



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by various Queensland coal producers

in respect of

proposed collective bargaining with QR Network and
Adani Mining Pty Ltd

Date: 7 February 2013

Authorisation numbers: A91350 & A91351

Commissioners: Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation for 15 years to various Queensland coal producers to collectively negotiate terms and conditions of access, including price, to Adani Mining Pty Ltd's Dudgeon Point terminal infrastructure and QR Network Pty Ltd's connecting below rail infrastructure for the purpose of transporting coal from the Bowen Basin to the terminal for export.

The ACCC also grants interim authorisation to enable the Applicants to commence collective negotiations with Adani and Aurizon Network (previously QR Network) for the terms and conditions of access to the identified port and below rail infrastructure respectively.

The ACCC will seek further submissions in relation to this draft determination before making its final decision.

The applications for authorisation

1. On 7 December 2012 various Queensland coal producers lodged two collective bargaining applications for authorisation with the Australian Competition and Consumer Commission (ACCC).
2. The coal producers also requested interim authorisation to enable them to engage in the proposed collective bargaining conduct while the ACCC is considering the substantive application. Further detail in relation to the request for interim authorisation is provided from paragraph 107.
3. Authorisation is a transparent process where the ACCC may grant 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹

The conduct

4. The applications concern the collective negotiation of terms and conditions of access to the coal export terminal being built by Adani Mining Pty Ltd (**Adani**) at Dudgeon Point at the Port of Hay Point in Queensland (A91350) and the connecting below rail infrastructure operated by QR Network Pty Ltd (**QR Network**) (A91351).²

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

² The applications for authorisation (A91350 and A91351) are available from the ACCC's website www.accc.gov.au/authorisationregister.

5. The ACCC notes that, effective on 1 December 2012, QR National Limited changed its name to Aurizon Holdings Ltd. This included QR Network changing its name to Aurizon Network. For the purpose of this draft determination, the ACCC has adopted the wording contained throughout the applications for authorisation A91350 and A91351 – namely, QR Network.
6. Endocoal Ltd, Whitehaven Coal Ltd, Yancoal Australia Ltd and QC Resource Investments Pty Ltd lodged application for authorisation A91350 to:
 - collectively discuss and negotiate terms and conditions with Adani for access to each and any of the terminals to be developed at Dudgeon Point by Adani (**the Terminal**), any expansions to the Terminal and any other infrastructure at or around Dudgeon Point necessary to support the Terminal (**Port Infrastructure**)
 - enter into and give effect to contracts, arrangements or understandings with Adani and
 - discuss related matters amongst themselves (hereafter referred to as the **Port Collective Negotiations**).
7. A similar group of coal producers (namely, Endocoal Ltd, Linc Energy Ltd, Whitehaven Coal Ltd, Yancoal Australia Ltd and QC Resource Investments Pty Ltd) lodged application for authorisation A91351 to:
 - collectively discuss and negotiate terms and conditions with QR Network for access to the Newlands, Goonyella and Blackwater coal rail systems (to the extent that these systems are used to service each and any of the terminals to be developed at Dudgeon Point by Adani), all expansions to these systems and access to any other QR Network rail infrastructure necessary to support the Terminal (**Below Rail Infrastructure**)
 - enter into and give effect to contracts, arrangements or understandings with QR Network and
 - discuss related matters amongst themselves (hereafter referred to as the **Below Rail Collective Negotiations**).
8. The two groups of coal producers will be referred to as the **Applicants** for authorisation within this draft determination.
9. Participation in the proposed Port and Below Rail Collective Negotiations is voluntary and does not include boycott activities. It is proposed that having collectively negotiated terms and conditions with Adani and QR Network, each producer will determine whether to accept those negotiated terms and conditions. Each Applicant may pursue independent negotiations with Adani and QR Network on any matter, including in relation to port and below rail access.
10. Further, the Applicants submit that during the collective bargaining processes, information will be shared only to the extent it is reasonably necessary for the purpose of negotiating terms and conditions of access to the Port Infrastructure and Below Rail Infrastructure. The Applicants submit they will not share other commercially sensitive information such as the identity of downstream customers, pricing and production costs.

11. Authorisation is sought for a period of 15 years.
12. The Applicants request that any authorisation granted also apply to:
 - any future producers and users of the Terminal that will need to negotiate access to the Port Infrastructure with Adani and the Below Rail Infrastructure with QR Network in the future as the development and expansion of the Terminal progresses and
 - the Applicants' successors, assigns, related bodies corporate, associated entities and joint venture partners.
13. The applications for authorisation A91350 and A91351 list Adani, QR Network and any future owners or operators of both the Port and Below Rail Infrastructure as parties to the proposed collective bargaining arrangements.

The Applicants³

14. The Applicants have mining leases and/or exploration licences for coal mines or tenements in the Bowen Basin in central Queensland. The producers mine coal primarily for export.
15. *Endocoal Ltd* is an ASX listed Australian coal exploration and development company which operates exploration activities solely in the Bowen Basin. It has 388.7 million tonnes of resources identified, plus mine development activities underway. Its flagship Orion Downs project has 51.4 million tonnes of export quality thermal coal and is scheduled to commence production in the second half of 2013.
16. *Whitehaven Coal Limited* is an Australian coal company listed on the ASX. On 2 May 2012 Whitehaven completed its merger with Aston Resources Ltd and acquired Boardwalk Resource Ltd. As part of its operations, Whitehaven aims to produce hard coking, PCI and thermal coal as part of its Dingo and Sienna projects in the Bowen Basin.
17. *Yancoal Australia Ltd* is an ASX listed company and one of the largest coal producers in Australia. In the Bowen Basin, its Yarrabee mine produces low volatile, high energy PCI coal which is exported to steelmakers and general industry in Asia. Production at Yarrabee has grown from 1.5 million tonnes per annum in 2005 to over 2.1 million tonnes per annum in 2012. Production is forecast to increase to 3.2 million tonnes per annum by 2014 in line with increasing port allocations. Yarrabee is a long life mine which is capable of further future growth.
18. Yancoal also has investments in two coal terminals – Wiggins Island in Gladstone (5.6 per cent) and NCIG at the Port of Newcastle (27 per cent).
19. *QC Resource Investments Pty Ltd* is based in Brisbane and is a privately held Australian resource company. Its flagship project, Fairhill, is located close to Emerald in the Bowen Basin.

³ The information appearing under this heading was obtained from Schedule 1 to each of the supporting submissions to the applications for authorisation A91350-A91351, 7 December 2012, page 18.

20. *Linc Energy Ltd* is a publicly listed diversified energy company with operations worldwide. Linc Energy's Coal Division has conventional coal exploration and development assets in Queensland, South Australia and the USA.
21. Linc Energy is proposing to develop the Teresa Coal Project in the Bowen Basin. The proposed underground long wall mine could produce up to 8 million tonnes per annum of export coal for 20 to 30 years.

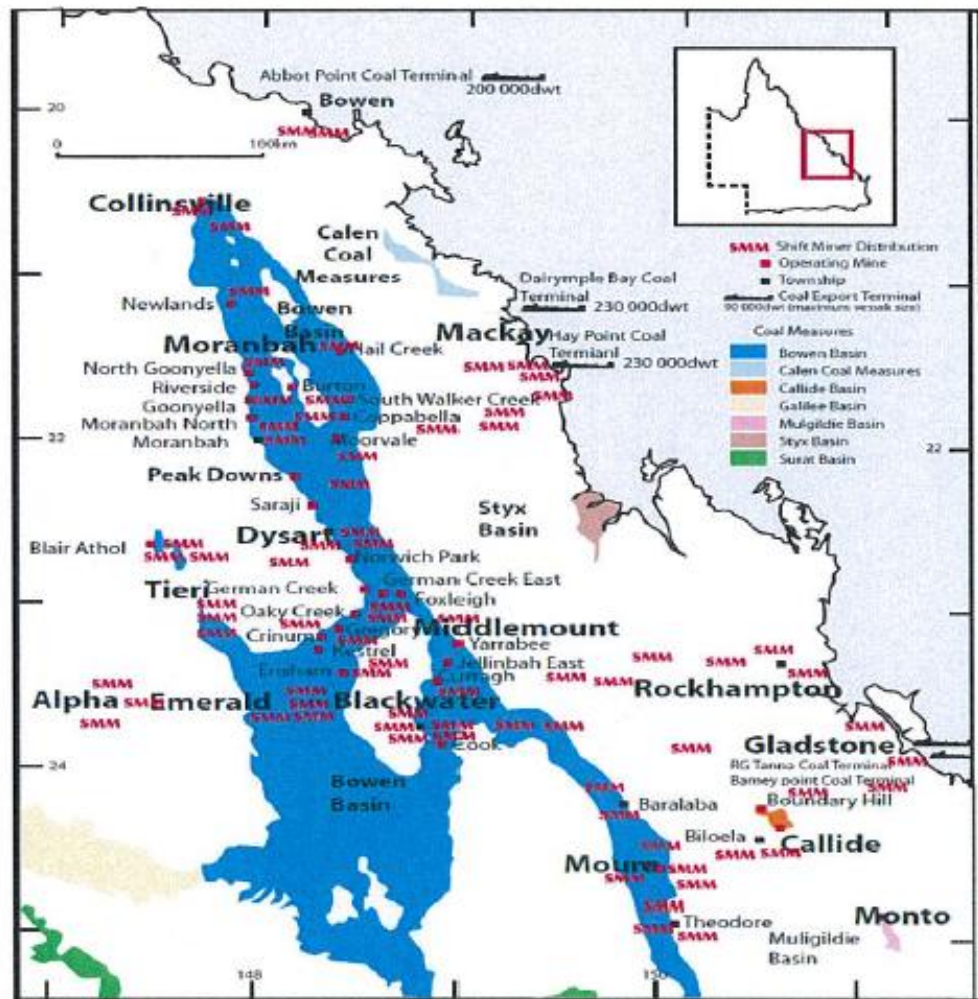
Background

Overview of Queensland coal industry⁴

22. It is estimated that in 2011-12 Queensland produced approximately 53 per cent of Australia's black coal output (that is, thermal and metallurgical coal). Approximately 86 per cent of Queensland's coal is exported. Many of the newer mines in Queensland are effectively dedicated to export trade.
23. The majority of coal mines in central Queensland are located in the Surat and Bowen Basins. Figure 1 (below) shows the location of central Queensland coal reserves and coal export terminals.

⁴ Unless otherwise stated, information appearing under this heading was obtained from the supporting submission to application for authorisation A91350, 7 December 2012, pages 4-5.

Figure 1: Location of central Queensland coal reserves and export terminals



Source: Shift Miner (2009)

24. The Galilee Basin, adjacent to the Bowen Basin, is not currently producing coal but production is expected in the future. Development of the Galilee Basin will require significant infrastructure investment.
25. The Callide, Clarence-Moreton, Tarong and Surat Basins are important sources of thermal coal for domestic power generation.
26. The Surat Basin is also emerging as a major source of thermal coal for export. Within the next five years, large scale open-cut mining is anticipated in the Surat Basin, particularly around Chinchilla, Wandoan and Taroom. Also within the next five years, large scale open-cut mining is expected in the Bowen Basin, in and around the Blackwater and Emerald regions. However, these developments will be subject to the establishment of sufficient water, rail and port infrastructure.
27. Central Queensland coal producers transport coal by rail from each mine site to coal export terminals at Abbot Point, Hay Point, Dalrymple Bay and Gladstone (RG Tana and Barney Point terminals and the Wiggins Island terminal currently being constructed).

The development of the Terminal⁵

28. Dudgeon Point is an undeveloped tract of land (1400 hectares) at the Port of Hay Point 25 kilometres south of Mackay, and adjacent to Dalrymple Bay, on the central Queensland coast. The North Queensland Bulk Ports Corporation is the port authority responsible for the Port of Hay Point.
29. The Proposed mine developments in the Bowen Basin require further expansion of the Port of Hay Point. In particular, it is estimated that current export capacity of 129 million tonnes per annum from the Goonyella coal chain will need to double to 250-300 million tonnes per annum over the next 5-10 years to meet projected industry demand. In this regard, Dudgeon Point Project Management Pty Ltd (**DPPM**) and Adani have been awarded preferred developer rights to develop coal terminals at Dudgeon Point and both parties have signed Framework Agreements with the North Queensland Bulk Ports Authority.
30. There are two coal export terminals currently at the Port of Hay Point – namely, Hay Point Coal Terminal and Dalrymple Bay Coal Terminal (see Figure 1). The two new separate coal export terminals will have a combined export capacity of up to 180 million tonnes per annum of coal. The new development will also include two offshore jetty's and wharf facilities for up to eight ship berths.⁶
31. Development of the Terminal has completed the public consultation phase in relation to the Queensland Government's draft terms of reference for the project's environmental impact statement and the Commonwealth Government's draft environmental impact statement.

Below rail infrastructure⁷

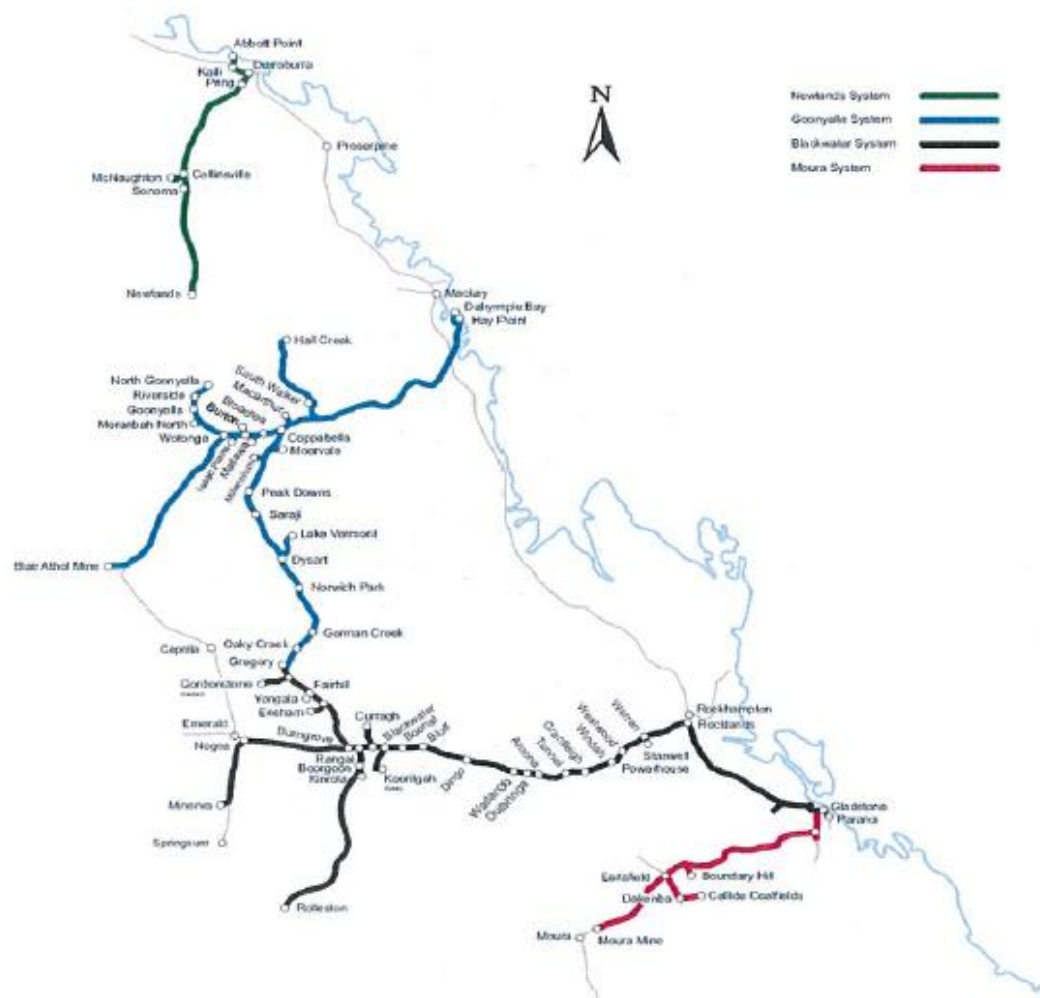
32. Below rail infrastructure in central Queensland is currently provided by QR Network. QR Network holds a lease from the Queensland Government over the rail transport infrastructure. As illustrated in Figure 2 (below), QR Network's rail infrastructure in central Queensland includes the Newlands, Goonyella, Blackwater and Moura coal rail systems.

⁵ Unless otherwise stated, the information appearing under this heading was obtained from the supporting submission to application for authorisation A91350, 7 December 2012, pages 7-8.

⁶ Queensland Government, *Dudgeon Point Coal Terminal Project, Terms of Reference for an environmental impact statement*, June 2012, page 3

⁷ Unless otherwise stated, information appearing under this heading was obtained from the supporting submission to application for authorisation A91350, 7 December 2012, page 6.

Figure 2: QR Network's below rail infrastructure



Source: Queensland Competition Authority Act 1997 (Qld) – Schedule 1, Central Queensland coal network rail infrastructure

33. QR Network recently completed the Goonyella to Abbot Point Expansion Project, which now connects the coal rail lines between North Goonyella (in the Goonyella System) to the Newlands Rail System (also referred to as the 'Northern Missing Link').
34. Further, the Surat Basin Rail Joint Venture is currently constructing a new rail line 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. Construction of this new line is expected to be completed in 2014-15 financial year.⁸

⁸ ACCC Determination in relation to application for authorisation A91311 for collective bargaining with Surat Basin Rail, 20 September 2012, page 3.

The Targets

Adani

35. Adani is an Australian subsidiary of Adani Enterprises Limited, a global infrastructure and mining exploration company based in India.
36. In addition to being granted preferred developer rights by the North Queensland Bulk Ports Authority to construct a Terminal at Dudgeon Point, Adani is also proposing to develop a 60 million tonne per annum thermal coal mine in north Galilee Basin (called the Carmichael Coal Mine).⁹ Construction of the mine is expected to commence in 2013 and production expected to commence in 2016.¹⁰ Once fully developed, the Carmichael Coal Mine is expected to be the largest coal mine in Queensland.¹¹
37. Further, Adani proposes to construct a new rail line linking the Carmichael Coal Mine to the existing Goonyella and Newlands rail systems of QR National. This will transport coal from the mine to its Abbott Point coal terminal near Bowen, and Adani's proposed new Terminal at Dudgeon Point.¹² The export coal from the new mine will predominantly service the Indian domestic power market.
38. The new railway is proposed to be 'a common rail corridor available for third party access to other mining organisations'.¹³

QR Network

39. QR Network is a wholly owned subsidiary of QR National Limited and operates the below rail business of QR National. As previously discussed, QR Network has recently changed its name to Aurizon Network. However, for the purpose of this draft determination, the ACCC has adopted the wording used within the applications for authorisation – namely, QR Network.
40. An outline of QR Network's below rail infrastructure is provided at paragraphs 32 and 33 above.
41. Above rail operators that are accredited by Queensland Transport, and have an access agreement with QR Network, may access QR Network's rail systems. Access seekers who also have an access agreement with QR Network access the rail network through the use of an accredited rail operator.¹⁴

⁹ Adani, *Carmichael Coal Mine and Rail Project Environmental Impact Statement*, Executive summary, E-i; viewed on Adani's website www.adanimining.com on 24 January 2013.

¹⁰ Adani Media Release, *Statement by Adani Mining Pty Ltd – 13 December 2012*.

¹¹ Adani's website: http://www.adanimining.com/Australia_Rail_Prj, viewed on 24 January 2013.

¹² Adani, *Carmichael Coal Mine and Rail Project Environmental Impact Statement*, Description of the Project, 2-1, viewed on Adani's website www.adanimining.com on 24 January 2013.

¹³ Adani's website: http://www.adanimining.com/Australia_Rail_Prj, viewed on 24 January 2013.

¹⁴ QR Network's website: <http://www.aurizon.com.au/OurBusiness/Pages/networkaccess.aspx>, viewed on 29 January 2013.

42. Applications for access to QR Network's below rail infrastructure is handled under a process set down in QR Network's Access Undertaking, which has been approved by the Queensland Competition Authority.

Recent ACCC collective bargaining decisions involving below rail and port access

A91241 – 2010 Wiggins Island collective bargaining authorisation with QR Network

43. 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.

A91277 – 2012 collective bargaining with Dudgeon Point Project Management Pty Ltd (DPPM)

44. On 16 February 2012 the ACCC granted authorisation to certain Bowen Basin coal producers¹⁵ in Queensland to collectively negotiate with DPPM on the terms and conditions, including price, for the development and access to the port facilities at DPPM's proposed coal export terminal being constructed at Dudgeon Point.

A91278 – 2012 collective bargaining with QR Network for Dudgeon Point Coal Export Terminal producers

45. On 16 February 2012 the ACCC granted authorisation to certain Bowen Basin coal producers (same as those covered by authorisation A91277) 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 being built at the Port of Hay Point by DPPM.

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

46. On 16 February 2012 the ACCC granted authorisation to certain Bowen Basin producers (same as those covered by authorisations A91277 and 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.

¹⁵ The initial Applicants were: Carabella Resources Limited, Macarthur Coal Limited, Middlemount Coal Pty Limited, New Hope Corporation Limited and Peabody Energy Australia Pty Limited. Authorisation was also granted to future users of the DPPM Terminal.

A91311 – 2012 collective bargaining authorisation for collective bargaining with Surat Basin Rail

47. On 20 September 2012 the ACCC granted authorisation to Cockatoo Coal Limited and Stanmore Coal Limited 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.

Submissions received by the ACCC

48. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
49. The Applicants submit that the proposed conduct will support the timely development of the Dudgeon Point Terminal. In particular, the Applicants consider the proposed collective bargaining conduct will enable them to present a considered and uniform view to Adani in relation to their requirements for the proposed development and access rights to the Terminal, as well as QR Network in relation to below rail requirements.
50. In addition, the Applicants are of the view that the proposed collective bargaining conduct will provide expeditious confirmation of the identity of the Terminal's customers and the allocation of capacity to those customers.
51. The ACCC sought submissions from around 30 interested parties potentially affected by this application, including Adani, QR Network, other coal producers, government and industry associations.
52. The ACCC received two public submissions from the following interested parties:

- *Queensland Department of State Development, Infrastructure and Planning (the Department)* – the Department submits that the development of the Galilee and Bowen Basins is of great importance to the economic prosperity of Queensland and the nation. In this regard, it advises that the Queensland Government is working closely with mining companies and infrastructure developers to ensure that coordinated, timely and cost effective provision of infrastructure that meets the needs of the mining sector occurs within the region.

As such, the Department submits that the Queensland Government supports the two applications seeking to collectively negotiate with Adani and QR Network. It also supports the Applicants' request for interim authorisation to enable them to commence meaningful negotiations with the two infrastructure providers as soon as possible.

- *Asciano* – supports the application for authorisation in principle. It considers there are public benefits which could arise from the development of the Terminal and associated rail infrastructure. However, Asciano considers that any authorisation must exclude any collective negotiations in relation to above rail infrastructure and services.
53. The views of the Applicants and interested parties are considered in more detail where relevant in the evaluation chapter of this draft determination.

54. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

55. The ACCC's evaluation of the proposed collective bargaining conduct is in accordance with the relevant net public benefit tests¹⁶ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
56. In order to measure and assess the effect of the proposed collective bargaining conduct 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

57. The Applicants submit the most relevant areas of competition impacted upon by the proposed collective bargaining conduct are the markets for the:
- supply and acquisition of services necessary for access to the relevant Port Infrastructure associated with the Dudgeon Point Terminal to be constructed by Adani and
 - supply and acquisition of access to the identified Below Rail Infrastructure necessary to support the Dudgeon Point Terminal to be constructed by Adani.
58. The Applicants consider that possible secondary markets affected by the proposed conduct include the markets for:
- the supply and acquisition of above rail haulage services and coal handling services at neighbouring ports and
 - the global supply of thermal and metallurgical coal.
59. The ACCC considers the primary areas of competition affected by the proposed collective bargaining conduct are the supply and acquisition of access to below rail infrastructure providing rail access to Adani's proposed Dudgeon Point Terminal, as well as the supply and acquisition of port access to that Terminal.
60. The ACCC recognises that other relevant areas of competition could include the supply and acquisition of above rail haulage services and coal handling services in neighbouring ports and terminals, as well as global markets for the supply of thermal and metallurgical coal.

¹⁶ Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment A.

The future with and without

61. The ACCC compares the 'future with-and-without' authorisation to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹⁷
62. The Applicants submit that without authorisation, at least some of the Applicants would negotiate individually with Adani and QR Network for access to the Port Infrastructure and Below Rail Infrastructure respectively. However, the Applicants submit that some of the smaller producers may not negotiate separately given limited resources. As such, small producers may need to reconsider development of their resources without authorisation of the proposed conduct.
63. Further, following the introduction of criminal sanctions for cartel conduct, the Applicants submit that they require certainty that the proposed conduct does not contravene the Act. Therefore proceeding to engage in collective bargaining conduct without authorisation is not a viable option for the Applicants.
64. In this instance, the ACCC considers that without authorisation of the proposed collective bargaining conduct, at least some of the Applicants would negotiate individually with Adani in relation to the terms and conditions of access to the proposed Port Infrastructure and QR Network for access to its Below Rail Infrastructure.
65. The ACCC recognises that some smaller producers may need to consider the availability of the required resources to negotiate separately with Adani and QR Network. Having said this, the ACCC notes access arrangements to QR Network's below rail infrastructure are regulated under its Access Undertaking, which requires access to be provided on fair and equitable terms unless particular risk factors exist.

Public benefit

66. 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.¹⁸
67. The Applicants submit the proposed collective bargaining conduct will deliver the following public benefits:
 - transaction cost savings
 - facilitating efficient investment in infrastructure and improved business efficiency and

¹⁷ *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.

¹⁸ *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.

- faster growth in export markets.
68. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Transaction cost savings

69. 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.
70. The Applicants submit that the proposed conduct will result in significantly lower transaction costs than would be the case if each Applicant was required to negotiate individually with Adani or QR Network. In particular, the Applicants consider transaction costs savings are likely to include:
- less hours spent negotiating with Adani and QR Network
 - lower costs involved in briefing external lawyers or experts and
 - efficiencies in the pooling of the limited resources of a number of smaller Applicants.
71. The ACCC considers 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 in respect of the proposed Port Infrastructure and Below Rail Infrastructure, compared to a situation where the Applicants negotiate individually with the parties

Efficient infrastructure investment and business operations

72. In regards to Port Infrastructure investment, the Applicants submit that the proposed conduct will enable them to present a uniform view of their development and capacity needs to Adani. In regards to rail, the Applicants submit that the proposed conduct will enable them to provide more accurate information to QR Network about the Terminal development and hence likely coal volumes, as well as required rail capacity expansions.
73. The Applicants believe this:
- ...will lead to improvements in infrastructure investment, including by allowing Adani to identify proposals that seek to satisfy the needs of the relevant parties more fully.¹⁹
74. Additionally, the Applicants note that the proposed Dudgeon Point Terminal will require significant investment in associated Port Infrastructure. The Applicants submit that these sort of investments need to be planned in advance by Adani to ensure that they deliver the required port capacity in the most efficient manner. If the planning/negotiating phase does not commence sufficiently far in advance, new developments may be delayed considerably.

¹⁹ The Applicants' supporting submission to application for authorisation A91350, 7 December 2012, pages 13-14. .

75. Similarly, the Applicants submit that the proposed development of the Dudgeon Point Terminal by Adani will require significant investment in the rail network by QR Network. These sort of investments also require sufficient planning and long lead times to ensure that the required rail capacity is delivered in the most efficient manner. Delayed rail expansions could also lead to delays in related projects, such as the development of the Terminal.
76. In regards to improved business efficiency, the Applicants submit that the conduct will deliver additional commercial certainty to the coal producers by enabling them to secure, on a more timely basis, sufficient below rail infrastructure to support the development of the Terminal. In particular, the Applicants submit that in order to proceed to bid for capacity at the Terminal and negotiate the terms and conditions of port access, the Applicants need to understand the likely charges for rail access.
77. Consistent with recent ACCC collective bargaining authorisation decisions²⁰, the ACCC considers the proposed collective bargaining conduct is likely to result in greater commercial certainty regarding investment in infrastructure within the Bowen Basin and supporting port and below rail infrastructure, which is a public benefit.

Faster growth in export markets

78. The Applicants are of the view that the expansion of mining activities, supported by efficient transportation of coal from the mine gate to the port, is a significant public benefit. The Applicants consider the proposed conduct will minimise any access-based delays to such expansion, and thereby ensure that any delays in additional export revenue are minimised.
79. The ACCC considers that enabling the Applicants to secure, on a more timely basis, access to Port and Below Rail Infrastructure to support mining expansions in the region will avoid any unnecessary delays in the generation of additional export revenue which is a public benefit.

Public detriment

80. 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.²¹
81. The Applicants submit that the proposed collective bargaining conduct will result in minimal, if any, public detriment for the following reasons:
- the voluntary nature of the proposed collective bargaining conduct and the absence of any proposed collective boycott activity

²⁰ For example, the ACCC's 2012 Cockatoo Coal and Stanmore Coal final determination in relation to application for authorisation A91311, 20 September 2012 and the ACCC's 2010 Wiggins Island final determination in relation to application for authorisation A91241, 2 December 2010.

²¹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- information sharing restrictions
 - the limited scope of the infrastructure to be covered and
 - the exclusion of above rail infrastructure and services from the applications for authorisation.
82. Asciano submits that it generally agrees there is minimal public detriment from the proposed conduct. However, Asciano considers there are potential concerns associated with the relationship between Aurizon Network (until recently known as QR Network)²² and the Aurizon above rail business which should be addressed in any authorisation. In particular, Asciano expressed concern that:
- ...Aurizon has the ability to leverage its market power in the infrastructure market to secure contracts in the above rail market thereby undermining competition in the above rail market.²³
83. As such, Asciano is of the view that any authorisation should be limited to collective bargaining in relation to infrastructure that Aurizon Network owns and operates (or will own and operate when constructed) and not be extended to:
- any information exchanges or collective negotiations in relation to any above rail services with either Aurizon Network or any other Aurizon entity and
 - negotiations regarding below rail infrastructure that does not support the transportation of coal to the Terminal.
84. The ACCC notes that proposed rail collective bargaining conduct for which authorisation is sought only relates to terms and conditions of access to the identified rail systems, all expansions to these systems and access to any other QR Network rail infrastructure necessary to support the transportation of coal to the Dudgeon Point Terminal to be developed by Adani.
85. Further, the ACCC notes that any conduct engaged in by the parties to the proposed collective negotiations outside the conduct authorised would be exposed to the operation of the competition provisions of the Act.
86. Accordingly, the ACCC confirms that the conduct for which authorisation is sought does not include collective negotiations in relation to above rail services.
87. Overall, the ACCC is satisfied that the proposed collective 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 coal producers requiring access to the Port Infrastructure and Below Rail Infrastructure
 - collective boycott activity is not being proposed
 - the limited composition of the collective bargaining group and

²² As previously noted, in December 2012 QR Network recently changed its name to Aurizon Network.

²³ Asciano's submission, 21 January 2013, page 2.

- bargaining and information exchanges between coal producers being limited to terms and conditions of access the Port Infrastructure and Below Rail Infrastructure.

Balance of public benefit and detriment

88. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
89. In summary, the ACCC considers the proposed conduct is likely to result in the following public benefits:
- transaction cost savings
 - greater commercial certainty regarding infrastructure investment within the Bowen Basin and supporting infrastructure and
 - enabling the Applicants to secure, on a more timely basis, access to Port and Below Rail Infrastructure to support mining expansions in the region and avoid any unnecessary delays in the generation of additional export revenue.
90. For the reasons outlined in the Public Detriments section, the ACCC considers there is little, if any, public detriment likely to result from the proposed conduct.
91. Therefore, the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
92. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

93. The Act allows the ACCC to grant authorisation for a limited period of time.²⁴ 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.
94. In this instance, the Applicants seek authorisation for 15 years on the basis that:
- the development of the Terminal is proposed to occur over a period of several years and collective negotiations are proposed to occur in line with that development
 - there are long lead times associated with this type of extensive capital investment in infrastructure and a need to deliver long term commercial certainty to the Applicants, Adani and QR Network
 - the Applicants propose to enter into access agreements of at least 10 years duration with Adani and QR Network and

²⁴ Subsection 91(1).

- it is likely to be necessary to conduct ongoing collective negotiations with Adani and QR Network during the terms of any access agreements regarding any potential price review/reset mechanisms within those agreements or about initiatives to optimise system usage.
95. In its consideration of other similar collective bargaining matters²⁵, the ACCC has considered it appropriate to authorise arrangements for a period to provide sufficient certainty to the applicants – namely, to cover initial negotiation periods during the development of significant infrastructure projects, such as coal rail networks and coal export terminals, as well as the initial contract period necessary to underwrite the investment.
96. Given the likely timeframes involved for the Applicants to negotiate port and below rail access agreements with Adani and QR Network and to allow the Applicants to give effect to any agreements entered into with those parties for an initial 10 year period, the ACCC considers a 15 year period of authorisation is appropriate in this instance.
97. Therefore, the ACCC proposes to grant authorisation to the proposed collective bargaining arrangements for 15 years, commencing from the date the ACCC’s final determination comes into effect.

Draft determination

The application

98. On 7 December 2012 the Applicants²⁶ lodged applications for authorisation A91350 and A91351 with the ACCC using Form B, Schedule 1, of the Competition and Consumer Regulations 2010.
99. Application A91350 was made under subsections 88(1) and 88(1A) of the Act to:
- collectively discuss and negotiate terms and conditions with Adani Mining Pty Ltd (**Adani**) for access to each and any of the terminals to be developed at Dudgeon Point by Adani (**the Terminal**), any expansions to the Terminal and any other infrastructure at or around Dudgeon Point necessary to support the Terminal (**Port Infrastructure**)
 - enter into and give effect to contracts, arrangements or understandings with Adani and
 - discuss related matters amongst themselves.
100. Application A91351 was made under subsections 88(1) and 88(1A) of the Act to:
- collectively discuss and negotiate terms and conditions with QR Network for access to the Newlands, Goonyella and Blackwater coal rail systems (to the

²⁵ For example, the ACCC’s 2012 Cockatoo Coal and Stanmore Coal final determination in relation to application for authorisation A91311, 20 September 2012 and the ACCC’s 2010 Wiggins Island final determination in relation to application for authorisation A91241, 2 December 2010.

²⁶ As defined at paragraphs 6 and 7 of this draft determination.

extent that these systems are used to service each and any of the terminals to be developed at Dudgeon Point by Adani), all expansions to these systems and access to any other QR Network rail infrastructure necessary to support the Terminal (**Below Rail Infrastructure**)

- enter into and give effect to contracts, arrangements or understandings with QR Network and
- discuss related matters amongst themselves.

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

The net public benefit test

102. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed collective bargaining conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

103. Therefore, the ACCC proposes to grant authorisation to the Applicants for 15 years to:

- collectively discuss and negotiate terms and conditions with Adani (or any future owner or operator of the Port Infrastructure) for access to the Terminal, any expansions to the Terminal and any other infrastructure at or around Dudgeon Point necessary to support the Terminal
- enter into and give effect to contracts, arrangements or understandings with Adani
- collectively discuss and negotiate terms and conditions with QR Network (or any future owner or operator of the Below Tail Infrastructure) for access to the relevant Below Rail Infrastructure
- enter into and give effect to contracts, arrangements or understandings with QR Network and
- discuss related matters amongst themselves.

104. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to any future producers that will be users of the Terminal that will need to negotiate access to the Port Infrastructure with Adani and the Below Rail Infrastructure with QR Network in the future as the development and expansion of the Terminal progresses.

105. This draft determination is made on 7 February 2013.

Conduct not proposed to be authorised

106. The proposed authorisation does not extend to:
- any information exchanges or collective negotiations in relation to above rail services
 - negotiations regarding below rail infrastructure other than those that support the transportation of coal to the Dudgeon Point Terminal to be developed by Adani and
 - collective boycott activity by the Applicants.

Interim authorisation

107. The Applicants seek interim authorisation to commence meaningful negotiations with Adani and QR Network as soon as possible. In particular, the Applicants advise that Adani has informed them that it intends to commence contract negotiations at the start of 2013.
108. Further, the Applicants advise that QR Network is currently planning the development of its network. The Applicants consider that if they can have detailed collective negotiations with QR Network about their rail needs as soon as possible it will assist QR Network to plan its investment more efficiently and reduce the risk that the development of the Terminal will be delayed while any below rail access matters are resolved.
109. Given the ACCC's assessment of the proposed conduct outlined within this draft determination, the ACCC grants interim authorisation under section 91(2) of the Act to enable the Applicants to commence collective negotiations with Adani and Aurizon Network (previously QR Network) for the terms and conditions of access to the Port Infrastructure and Below Rail Infrastructure respectively.
110. Interim authorisation only extends to any agreement entered into which contains a condition precedent, such that it will not come into force unless and until final authorisation is granted by the ACCC.
111. Interim authorisation will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

Further submissions

112. The ACCC will now seek further submissions from interested parties. In addition, the applicant 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 - Summary of relevant statutory provisions

Subsections 90(5A) and 90(5B) provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

Subsections 90(6) and 90(7) 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Section 91(2) permits the ACCC to grant interim authorisation if it considers that it is appropriate to do so:

- (a) for the purpose of enabling due consideration to be given to:
 - (i) an application for an authorization; or
 - (ii) an application for a minor variation of an authorization; or
 - (iii) an application for the revocation of an authorization and the substitution of a new one; or
- (b) [in relation to making an application to the Australian Competition Tribunal for a review of an ACCC determination]
- (c) for any other reason;