



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

**Cockatoo Coal Limited and
Stanmore Coal Limited**

in respect of

collective bargaining with Surat Basin Rail

Date: 16 August 2012

Authorisation number: A91311

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

The Australian Competition and Consumer Commission (ACCC) proposes to grant authorisation to Cockatoo Coal Limited and Stanmore Coal Limited (the Applicants) to collectively negotiate terms and conditions of access, including price, to Surat Basin Rail's below rail infrastructure for the purpose of transporting coal to the Wiggins Island Coal Export Terminal in the Port of Gladstone, Queensland. The ACCC proposes to grant authorisation for 22 years, commencing from the date the ACCC's final determination comes into effect.

Next steps

The ACCC will seek further submissions in relation to this draft determination, including on the proposed duration of authorisation, before making its final decision. The Applicants and interested parties may also request that a pre decision conference be held to allow oral submissions about the draft determination.

1. The application for authorisation

- 1.1 On 23 May 2012 Cockatoo Coal Limited and Stanmore Coal Limited (the Applicants) lodged an application for authorisation (A91311) with the ACCC under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the Act).¹ The Applicants also requested interim authorisation under section 91 of the Act.
- 1.2 Authorisation is a transparent process where the ACCC may grant statutory protection from legal action for conduct that might otherwise breach the Act. The ACCC can 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the likely public benefit from the conduct outweighs the likely 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.²

The conduct

- 1.3 The Applicants seek authorisation to collectively bargain for access to:
 - the Surat Basin Rail Line below rail infrastructure connecting the Western rail system near Wandoan with the Moura rail system near Banana, including all expansions and extensions to this system (the **Surat Basin Rail Line**) and
 - any other below rail infrastructure connected directly or indirectly to the Surat Basin Rail Line (excluding the Moura Rail Line and the Miles to Wandoan Line),

1 The application for authorisation is available from the ACCC's website www.accc.gov.au/authorisationsregister.

2 The ACCC's Guide to the Authorisation (available from the ACCC website www.accc.gov.au) has more details about the authorisation process and the relevant public benefit tests are set out in full at Attachment A.

as well as all services relating to such access (together the '**Identified Rail Infrastructure and Services**'), with:

- the Surat Basin Rail Joint Venture (Surat Basin Rail)
- any entity which acquires an interest in Surat Basin Rail and/or
- any future owner or operator of any part of the Identified Rail Infrastructure (together the '**Access Provider**'),

necessary to support the Wiggins Island Coal Export Terminal (the Wiggins Island Terminal), for the purpose of transporting coal to the terminal for export.

- 1.4 The proposed arrangements are voluntary and do not contain collective boycott activities. The Applicants also advise that the collective bargaining (and information exchanges) only relate to the Identified Rail Infrastructure and Services.
- 1.5 Authorisation is sought for a period of 20 years.
- 1.6 The Applicants request that any authorisation granted also apply to future users of the Identified Rail Infrastructure and Services who will need to negotiate below rail access as the staged development of the Wiggins Island Terminal occurs.

The Applicants

- 1.7 The Applicants are coal producers located in the Surat Basin in Queensland which were both selected to have capacity from the Stage 2 expansion of the Wiggins Island Terminal.
- 1.8 *Cockatoo Coal* currently exports metallurgical and thermal coal from the Bowen Basin and is developing a portfolio of advanced coal mining projects in the Surat Basin. It plans to expand its production from 500 000 tonnes per annum in 2009/10 to 750 000 tonnes in 2012, and to in excess of 9 million tonnes per annum from 2015/2016.
- 1.9 Cockatoo Coal has an allocation of 3 million tonnes per annum at the Wiggins Island Terminal commencing from 2014.
- 1.10 *Stanmore Coal* has mining projects in the Bowen and Surat Basins. It is a relatively new producer, having been listed on the ASX in 2009. Stanmore Coal has initial coal production plans for 7 million tonnes per annum by 2015.

2. Background

Construction of rail and port infrastructure

- 2.1 The Surat Basin Rail Line will be new track connecting coal mines in the Surat Basin region to the Moura Rail System, and ultimately to the Wiggins Island Terminal at the Port of Gladstone in Queensland. Historically, coal has not been mined in the Surat Basin because of a lack of access to rail and a suitable port for export. The Applicants advise that the construction of this new track will unlock approximately 6.3 billion tonnes of coal reserves in the Surat Basin.³
- 2.2 The ACCC is advised that construction of the new rail line is expected to commence in the 2011-12 financial year and to be completed in the 2014-15 financial year. This is subject to achieving financial close and obtaining the necessary approvals to construct and operate the rail infrastructure.⁴
- 2.3 Apart from the Applicants, other producers with existing or developing mines in the Surat Basin region which may require access to the new rail infrastructure in the future include Xstrata Coal Queensland Pty Ltd, Metrocoal Limited, Allegiance Coal, Yancoal Australia and Blackwood Corporation.
- 2.4 The Wiggins Island Terminal is currently under construction at the Port of Gladstone. The terminal is owned by a group of Queensland producers and will be operated by Gladstone Ports Corporation.⁵ Access to the Wiggins Island Terminal is governed by an Access Policy which is administered by Wiggins Island Coal Export Terminal Pty Ltd.
- 2.5 It is intended that the Wiggins Island Terminal will be built in stages to match forecast coal export demand. Construction of Stage 1 of the terminal began in 2011 and shipments from Stage 1 are expected to commence in 2014. Stage 1 of the terminal will have a capacity of 27 million tonnes per annum.⁶ The terminal will then be expanded (subject to demand) incrementally under Stage 2 to a capacity of approximately 85 million tonnes per annum, with an option of further expansion if there is excess demand from producers.⁷
- 2.6 One of the conditions precedent under the 2009 Framework Deed for the Wiggins Island project is that potential users must be able to demonstrate certainty of rail access to ensure that their coal can be transported to the new terminal.

3 The Applicants' supporting submission to application for authorisation A91311, 23 May 2012, page 14.

4 Ibid, page 15.

5 The coal companies comprising the shareholders of Wiggins Island Coal Export Terminal Pty Ltd are: Aquila Resources; Bandanna Energy; Caledon Coal Ltd; Cockatoo Coal; Northern Energy Corporation; Wesfarmers Curragh; Yancoal; and Xstrata Coal.

6 Wiggins Island Coal Export Terminal's website: <http://www.wicet.com.au/index.php?id=5>, viewed on 11 June 2012.

7 The Applicants' supporting submission to application for authorisation A91311, 23 May 2012, page 13.

Surat Basin Rail

- 2.7 On 12 July 2007 the Queensland Government awarded an unconditional exclusive mandate to Surat Basin Rail for the development of an open access multi-user rail line. Surat Basin Rail is a joint venture between ATEC (Dawson Valley Railway) Pty Ltd, QR Surat Basin Rail Pty Ltd and Xstrata Coal Surat Basin Rail Pty Ltd established for the purpose of constructing the below rail infrastructure comprising the Surat Basin Rail Line.
- 2.8 The Applicants advise that the collective bargaining conduct is proposed to operate within the negotiation framework of Surat Basin Rail's draft Access Policy, which was issued in January 2012. The draft Access Policy is not an approved access undertaking for the purposes of Part 5 of the *Queensland Competition Authority Act 1997 (Qld)*.

Recent ACCC collective bargaining decisions involving below rail access

A91241 – 2010 Wiggins Island collective bargaining authorisation with QR Network

- 2.9 On 2 December 2010 the ACCC granted conditional authorisation to various coal producers that would use the Wiggins Island Terminal to collectively bargain with QR Network in relation to below rail access to transport coal to the terminal. The collective bargaining conduct covered below rail access to the Blackwater and Moura rail systems.

A91278 – 2012 collective bargaining authorisation for Dudgeon Point Coal Export Terminal producers

- 2.10 On 16 February 2012 the ACCC granted authorisation to certain Bowen Basin coal producers in Queensland to collectively negotiate terms and conditions with QR Network to secure access to below rail infrastructure in the Newlands, Goonyella and Blackwater rail systems necessary to support the proposed Dudgeon Point Coal Export Terminal at the Port of Hay Point.

A91275 – 2012 collective bargaining authorisation for Abbot Point Coal Export Terminal producers

- 2.11 On 16 February 2012 the ACCC granted authorisation to certain Bowen Basin producers (same as those covered by authorisation A91278) to collectively negotiate with QR Network terms and conditions of access to below rail infrastructure in the Newlands, Goonyella and Blackwater coal rail systems in order to support transportation of coal to the applicants terminal at the Port of Abbott Point.

3. ACCC evaluation

- 3.1 The ACCC's evaluation of the proposed collective bargaining conduct is in accordance with the relevant net public benefit tests⁸ contained in the Act. In broad terms, under these tests the ACCC shall not grant authorisation unless it is satisfied that the likely

8 Sections 90(6), 90(7), 90(5A) and 90(5B).

benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.

- 3.2 The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC invited submissions from 20 interested parties potentially affected by the application. The ACCC received one submission from Surat Basin Rail. Surat Basin Rail advised that it has no objection to the application and considers that collective negotiations with producers may, in many circumstances, be useful.
- 3.3 The views of the Applicants and Surat Basin Rail are considered further in this chapter of the draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister, as well as further details about the ACCC's consultation process.
- 3.4 In order to measure and assess the effect of the proposed collective bargaining arrangement and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

- 3.5 The Applicants submit that the potential areas of competition impacted by the collective bargaining arrangements are:
- the primary market for the supply and acquisition of access to below rail infrastructure providing rail access to the Wiggins Island Terminal and
 - the global market for the supply of coking and thermal coal.⁹
- 3.6 The ACCC considers the primary area of competition affected by the collective bargaining arrangements is the supply and acquisition of access to below rail infrastructure providing rail access to the Wiggins Island Terminal. The ACCC notes that the below rail infrastructure surrounding the proposed Surat Basin Rail Line (including the Blackwater Rail System, the Moura Rail System and the Western Rail System) is currently owned by QR Network.

⁹ The Applicants' supporting submission to application for authorisation A91311, 23 May 2012, page 25.

- 3.7 The ACCC considers the arrangements may also have an impact on the supply and acquisition of above rail haulage services and coal handling services at the Port of Gladstone, as well as the global markets for the supply of thermal and metallurgical coal. The ACCC notes these markets are consistent with those found in the above mentioned Wiggins Island, Port of Hay Point and Port of Abbott Point collective bargaining decisions.

The future with and without test

- 3.8 The ACCC applies a 'future with-and-without test' to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹⁰
- 3.9 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.
- 3.10 Absent authorisation of the proposed collective bargaining arrangements, the Applicants submit that:¹¹
- they could not, or only in a restricted manner because of certain provisions of the Act, negotiate collectively
 - as a result of being unable to collectively negotiate, negotiating access to the Identified Rail Infrastructure and Services would be a far less efficient, more costly and lengthier process and
 - individual negotiations would be less efficient in gauging overall capacity requirements leading to some of the contracted capacity misalignments in the export coal chain that have arisen in other coal export supply chains.
- 3.11 In this instance, the ACCC considers that without authorisation of the proposed collective bargaining conduct, the Applicants would negotiate individually with Surat Basin Rail for access to the Identified Rail Infrastructure and Services.

Public benefit

- 3.12 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.¹²

10 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.

11 The Applicants' submission in support of application for authorisation A91311, 23 May 2012, page 29.

12 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.

3.13 For the current application, the Applicants submit that the public benefits likely to result from the proposed conduct are the same as which arose in the ACCC's 2010 Wiggins Island collective bargaining authorisation. In particular, the Applicants submit the proposed conduct is likely to result in the following public benefits:

- facilitating investment in infrastructure along the coal chain associated with the Wiggins Island Terminal by providing greater commercial certainty
- fostering business efficiency in understanding likely demand and timing requirements by coal producers using the Wiggins Island Terminal, resulting in improved commercial outcomes particularly where this results in increased exports and enhanced international competitiveness
- lowering transaction costs and negotiation risks for the Applicants and Surat Basin Rail
- growth in export markets and the volumes of coal that will be exported by Australian producers to international customers
- enabling some of the Applicants, who are smaller coal producers, to be more competitive with larger producers by facilitating more equal negotiating positions with Surat Basin Rail
- benefiting the Queensland and Australian economies as a result of increased exports, which is likely to lead to the creation of increased employment opportunities
- helping to address the lack of contractual alignment which has existed in coal supply chains in recent years by enabling Surat Basin Rail to be informed as to the demand for the Identified Rail Infrastructure and to ensure that the parties which are granted capacity for Stage 2 of the Wiggins Island Terminal's development have sufficient below rail access and
- providing a number of environmental and safety benefits associated with contractual alignment which may assist in reducing vessel queues due to constrained coal supply chains in Queensland (including greater protection of the Great Barrier Reef than would otherwise be the case).¹³

3.14 In its submission to the ACCC, Surat Basin Rail did not comment on the specific public benefit claims made by the Applicants.

3.15 The ACCC's assessment of the likely public benefits from the proposed conduct is as follows.

13 The Applicants' supporting submission to application for authorisation A901311, 23 May 2012, pages 31-32.

Efficient investment and expansion

3.16 Consistent with its 2010 Wiggins Island determination, the ACCC considers the proposed collective bargaining conduct is likely to result in the following public benefits:

- greater commercial certainty regarding investment in infrastructure along the coal supply chain and
- enabling the Applicants to secure, on a more timely basis, sufficient below rail capacity thereby avoiding any unnecessary delays in the construction of Stage 2 of the Wiggins Island Terminal and the resulting benefits flowing from its construction, such as export revenue.

Transaction cost savings

3.17 Generally, the ACCC considers there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiation process is employed, relative to a situation where a series of individual negotiation processes are necessary.

3.18 The ACCC considers that the proposed collective bargaining conduct is likely to result in a public benefit in the form of transaction cost savings, particularly given the complexity of contractual obligations being negotiated, compared to a situation where the Applicants negotiate individually with Surat Basin Rail for below rail access. Having said this, the ACCC notes that there are currently only two producers seeking to collectively negotiate with Surat Basin Rail, and as such, the size of this public benefit (compared to previous similar matters involving a larger number of producers) may be small. The ACCC notes that other producers may decide to join the collective bargaining group as additional mines are developed and commence production in the Surat Basin region.

Contractual alignment

3.19 In its 2010 Wiggins Island decision, the ACCC outlined its view that achieving contractual alignment in coal supply chains is dependent on:

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

3.20 In its 2010 decision, the ACCC noted that absent authorisation of the collective bargaining arrangements, aggregate capacity requirements at the port and in rail would still be known by the relevant service providers and infrastructure owners. The ACCC also noted the Wiggins Island Terminal's separate commitment under the terms of its Terminal Access Policy to work with the relevant service providers to develop appropriate mechanisms to ensure that access contracts reflect the capacity of the supply chain as a whole.

3.21 At that time, the ACCC concluded that it was unclear how collective bargaining arrangements would contribute significantly to the achievement of contractual alignment. As such, the ACCC was not satisfied that contractual alignment was a public benefit likely to result from collective bargaining.

3.22 The current Applicants agree that the factors identified in the ACCC's 2010 decision (outlined at paragraph 3.19) are necessary to achieve contractual alignment. However,

the Applicants submit that collective bargaining facilitates the achievement of these factors by:

- assisting the Applicants to reach satisfactory commercial terms for access to the Identified Rail Infrastructure, thereby facilitating the execution of long term contracts and
- making the negotiation process more efficient and informing Surat Basin Rail of the likely demand for the infrastructure so that it may better plan investment, which in turn will form part of the whole of coal chain solution.

3.23 While the ACCC considers that collective bargaining will increase the efficiency of the negotiation process between the Applicants and Surat Basin Rail, thereby facilitating efficient investment, it remains unsatisfied that collective bargaining is likely to contribute significantly to the achievement of contractual alignment.

Environmental and safety benefits

3.24 The Applicants submit that the collective bargaining will result in a number of environmental and safety benefits associated with contractual alignment, which may assist in reducing vessel queues due to constrained coal supply chains in Queensland.

3.25 As previously noted, the ACCC is not satisfied that the collective bargaining arrangements would contribute significantly to the achievement of contractual alignment. While the ACCC considers addressing the environmental and safety issues associated with large vessel queues off Australia's coastline is an important issue, the ACCC is not satisfied that environmental and safety benefits result from collective bargaining.

Public detriment

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

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁴

3.27 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. This application involves collective bargaining and information sharing between competing coal producers in the acquisition of below rail infrastructure from Surat Basin Rail.

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

3.28 The Applicants submit that the proposed collective bargaining conduct will not result in any identifiable public detriment in any market, given that:

- the collective bargaining arrangements are voluntary and neither the Applicants or Surat Basin Rail are compelled to participate
- the collective bargaining group is relatively limited. The Applicants seek to extend any authorisation only to current and future users of the Surat Basin Rail Line who will similarly need to negotiate with Surat Basin Rail for access to the Identified Rail Infrastructure
- there is no proposed boycott activity
- Surat Basin Rail is a monopoly provider of the Identified Rail Infrastructure and Services, reducing the probability that the collective bargaining group will achieve inefficiently low prices and
- information will only be shared between the Applicants to the extent that it is related to the Identified Rail Infrastructure. The Applicants will continue to compete with each other in relation to the production and supply of coal to international customers and for access to above rail infrastructure and services.¹⁵

3.29 The ACCC is satisfied that the proposed bargaining conduct is unlikely to lead to any significant public detriment due to:

- participation in the collective bargaining arrangements being voluntary, including for any future users of the Identified Rail Infrastructure and Services
- collective boycott activity is not proposed
- the limited composition of the collective bargaining group and
- the bargaining and information exchanges between coal producers will be restricted to the Identified Rail Infrastructure and Services.

Balance of public benefit and detriment

3.30 In summary, the ACCC considers the proposed conduct is likely to result in the following public benefits:

- transaction cost savings
- greater commercial certainty regarding investment in infrastructure along the coal supply chain and
- enabling the Applicants to secure, on a more timely basis, sufficient below rail capacity thereby avoiding any unnecessary delays in the construction of Stage 2 of

15 The Applicants' submission in support of application for authorisation A91311, 23 May 2012, pages 36-37.

the Wiggins Island Terminal and the resulting benefits flowing from its construction, such as export revenue.

- 3.31 For the reasons outlined in this chapter, the ACCC considers there is little if any public detriment likely to result from the proposed conduct.
- 3.32 Therefore, the ACCC is satisfied that in all the circumstances, that the proposed collective bargaining conduct is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 3.33 Accordingly, the ACCC is satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) of the Act are met.

Length of authorisation

- 3.34 The Act allows the ACCC to grant authorisation for a limited period of time.¹⁶ 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.
- 3.35 In this instance, the Applicants seek authorisation for 20 years given that:
- Surat Basin Rail's proposed access agreements are for 20 years on a take or pay basis
 - the development of the Wiggins Island Terminal is proposed to occur in stages over several years. Stage 2 coal producers (including the current Applicants) will need to secure rail access at this stage, whereas other coal producers will need to secure rail access at future stages of development
 - Surat Basin Rail will be required to undertake expansions to the Identified Rail Infrastructure on a staged basis over a similar time frame, which will require negotiations with future users under the terms of the draft Access Policy
 - there are long lead times associated with infrastructure investment and a need to deliver long term commercial certainty to both the Applicants, Surat Basin Rail and other access providers in the supply chain associated with such infrastructure
 - the impact of a 20 year authorisation on competition would be minimal and
 - Surat Basin Rail's initial rail access terms are likely to provide a basis for further expansions of the track and, as such, there are benefits in allowing a 20 year term of authorisation to allow this process to occur.
- 3.36 In its consideration of other similar collective bargaining matters¹⁷, the ACCC has considered it appropriate to authorise arrangements for long periods in order to provide sufficient certainty to Applicants – namely, to cover initial negotiation periods during the

¹⁶ Section 91(1).

¹⁷ See ACCC determinations for authorisation applications A91241, A91275 and A91278.

development of coal export terminals, as well as giving effect to any below rail access agreements entered into for their initial terms.

- 3.37 The ACCC understands that timeframes for the construction of the Surat Basin Rail Line are being driven by the construction of the Wiggins Island Terminal. The ACCC understands that coal shipments from Stage 2 of the terminal are expected to commence in 2015, and as such, it would seem that collective negotiations with Surat Basin Rail are likely to occur over the next 2-3 years.
- 3.38 Given the likely timeframes involved for the Applicants to negotiate rail access and so as to allow the Applicants to give effect to any access agreements entered into with Surat Basin Rail for an initial 20 year term, the ACCC considers a 22 year period of authorisation may be appropriate in this instance.
- 3.39 Therefore, the ACCC proposes to grant authorisation to the proposed collective bargaining arrangements for 22 years, commencing from the date the ACCC's final determination comes into effect.
- 3.40 The ACCC invites further information from interested parties and the Applicants regarding the proposed duration of authorisation.

4. Draft determination

Proposed grant of authorisation

- 4.1 Section 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall issue a draft determination. The attachments to this document are part of the draft determination.
- 4.2 For the reasons outlined in this draft determination, the ACCC is satisfied that the net public benefit tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met.¹⁸ Therefore the ACCC proposes to grant authorisation to the Applicants to:
- collectively discuss and negotiate terms and conditions, including price, with the Access Provider¹⁹ for access to the Identified Rail Infrastructure and Services necessary to service the proposed expansion of the Wiggins Island Terminal
 - discuss matters relating to those discussions and negotiations amongst themselves and
 - enter into and give effect to contracts, arrangements or understandings with the Access Provider containing terms and conditions, including price, upon which access to the Identified Rail Infrastructure and Services will be acquired.
- 4.3 The ACCC proposes to grant authorisation for 22 years, commencing from the date the ACCC's final determination comes into effect.

18 See Attachment A.

19 As defined at paragraph 1.3.

4.4 Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to future producers that need to negotiate access to the Identified Rail Infrastructure and Services as the staged development of the Wiggins Island Terminal occurs.

4.5 This draft determination is made on 16 August 2012.

Conduct not proposed to be authorised

4.6 The proposed authorisation does not extend to:

- any information exchanges or collective negotiations in relation to above rail services
- negotiations regarding below rail infrastructure that does not support the transportation of coal to the Wiggins Island Terminal and
- collective boycott activity by the Applicants.

Interim authorisation

4.7 The ACCC granted interim authorisation on 20 June 2012 to enable the Applicants to commence collective negotiations with Surat Basin Rail. Interim authorisation will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

Further submissions

4.8 The ACCC will now seek further submissions from interested parties, including in relation to the proposed duration of authorisation. 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 – relevant statutory tests

Sections 90(5A) and 90(5B) of the Act 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.

Sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding 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.