



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation A91278

lodged by

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

to

collectively bargain with QR Network

Date: 16 February 2012

Commissioners: Schaper
Court
Dimasi
Walker

Authorisation no.: A91278

Public Register no.: C2011/823

Summary

The ACCC grants authorisation for 15 years to the Applicants, and any future users of the DPPM Terminal proposed for Dudgeon Point, to:

- collectively discuss and negotiate terms and conditions with QR Network, including price, for access to the below rail infrastructure necessary to use of the DPPM Terminal;
- discuss among themselves matters relating to those discussions and negotiations; and
- enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.

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 DPC Group) lodged authorisation application A91278 to:

- collectively discuss and negotiate terms and conditions with QR Network Pty Ltd (QR Network), including price, for access to the below rail infrastructure necessary to service Dudgeon Point Project Management's (DPPM) proposed coal terminal development at Dudgeon Point, within the Port of Hay Point (the DPPM Terminal);
- discuss among themselves matters relating to those discussions and negotiations; and
- enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the below rail infrastructure will be acquired.

On 4 November 2011, the parties sought to amend authorisation application A91278 to add Rio Tinto Coal Australia Pty Limited (Rio Tinto) to the list of applicants as a likely user of the DPPM Terminal.

The DPC Group and Rio Tinto (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 note that participation in the collective bargaining arrangements will be voluntary and will not involve collective boycotts.

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 DPC Group was formed for the purpose of facilitating the access to facilities (including the DPPM Terminal) required by the DPC Group's members to export their Bowen Basin coal through Dudgeon Point. Rio Tinto has advised the ACCC that it is also negotiating for additional capacity at the DPPM Terminal, to facilitate the export of its coal from the Bowen Basin. A map depicting Dudgeon Point, relative to coal deposits and coal export terminals is at **Attachment D**.

In order to support the transportation of coal to their terminal developments in the Port of Dudgeon Point, the Applicants wish to secure access to below rail infrastructure in the Newlands, Goonyella and Blackwater coal rail systems, including:

- all expansions to these systems;
- access to any other QR Network rail infrastructure necessary to support the Applicants' access to the DPPM Terminal; and
- all services relating to such access for the purpose of transporting the Applicants' coal to the DPPM Terminal.

(the Below Rail Infrastructure)

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 QR Network for access to the Below Rail Infrastructure. The ACCC considers the collective bargaining arrangements could also deliver additional public benefits through:

- ensuring that QR Network and the Applicants develop an accurate and uniform view of the Applicants' development and capacity needs in relation to the Below Rail Infrastructure, 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

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 Below Rail Infrastructure.

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 agreements with QR Network (normally 10 years). Accordingly, the ACCC grants authorisation for 15 years as sought.

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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, Peabody Energy Australia Pty Limited and Rio Tinto Coal Australia Pty Limited and the successors, assigns, related bodies corporate, associated entities and joint venture partners of each.
Below Rail Infrastructure	QR Network owned below rail infrastructure in the Newlands, Goonyella and Blackwater coal rail systems, including: <ul style="list-style-type: none">• all expansions to these systems;• access to any other QR Network rail infrastructure necessary to support the DPPM Terminal; and• all services relating to such access for the purpose of transporting the Applicants' coal to the DPPM Terminal.
Consortium Terminal	Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited's proposed coal terminal development at the Port of Abbot Point.
DPC Group	Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited
DPPM	Dudgeon Point Project Management, proposed developers of a coal terminal at Dudgeon Point, in the Port of Hay Point, Queensland, including its successors, assigns, related bodies corporate, associated entities and joint venture partners.
DPPM Terminal	The coal terminal proposed to be developed by DPPM 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

Proposed Conduct	<p>By the Applicants, means:</p> <ul style="list-style-type: none"> • collective discussions and negotiation of terms and conditions with QR Network, including price, for access to the below rail infrastructure necessary to service DPPM Terminal; • discussions among themselves about matters relating to those discussions and negotiations; and • to enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the below rail infrastructure will be acquired.
QR Network	QR Network Pty Ltd and its successors and assigns.
Rio Tinto	Rio Tinto Coal Australia Pty Limited and its successors, assigns, related bodies corporate, associated entities and joint venture partners.
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 DPC Group) lodged application for authorisation A91278 with the ACCC.
- 1.2 Broadly, in order to support the transportation of coal to Dudgeon Point Project Management's (DPPM) proposed new terminal at Dudgeon Point (the DPPM Terminal), the DPC Group sought authorisation to collectively bargain with QR Network in relation to access to below rail infrastructure in the Newlands, Goonyella and Blackwater coal rail systems, including:
- all expansions to these systems;
 - access to any other QR Network rail infrastructure necessary to support the DPC Group's access to the DPPM Terminal; and
 - all services relating to such access for the purpose of transporting the DPC Group members' coal to the DPPM Terminal.
- (the Below Rail Infrastructure)
- 1.3 In particular, the Applicants applied for authorisation for 15 years to:
- (a) collectively discuss and negotiate terms and conditions with QR Network Pty Ltd (QR Network), including price, for access to the below rail infrastructure necessary to service the DPPM Terminal;
 - (b) discuss among themselves matters relating to those discussions and negotiations; and
 - (c) enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.
- (the Proposed Conduct)
- 1.4 On 4 November 2011, the parties sought to amend authorisation application A91278 to add Rio Tinto Coal Australia Pty Limited (Rio Tinto) to the list of applicants as a likely user of the DPPM Terminal.
- 1.5 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](#).

1.6 Application A91278 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).

Other parties

1.7 The Applicants have requested that authorisation also extend to future users of the DPPM Terminal.

1.8 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.

1.9 Further, pursuant to section 88(10) of the Act, the ACCC may grant authorisation to future users of the DPPM Terminal who will similarly need to negotiate below rail access.

Draft Determination

1.10 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.11 On 15 December 2011, the ACCC issued a draft determination proposing to authorise the collective bargaining arrangements for 15 years.

1.12 The ACCC received no submissions or requests for a pre-decision conference in response to the draft determination.

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.

Rio Tinto Coal Australia Pty Limited (Rio Tinto)

- 2.7 Rio Tinto is worth around \$3,186 million and manages a number of subsidiaries and joint ventures which produce both metallurgical and coking coal from the Bowen Basin. In particular, Rio Tinto manages the Blair Athol and Clermont Mines and provides management services to the Hall Creek and Kestrel Mines.

Coal Export Industry

- 2.8 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.
- 2.9 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.
- 2.10 The Dudgeon Point terminals will be largely supplied with coal from the Bowen Basin. The Galilee Basin is adjacent to the Bowen Basin and although not currently producing coal, several major coal exploration projects are currently underway. Accordingly, Dudgeon Point may also be used by Galilee Basin producers in the future.
- 2.11 The DPC Group was formed for the purpose of facilitating its members’ access to the facilities and infrastructure required to export their Bowen Basin coal through Dudgeon Point. The DPC Group is currently seeking capacity at the DPPM Terminal for this purpose. Rio Tinto has advised the ACCC that it is also negotiating for additional capacity at the DPPM Terminal, to facilitate the export of its coal from the Bowen Basin. A map depicting Dudgeon Point, relative to coal deposits and coal export terminals is at **Attachment D**.

Rail Access Undertaking

- 2.12 In order to support the transportation of coal to the DPPM Terminal, the Applicants wish to secure access to the Below Rail Infrastructure. Below rail infrastructure in Queensland is provided by QR Network.
- 2.13 The terms and conditions upon which QR Network will provide access to below rail infrastructure to coal producers are subject to an access undertaking with the Queensland Competition Authority pursuant to Part 5 of the *Queensland Competition Authority Act 1997* (the Rail Access Undertaking). The Rail Access Undertaking provides that access to below rail infrastructure must be provided by QR Network on fair and equitable terms. However, there are access situations which are not dealt with in detail in the Rail Access Undertaking, leading to a requirement for further negotiation of access terms with QR Network.

Recent 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

- 2.14 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.

2010 North West Iron Ore Alliance authorisation – collective negotiation of rail access in the Pilbara

- 2.15 On 29 April 2010, the ACCC granted conditional authorisation A91212 to the North West Iron Ore Alliance to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia. Authorisation was granted for 15 years.

Current related applications

- 2.16 The members of the DPC Group have lodged an application for authorisation to collectively bargain with Dudgeon Point Project Management (DPPM) in relation to access to the DPPM Terminal to be established at Dudgeon Point, Queensland (A91277). The ACCC granted interim authorisation on 27 October 2011 and issued a draft determination proposing to grant authorisation on 15 December 2011.
- 2.17 The Applicants have also lodged an application 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). The ACCC issued a draft determination proposing to grant authorisation in relation to this matter on 8 December 2011.

3 Submissions received by the ACCC

Prior to the draft determination

- 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 (QR Network), as well as coal producers, above rail providers, competing coal export terminals and relevant state and federal government agencies. A summary of the public submissions received from interested parties follows and the details are considered in the ACCC's evaluation of the Proposed Conduct in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

North Queensland Bulk Ports Corporation (NQBPC)

- 3.4 NQBPC provided a submission questioning whether significant benefit is likely to accrue from authorisation of collective bargaining in this case, given the application of the Rail Access Undertaking. NQBPC also questioned how the Proposed Conduct would interact with the Rail Access Undertaking and the effect of the financial incentive toward

collective bargaining provided by any economic benefits that may arise from the Proposed Conduct.

Asciano

- 3.5 Asciano gave in principle support to the application and noted the public benefits which could arise from collective negotiation as a means to potentially facilitate the development of the proposed new Dudgeon Point coal terminals and the more efficient operation of the coal logistics chain.
- 3.6 However, Asciano also noted its previous publicly expressed concerns regarding the vertically integrated nature of QR Network and the QR National above rail business. In this context, Asciano submitted that the authorisation should be limited to collective bargaining in relation to infrastructure that QR Network owns and operates (or will own and operate when constructed) and should not extend to:
- any information exchanges or collective negotiations in relation to above rail services with either QR Network or any other QR National entity;
 - negotiations regarding below rail infrastructure that does not support the transportation of coal to the DPPM Terminal (including negotiations relating to infrastructure owned by other QR National entities, and in particular QR entities with an above rail business, for example, rail sidings or storage facilities).
- 3.7 In order to support these limitations, Asciano submitted that a monitoring regime is required to ensure that collective negotiations relating to below rail issues do not transition into negotiations on above rail issues.

Following the draft determination

- 3.8 On 15 December 2011, the ACCC issued a draft determination proposing to authorise the collective bargaining arrangements for 15 years.
- 3.9 The ACCC received no submissions or requests for a pre-decision conference in response to the draft determination.

4 ACCC evaluation

- 4.1 The ACCC's evaluation of the Proposed Conduct is in accordance with tests found in the following sections of the Act:
- 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 below rail infrastructure associated with the proposed terminal developments at Dudgeon Point. The Applicants identified possible secondary markets as:

- the supply and acquisition of above rail haulage services and coal handling services at the neighbouring ports; and
- the global markets for the supply of thermal and metallurgical coal.

4.5 The ACCC did not receive submissions from interested parties specifically commenting on this issue.

4.6 The markets submitted by the Applicants for rail haulage and coal handling are consistent with that found by the ACCC in the WICET Determination. However these markets may broaden following completion of QR National's Goonyella to Abbot Point (GAP) expansion project (projected for mid-2012). The scope of this project, as noted in the Applicants' submission, includes:

- construction of a 69km new railway between the Goonyella and Newlands coal rail systems;
- a major upgrade and expansion of the existing Newlands system; and
- related works in the Goonyella system to enable trains to travel north to Abbot Point.

4.7 The stated objective of the GAP project is to improve the integration of the coal rail network and increase the rail transport options for coal producers in central Queensland. In particular, the intention is to enable central Bowen Basin mines, currently serviced by the Goonyella and Blackwater coal rail systems, to transport coal to Abbot Point through the Newlands system. The GAP project would also allow the transport of coal from the north to Dudgeon Point.

4.8 Accordingly, the ACCC considers that the geographic markets for below rail infrastructure and the supply and acquisition of above rail haulage services and coal handling services may be broader than that proposed by the Applicants. 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 likely future with and without the conduct

4.9 The ACCC applies the ‘future with-and-without test’ established by the Competition Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹

4.10 Under this test, the ACCC compares the likely public benefit and likely anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.

4.11 The Applicants submit the most likely alternative future is that, without authorisation, the Applicants or at least some of them would negotiate separately with QR Network for access to the Below Rail Infrastructure. However, the Applicants’ submission also notes the possibility that the smaller producers, such as Carabella Resources Limited, have limited resources and expertise and may not be able to cost effectively negotiate separately with QR Network. Accordingly, these producers may not be willing to proceed further with the considerable investment required to develop their coal resources without authorisation of collective negotiations with QR Network.

4.12 The ACCC received no other submissions from interested parties specifically commenting on this issue.

4.13 The ACCC considers that the most likely alternative future is that, without authorisation, the coal asset development projects would proceed in some form and the Applicants would negotiate separately with QR Network for access to the Below Rail Infrastructure.

Public benefit

Background to public benefit considerations

4.14 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.²

4.15 The Applicants submit the Proposed Conduct will deliver public benefits, including:

- transaction cost savings
- facilitating efficient investment in infrastructure

¹ *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.

² *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.

- improvement in business efficiency and commercial outcomes
- growth in export markets

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

Transaction cost savings

4.17 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 Below Rail Infrastructure 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 QR Network;
- a decrease in the cost of legal and expert advisors; and
- efficiencies in the pooling of the limited resources of the smaller Applicants.

4.18 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 Below Rail Infrastructure.

4.19 Generally, 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.

4.20 NQBPC questions whether significant benefit is likely to accrue from authorisation of collective bargaining in this case, given the application of the Rail Access Undertaking.

4.21 The Applicants submit that the Proposed Conduct will enable them to realise transaction cost savings and more efficient commercial outcomes where the Rail Access Undertaking does not apply. The Applicants note, for example, that to provide the access sought, QR Network is undertaking a 'Significant Investment'³ in excess of \$300 million. As such, QR Network can impose Access Conditions (as defined in the Rail Access Undertaking) on access seekers which are negotiated outside the scope of the standard form access agreements. The Applicants submit that the Proposed Conduct is especially appropriate in this instance as it provides an effective mechanism to enable the Applicants to negotiate access on timely, fair and equitable terms.

4.22 The Applicants also submit that the practical implementation of the user funding mechanism in the Rail Access Undertaking (which involves engagement with QR Network in relation to below rail infrastructure upgrades) would also be an appropriate subject for discussion and agreement amongst themselves. The Applicants submit that QR Network recognised this in its submissions in the WICET authorisation process. Accordingly, the Applicants consider that the Proposed Conduct also supports the user

³ As defined in the Rail Access Undertaking.

funding mechanism within the Rail Access Undertaking, which in turn facilitates the public benefit of efficient investment in valuable infrastructure.

- 4.23 The ACCC does not consider that the Rail Access Undertaking replaces the need to negotiate the terms of access to the Below Rail Infrastructure. Instead, the ACCC considers that the Rail Access Undertaking and the Proposed Conduct are likely to compliment each other. In particular, the ACCC considers that, absent authorisation of the Proposed Conduct, individual negotiations regarding the terms and conditions for below rail access are likely to result in a longer and more costly negotiation process for the Applicants and QR Network.
- 4.24 Accordingly, the ACCC considers that significant transaction cost savings are likely to result from the Proposed Conduct, compared to a situation where the Applicants attempt to negotiate individually for below rail access. Therefore, the ACCC accepts that the collective bargaining arrangements are likely to deliver a public benefit in the form of transaction cost savings.

Facilitating efficient business outcomes and investment

- 4.25 The Applicants submit that the Proposed Conduct is likely to improve business efficiency by:
- (a) reducing the delay in securing access rights and thus avoiding unnecessary delays in the development of the DPPM Terminal;
 - (b) helping to minimise the bargaining imbalance between QR Network and each individual applicant; and
 - (c) assisting smaller Applicants to be more competitive with larger producers.
- 4.26 The Applicants submit that the Proposed Conduct will lead to investment efficiencies:
- in the short term, by providing QR Network with accurate information to inform its day to day investment; 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.
- 4.27 Asciano notes the public benefits which could arise from collective negotiation as a means to potentially facilitate the coal terminal developments at Dudgeon Point and the more efficient operation of the coal logistics chain.
- 4.28 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

- 4.29 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 Below Rail Infrastructure.

- 4.30 The ACCC received no submissions specifically upon this point. 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.
- 4.31 The ACCC considers that absent authorisation of the Proposed Conduct, any delays in individual producers securing below rail access could delay construction of the DPPM Terminal. To the extent that the Proposed Conduct helps to avoid unnecessary delay in the development of DPPM Terminal, the ACCC considers the Proposed Conduct is likely to provide a benefit to the public.

ACCC conclusion on public benefits

- 4.32 The ACCC considers the primary benefits to the public likely to be generated by the Proposed Conduct are the transaction cost savings, compared to a situation where the Applicants negotiate individually with QR Network for access to the Below Rail Infrastructure. The ACCC considers the collective bargaining arrangements could also deliver additional public benefits through:
- (a) ensuring that QR Network and the Applicants develop an accurate and uniform view of the Applicants' development and capacity needs in relation to the Below Rail Infrastructure, which may lead to improvements in business and infrastructure investment efficiency; and
 - (b) 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

- 4.33 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.⁴

- 4.34 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.

Potential loss of allocative efficiencies

- 4.35 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

⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

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.

- 4.36 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.
- 4.37 The Applicants submit that the Proposed Conduct will lead to minimal if any detriment. In particular, the Applicants note that:
- (a) the target of the collective bargaining is a monopoly provider, reducing the probability that the collective bargaining group will achieve inefficiently low prices.
 - (b) 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 QR Network or enter into the collective bargaining arrangements.
 - (c) there are restrictions on the coverage, composition and representation 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 QR Network for access to the Below Rail Infrastructure. In the WICET Determination, the ACCC allowed authorisation to extend to future users of the terminal affected by the collective bargaining.
 - (d) there is no proposed boycott activity, which means that the arrangement is also voluntary from the view of QR Network.
 - (e) information will only be shared between the Applicants to the extent that it is related to the Below Rail Infrastructure. The Applicants will not share information and will continue to compete with each other in relation to the production and supply of coal to customers in overseas markets and for access to above rail infrastructure.

- 4.38 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 target -of the collective bargaining is a monopoly provider;
 - 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.

Potential inconsistency with the Rail Access Undertaking

- 4.39 NQBPC questions how the Proposed Conduct will interact with the Rail Access Undertaking and the effect of the financial incentive toward collective bargaining provided by any economic benefits that may arise from the Proposed Conduct.

- 4.40 As noted above, the Rail Access Undertaking provides a framework for negotiating access with QR Network to the Below Rail Infrastructure. However, its coverage is limited in respect of the type of activity covered by this authorisation application. Accordingly, the ACCC does not consider that authorisation of the Proposed Conduct would conflict with the Rail Access Undertaking.
- 4.41 In addition, the ACCC does not consider that a financial incentive to engage in collective bargaining due to economic benefits that may arise from such bargaining is equivalent to a mandatory obligation to engage in collective bargaining. In particular, the ACCC notes that QR Network will be free to choose whether or not to negotiate with the collective group. As QR Network is the (natural) monopoly provider of below rail infrastructure in Queensland, it is likely to retain a bargaining advantage over the Applicants notwithstanding their collective size.

Potential for vertical leveraging of monopoly on below rail infrastructure

- 4.42 Asciano notes its previous publicly expressed concerns regarding the vertically integrated nature of QR Network and the QR National above rail business. In this context, Asciano submitted that the authorisation should be limited to collective negotiations with QR Network in relation to below rail issues and infrastructure only.
- 4.43 The ACCC notes that the authorisation application by the Applicants is limited in scope to the Below Rail Infrastructure associated with the DPPM Terminal. Therefore, in this instance, the ACCC considers that the Proposed Conduct as defined is already explicitly confined to exclude the conduct raised by Asciano as being of concern.
- 4.44 In relation to the monitoring regime proposed by Asciano, as the conduct of concern to Asciano is not covered by the application for authorisation, it remains subject to the normal operation of the Act. This includes potential criminal sanctions for cartel conduct. Given the Applicants' evident awareness of the Act and its ramifications, the ACCC considers that in these circumstances an additional monitoring regime is not required.

The ACCC's conclusion on public detriments

- 4.45 The ACCC considers that the Proposed Conduct is 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 Below Rail Infrastructure.

Balance of public benefit and detriment

- 4.46 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.

4.47 In the context of applying the net public benefit test in section 90(8)⁵ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁶

4.48 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 Below Rail Infrastructure 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.

4.49 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

4.50 The Act allows the ACCC to grant authorisation for a limited period of time.⁷ The ACCC generally considers that it is appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

4.51 In this instance, the Applicants seek authorisation for 15 years. The Applicants note that collective negotiations for access to the Below Rail Infrastructure 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 QR Network during the term of any access agreements (normally 10 years), particularly regarding potential price review mechanisms. Accordingly, the Applicants submit that an authorisation period of 15 years is appropriate.

4.52 The ACCC received no submissions other than from the Applicants in relation to the length of authorisation. The ACCC accepts that the authorisation period for collective bargaining with QR Network in relation to below rail access associated with development of the Dudgeon Point coal terminals needs to accommodate:

- (a) an initial 3-5 year period during development of the terminals; and
- (b) the likely term of the access agreement with QR Network (normally 10 years).

⁵ 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.

⁶ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

⁷ Section 91(1).

4.53 Accordingly, the ACCC grants authorisation to the Proposed Conduct for 15 years.

Future Users

4.54 The Applicants submit that it is appropriate that any authorisation granted by the ACCC be expressed to apply to future producers and users of the DPPM Terminal who will similarly need to negotiate access to Below Rail Infrastructure. The ACCC received no other submissions upon this point.

4.55 The ACCC considers that it is appropriate that authorisation extend to future prospective users of the proposed 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.⁸

5 Final 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 (the DPC Group) lodged application for authorisation A91278 with the ACCC.

5.2 Broadly, in order to support the transportation of coal to Dudgeon Point Project Management's (DPPM) proposed new terminal at Dudgeon Point (the DPPM Terminal), the DPC Group sought authorisation to collectively bargain with QR Network in relation to access to below rail infrastructure in the Newlands, Goonyella and Blackwater coal rail systems, including:

- all expansions to these systems;
- access to any other QR Network rail infrastructure necessary to support the DPC Group's access to the DPPM Terminal; and
- all services relating to such access for the purpose of transporting the DPC Group members' coal to the DPPM Terminal.

(the Below Rail Infrastructure)

5.3 In particular, the Applicants applied for authorisation for 15 years to:

- (a) collectively discuss and negotiate terms and conditions with QR Network Pty Ltd (QR Network), including price, for access to the below rail infrastructure necessary to service the DPPM Terminal;
- (b) discuss among themselves matters relating to those discussions and negotiations; and
- (c) enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.

⁸ Subsection 91B(3)

(the Proposed Conduct)

- 5.4 On 4 November 2011, the parties sought to amend authorisation application A91278 to add Rio Tinto Coal Australia Pty Limited (Rio Tinto) to the list of applicants as a likely user of the DPPM Terminal.
- 5.5 The Applicants are coal producers that propose to seek access to the DPPM Terminal and require corresponding access to the below rail infrastructure necessary to service it (the Below Rail Infrastructure).
- 5.6 Application A91278 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 contract, 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).
- 5.7 The Applicants seek authorisation to collectively negotiate with QR Network Pty Ltd (QR Network), including sharing information amongst themselves as part of the collective negotiations, for access to the Below Rail Infrastructure.
- 5.8 In particular, the Applicants seek authorisation to:
- collectively discuss and negotiate terms and conditions with QR Network, including price, for access to the below rail infrastructure necessary to service the DPPM Terminal;
 - discuss among themselves matters relating to those discussions and negotiations; and
 - enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.
- 5.9 The Applicants seek authorisation for 15 years and have requested that authorisation also extend to future users of the DPPM Terminal.

The net public benefit test

- 5.10 For the reasons outlined in Chapter 4 of this 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.
- 5.11 The ACCC therefore grants authorisation to application A91278.

Conduct for which the ACCC grants authorisation

- 5.12 The ACCC grants authorisation for 15 years to the Applicants to:
- collectively discuss and negotiate terms and conditions with QR Network, including price, for access to the below rail infrastructure necessary to transport coal to the DPPM Terminal;
 - discuss among themselves matters relating to those discussions and negotiations; and
 - enter into and give effect to contracts, arrangements or understandings with QR Network (or any successor or assignee) containing common terms and conditions, including price, upon which access to the Below Rail Infrastructure will be acquired.
- 5.13 Pursuant to clause 88(10) of the Act, the ACCC extends the above authorisation to any future users of the DPPM Terminal which require access to the Below Rail Infrastructure.
- 5.14 This determination is made on 16 February 2012.
- 5.15 Section 90(4) requires that the ACCC state in writing its reasons for a determination. The attachments to this determination are part of the determination.

Conduct not authorised

- 5.16 The grant of authorisation does not extend to the Applicants engaging in:
- any information exchanges or collective negotiations in relation to above rail services;
 - negotiations regarding below rail infrastructure that does not relate to the transportation of coal to the DPPM Terminal; or
 - collective boycott activity.
- 5.17 Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

Date authorisation comes into effect

- 5.18 This determination is made on 16 February 2012. If no application for review of the determination is made to the Australian Competition Tribunal the authorisation will come into force on 10 March 2011.

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 for application A91278

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

DATE	ACTION
28 September 2011	Application for authorisation lodged with the ACCC.
3 November 2011	Closing date for submissions from interested parties in relation to the application for authorisation.
23 November 2011	Submission received from the Applicants in response to interested party submissions.
16 December 2011	Draft determination issued.
16 February 2012	Final 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.⁹

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.¹⁰

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.¹¹

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 future¹²
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹³

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁴. 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.

⁹ *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.

¹⁰ *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.

¹¹ Section 91(3).

¹² Section 88(10).

¹³ Section 88(6).

¹⁴ Section 90(10A)

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹⁵ 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.¹⁶

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.¹⁷ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹⁸

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.¹⁹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²⁰

¹⁵ Subsection 91A(1)

¹⁶ Subsection 87ZD(1).

¹⁷ Subsection 91B(1)

¹⁸ Subsection 91B(3)

¹⁹ Subsection 91C(1)

²⁰ Subsection 91C(3)

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

