrangement is voluntary. The Applicants and other users of the DPPM Terminal will retain the ability to negotiate individually with DPPM or enter into the collective bargaining arrangements.
  - (b) there are restrictions on the coverage and composition of the bargaining group. The Applicants seek authorisation to extend only to current and future producers and users of the DPPM Terminal who will similarly need to negotiate with DPPM for access to the DPPM Terminal. In the WICET Determination, the ACCC allowed authorisation to extend to future users of the terminal affected by the collective bargaining.
  - (c) there is no proposed boycott activity, which means that the arrangement is also voluntary from the view of DPPM.
  - (d) information will only be shared between the Applicants to the extent that it is reasonably necessary for and related to the Proposed Conduct (which relates only to the DPPM terminal) and the related application regarding collective negotiation for below rail access (A91278). The Applicants will not share commercially sensitive information and will continue to compete with each other in relation to the production and supply of coal into overseas markets and for access to above rail infrastructure.
- 4.29 The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where:
- 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.



## **The ACCC's conclusion on public detriments**

- 4.30 The ACCC considers the collective bargaining arrangements are unlikely to lead to any significant public detriments due to:
- the voluntary nature of the Proposed Conduct;
  - the limited composition of the collective bargaining group; and
  - the restriction upon collective bargaining and information exchanges between producers to that related to the DPPM Terminal, which is not to include commercially sensitive information.

## **Balance of public benefit and detriment**

4.31 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.32 In the context of applying the net public benefit test in section 90(8)<sup>4</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>5</sup>

4.33 For the reasons outlined in this chapter the ACCC considers that significant public benefits are likely to result from savings in the time and cost of negotiation for access and avoiding unnecessary delays to the development of the DPPM Terminal. The ACCC considers that any potential detriment that may arise is likely to be limited by a range of facts including:

- the limited scope of the application, which applies only to the DPPM Terminal and only to the coal producers and potential coal producers which wish to access the DPPM Terminal;
- the restrictions upon information exchanges; and
- the voluntary nature of the Proposed Conduct.

4.34 Accordingly, the ACCC considers that in all the circumstances the Proposed Conduct for which authorisation is sought is likely to result in a benefit to the public that will outweigh the detriment to the public which is constituted by any lessening of competition that will result or is likely to result from the Proposed Conduct. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

## **Length of authorisation**

4.35 The Act allows the ACCC to grant authorisation for a limited period of time.<sup>6</sup> The ACCC generally considers that it is appropriate to grant authorisation for a limited

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<sup>4</sup> 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.

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

<sup>6</sup> Section 91(1).

period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

- 4.36 In this instance, the Applicants seek authorisation for 15 years. The Applicants note that collective negotiations for access to the DPPM Terminal are likely to occur in line with the development of the DPPM Terminal over a 3-5 year period. In addition, the Applicants are likely to need to conduct ongoing collective negotiations with DPPM during the term of any access agreements (of at least 10 years), particularly regarding potential price review mechanisms. Accordingly, the Applicants submit that an authorisation period of 15 years is appropriate.
- 4.37 The ACCC accepts the Applicants' submissions regarding the length of the authorisation period and proposes to grant authorisation to the Proposed Conduct for 15 years.

## **Future Users**

- 4.38 The Applicants submit that it is appropriate that any authorisation granted by the ACCC be expressed to apply to potential future producers and users of the proposed DPPM Terminal who will similarly need to negotiate access to the DPPM Terminal.
- 4.39 The ACCC considers that it is appropriate that authorisation extend to future prospective users of the DPPM Terminal. The ACCC notes that it may at any time review the authorisation and potentially revoke it should a future user alter the balance of likely public benefits and detriments sufficiently to constitute a material change of circumstances.<sup>7</sup>

## **5 Draft determination**

### **The application**

- 5.1 On 28 September 2011 Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited lodged application for authorisation A91277 with the Australian Competition and Consumer Commission (the ACCC) to:
- (a) collectively bargain with Dudgeon Point Project Management (DPPM) on the terms and conditions, including price, for:
    - (i) the development of and access to the port facilities at DPPM's proposed Dudgeon Point coal terminal (DPPM Terminal);
    - (ii) expansions to the DPPM Terminal;
    - (iii) associated infrastructure necessary to support the DPPM Terminal; and
    - (iv) all services related to those port facilities and infrastructure for the receipt, storage, handling and loading of coal for export;

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<sup>7</sup> Subsection 91B(3)

- (b) enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity; and
- (c) discuss related matters, including price and capacity allocations, amongst themselves.

(the Proposed Conduct)

- 5.2 The Applicants sought interim authorisation and substantive authorisation for a period of 15 years and have requested that authorisation also extend to future users of the DPPM Terminal.
- 5.3 Application A91277 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under:
- section 88(1) of the *Competition and Consumer Act 2010* (the Act) to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
  - 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.
  - section 88(1A) of the Act to make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
  - 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 On 27 October 2011, the ACCC decided to grant interim authorisation to allow the Applicants to:
- (a) collectively bargain with DPPM on the terms and conditions, including price, for the development of and access to the port facilities at the Dudgeon Point coal terminal (the DPPM Terminal), expansions to the DPPM Terminal, associated infrastructure necessary to support the DPPM Terminal and all services related to those port facilities and infrastructure for the export of coal; and
  - (b) discuss related matters, including terminal access price and capacity allocations, amongst themselves.
- 5.5 Interim authorisation did not extend to allowing the Applicants to enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity.
- 5.6 Section 90A(1) of the Act requires that before determining an application for substantive authorisation the ACCC shall prepare a draft determination.

## **The net public benefit test**

5.7 For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the Proposed Conduct for which authorisation is sought is likely to result in a benefit to the public that will outweigh the detriment to the public which is constituted by any lessening of competition that will result or is likely to result from the Proposed Conduct.

## **Conduct for which the ACCC proposes to grant authorisation**

- 5.8 The ACCC proposes to grant authorisation for 15 years to the Applicants to:
- (a) collectively bargain with DPPM on the terms and conditions, including price, for:
    - (i) the development of and access to the port facilities at the DPPM Terminal;
    - (ii) expansions to the DPPM Terminal;
    - (iii) associated infrastructure necessary to support the DPPM Terminal; and
    - (iv) all services related to those port facilities and infrastructure for the receipt, storage, handling and loading of coal for export;
  - (b) enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity; and
  - (c) discuss related matters, including price and capacity allocations, amongst themselves.
- 5.9 Pursuant to clause 88(10) of the Act, the ACCC proposes to extend the above authorisation to any coal producers which may in future wish to negotiate access to the DPPM Terminal.

## **Conduct not proposed to be authorised**

- 5.10 The proposed authorisation does not extend to the Applicants engaging in:
- any information exchanges or collective negotiations in relation to the marketing or sale of coal;
  - negotiations with DPPM that do not relate to the receipt, storage, handling or loading of coal at the DPPM Terminal; or
  - collective boycott activity.
- 5.11 Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

## **Further submissions**

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

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (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 statutory protection 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 statutory protection 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.

## **Attachment B — chronology of ACCC assessment**

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

<b>DATE</b>	<b>ACTION</b>
28 September 2011	Application for authorisation lodged with the ACCC.
27 October 2011	Interim authorisation granted.
3 November 2011	Closing date for submissions from interested parties in relation to the application for authorisation. No submissions received.
15 December 2011	Draft determination issued.

# Attachment C — the tests for authorisation and other relevant provisions of the Act

## Competition and Consumer Act 2010

### 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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

## 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 future<sup>11</sup>

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<sup>8</sup> *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.

<sup>9</sup> *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.

<sup>10</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>12</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>13</sup>. 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.

## **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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>17</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>18</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>19</sup>

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<sup>11</sup> Section 88(10).

<sup>12</sup> Section 88(6).

<sup>13</sup> Section 90(10A)

<sup>14</sup> Subsection 91A(1)

<sup>15</sup> Subsection 87ZD(1).

<sup>16</sup> Subsection 91B(1)

<sup>17</sup> Subsection 91B(3)

<sup>18</sup> Subsection 91C(1)

<sup>19</sup> Subsection 91C(3)

# Attachment D — Map showing the Port of Dudgeon Point and surrounding coal deposits and coal export terminals

