

## Form A

Commonwealth of Australia

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

### **EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

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

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

#### **1. Applicants**

(a) Name of Applicants:

A91410 Rio Tinto Coal Australia Pty Limited (**RTCA**)  
Peabody Energy Australia Pty Ltd (**Peabody**)  
Pacific National Pty Ltd (**Pacific National**)

(together, the **Applicants**)

(b) Description of business carried on by applicant:

RTCA and Peabody are coal producers that own and operate coal mines in Central Queensland, and export coal through the Dalrymple Bay Coal Terminal (**DBCT**)

using below rail infrastructure owned and operated by Aurizon Network Pty Ltd (**Aurizon Network**) (the **Goonyella System**).

Pacific National is an above rail operator that provides coal haulage services to RTCA and Peabody, and other coal producers using DBCT.

Further details on the Applicants is set out in Attachment B of the supporting submission.

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

C/- Mr Simon Muys  
Gilbert + Tobin  
Level 22, 101 Collins Street  
Melbourne VIC 3000  
T: +61 3 8656 3312  
E: smuys@gtlaw.com.au

## 2. Contract, arrangement or understanding

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

The Applicants seek authorisation for themselves and any future Members to make and give effect to the DBCT Coal Chain Coordinator (**DCCC**) Members' Agreement and Charter (the **Charter**) and to the agreements and arrangements contemplated by the Charter, including to:

- coordinate order requests to be made in relation to the scheduling of below rail train path entitlements between the Members' mines and DBCT;
- each appoint a common "Scheduling Coordinator" to act on behalf of all Members in submitting orders to DBCT Pty Ltd and Aurizon Network on behalf of Members;
- collectively discuss and agree amongst themselves matters relating to the coordinated order requests; and
- exchange mine, shipping and other relevant information (including mine 3-4 month production and stockpiling forecasts, and cargo information) to enable Members to cooperate and agree coordination of other parts of the DBCT coal chain, where the Members identify that this may improve the utilisation and efficient operation of the DBCT coal chain infrastructure. This may include making and giving effect to the coordinated management of:
  - coal availability (reflecting mine production, stockpiling, load-out infrastructure availability, maintenance, and operations);
  - below rail arrangements; and
  - port loading and shipping arrangements; and

- reject applications for membership where a prospective or existing Member fails to comply with eligibility criteria.

(the **Proposed Conduct**)

The Applicants have entered into the Charter, subject to a condition that it will not be taken to be made or come into effect unless the Proposed Conduct is authorised by the Australian Competition and Consumer Commission (ACCC).

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:

Authorisation is sought on the basis that the Proposed Conduct may be construed as making or giving effect to a cartel provision within the meaning of Division 1 of Part IV of the CCA, making or giving effect to an exclusionary provision or otherwise giving rise to a substantial lessening of competition within the meaning of section 45 of that Act.

For the sake of clarity, the Proposed Conduct does not include the making or giving effect to any contract, arrangement or understanding in relation to:

- joint marketing or collective bargaining activities in respect of any customers of a Member; or
- pricing arrangements in respect of any product supplied by Members.

More details on the Proposed Conduct are set out in the supporting submission.

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

The provision of coal handling services to coal producers using DBCT coal chain infrastructure, including mine production and stockpiling, above and below rail arrangements, port loading and shipping arrangements.

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

Authorisation is sought for the term of the Charter (including any extensions), up to a maximum period of 5 years. Please see the supporting submission for the grounds supporting this period.

### **3. Parties to the proposed arrangement**

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

Pursuant to section 88(10) of the CCA, the Applicants request that the authorisation, if granted, be expressed so as to apply also to future members of the DCCC. Future Members may include:

- other coal producers that own and operate coal mines in Central Queensland, and export coal through the DBCT using below rail infrastructure owned and operated by Aurizon Network. The other coal producers currently using DBCT, all of which are potential Members, are listed in Attachment A to the supporting submission; and
  - any above or below rail service provider in the Goonyella System. The current above and below rail service providers are described in Attachment A to the supporting submission;
- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

**Rio Tinto Coal Australia**  
123 Albert Street  
Brisbane QLD 4000

**Peabody Energy Australia Pty Ltd**  
100 Melbourne Street  
South Brisbane QLD 4101

**Pacific National Pty Ltd**  
Level 13, 324 Queen Street  
Brisbane QLD 4000

Pursuant to section 88(10) of the CCA, the Applicants request that any authorisation be expressed as also applying to:

- any future DCCC Members (as described above at (a)); and
- any of a Member's successors, assigns, related bodies corporate, associated entities and joint venture partners.

#### **4. Public benefit claims**

- (a) Arguments in support of application for authorisation:

The primary benefit of the DCCC is to make the DBCT coal chain more flexible in order to reduce interface losses through better and more coordinated planning, scheduling and operation by participating coal producers and rail operators of different elements within the coal chain. This will improve capital intensity and reduce costs for all users of the DBCT coal chain, irrespective of whether they are Members of the DCCC.

More detail on the public benefits associated with the DCCC is set out in the supporting submission.

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

Please see the supporting submission.

**5. Market definition**

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

Please see the supporting submission.

**6. Public detriments**

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

The Applicants have not identified any, or any material, public detriment in any market in Australia likely to result from the Proposed Conduct.

To the extent that any detriment may occur, it is mitigated by:

- participation in the DCCC is voluntary and available to all coal producers and rail operators using the DBCT coal chain;
- there is no minimum tonnage required to participate;
- the DCCC only schedules and/or allocates entitlements for Members and in relation to below rail train path entitlements (not haulage or any other contestable market);
- only operational information of Members will be disclosed and used as part of the DCCC – no pricing, marketing or customer information will be disclosed;
- the DCCC does not involve or require the amendment of any contractual or regulatory arrangements or rights; and
- to the extent that the Proposed Conduct provides for the alignment of production or stockpiling, this is limited to short-medium term planning and only for the purpose of ensuring efficient utilisation of infrastructure.

Please see the supporting submission for more detail.

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

Please see the supporting submission.

**7. Contracts, arrangements or understandings in similar terms**

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts,

arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

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

No. However, as set out in section 2(a) above, the Proposed Conduct includes agreements and arrangements contemplated by the Charter, as described in the supporting submission.

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

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

Not applicable.

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

Not applicable.

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

Not applicable.

## **8. Joint Ventures**

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

No.

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

Not applicable.

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

Not applicable.

## **9. Further information**

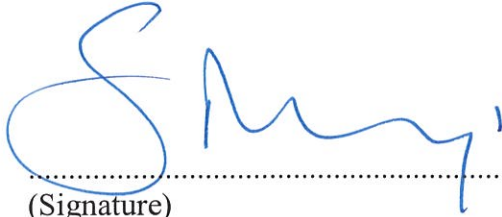
- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Mr Simon Muys  
Partner  
Gilbert + Tobin Lawyers  
Level 22  
101 Collins Street

Melbourne VIC 3000  
T: +61 3 8656 3312  
E: [smuys@gtlaw.com.au](mailto:smuys@gtlaw.com.au)

Dated 25 February 2014

Signed on behalf of the applicants:



.....

(Signature)

**Simon Muys**

.....

(Full Name)

**Gilbert + Tobin**

.....

(Organisation)

**Partner**

.....

(Position in organisation)

## Form B

Commonwealth of Australia

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

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

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- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

#### 1. Applicants

(a) Name of Applicants:

A91411 Rio Tinto Coal Australia Pty Limited (**RTCA**)  
Peabody Energy Australia Pty Ltd (**Peabody**)  
Pacific National Pty Ltd (**Pacific National**)

(together, the **Applicants**)

(b) Short description of business carried on by applicant:

RTCA and Peabody are coal producers that own and operate coal mines in Central Queensland, and export coal through the Dalrymple Bay Coal Terminal (**DBCT**)



using below rail infrastructure owned and operated by Aurizon Network Pty Ltd (**Aurizon Network**) (the **Goonyella System**).

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More detail on the public benefits associated with the DCCC is set out in the supporting submission.

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

Please see the supporting submission.

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- (b) If so, the following information is to be furnished:
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Not applicable.
  - (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:  
Not applicable.
  - (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:  
Not applicable.

#### **8. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?  
No.
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?  
Not applicable.
- (c) If so, by whom or on whose behalf are those other applications being made?  
Not applicable.

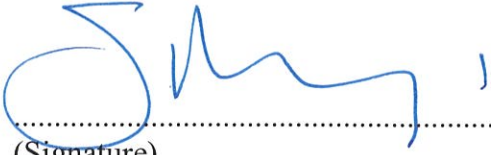
#### **9. Further information**

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

Mr Simon Muys  
Partner  
Gilbert + Tobin Lawyers  
Level 22  
101 Collins Street  
Melbourne VIC 3000  
T: +61 3 8656 3312  
E: smuys@gtlaw.com.au

Dated 25 February 2014

Signed on behalf of the applicants:



.....  
(Signature)

**Simon Muys**  
.....  
(Full Name)

**Gilbert + Tobin**  
.....  
(Organisation)

**Partner**  
.....  
(Position in organisation)

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# **Proposed Dalrymple Bay Coal Chain Coordination Arrangements**

Submission in support of application for  
authorisation

25 February 2014

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## Contents

Page

|              |   |    |
|--------------|---|----|
| 1            | Executive summary                                 | 1  |
| 2            | The Applicants                                    | 14 |
| 3            | The Queensland coal industry                      | 14 |
| 4            | The DBCT Coal Chain                               | 16 |
| 5            | Interface losses within the DBCT Coal Chain       | 18 |
| 6            | The Integrated Logistics Company                  | 23 |
| 7            | Proposed Conduct                                  | 23 |
| 8            | Request for authorisation                         | 29 |
| 9            | Public benefits arising from the Proposed Conduct | 31 |
| 10           | Market definition                                 | 36 |
| 11           | Anti-competitive detriment                        | 36 |
| 12           | Application for an interim authorisation          | 40 |
| Attachment A | DBCT Coal Chain                                   | 1  |
| Attachment B | Applicants  | 1  |
| Attachment C | DBCT throughput                                   | 1  |
| Attachment D | DCCC Charter                                      | 1  |



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# 1 Executive summary

## The Dalrymple Bay Coal Chain Coordinator

The Applicants are Rio Tinto Coal Australia (**RTCA**), Peabody Energy (**Peabody**) and Pacific National.

The Applicants have entered into an arrangement (the DBCT Coal Chain Coordinator or “**DCCC**”) to coordinate their use of the infrastructure required to handle and export coal through the Dalrymple Bay Coal Terminal (**DBCT**).

RTCA and Peabody are coal producers that own and operate coal mines in Central Queensland<sup>1</sup>, and export coal through DBCT using below rail infrastructure owned and operated by Aurizon Network Pty Ltd (**AN**) (**the Goonyella System**).

Pacific National is an above rail operator that provides coal haulage services to RTCA and Peabody, and other coal producers using DBCT.

The DCCC is established under the DBCT Coal Chain Coordinator Members’ Agreement and Charter (**the Charter**).

DCCC Membership is open to all other coal producers and rail operators that use or rail to DBCT (**users**). The Charter is conditional on authorisation by the ACCC. This submission is provided in support of the Applicants’ application for authorisation of the Charter, and associated activities.

The Applicants propose to establish the DCCC to enable the more efficient coordination of operational arrangements governing various parts of the coal chain which exports through DBCT (**DBCT Coal Chain**). In the absence of coordination across DBCT Coal Chain users, the existing framework of individual scheduling and operational arrangements results in sub-optimal usage of the DBCT Coal Chain and reduced throughput.

Coal chain inefficiencies arise because of a lack of flexibility and coordination in the operation and use of out-loading, rail and port infrastructure. The inefficiencies and costs are substantial. The current nominal capacity of DBCT is approximately 85 million tonnes per annum (**Mtpa**), while actual throughput is in the order of only 65Mtpa – despite both the terminal and associated below rail infrastructure being fully contracted.

These longstanding issues are well known and have previously been considered by the ACCC in authorising vessel management arrangements at DBCT.<sup>2</sup>

The DCCC will enable the members to coordinate their use of the DBCT Coal Chain to more flexibly and efficiently align their operational and contractual requirements. This will deliver substantial public benefits through efficiency

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<sup>1</sup> In the Goonyella System, RTCA exports coal from Hail Creek, Clermont and Kestrel and Peabody exports coal from North Goonyella, Eaglefield, Burton, Millennium, Coppabella and Moorvale

<sup>2</sup> The ACCC granted authorisation to a queue management system designed to address the imbalance between demand for coal loading services at DBCT and the capacity of the Goonyella coal chain. That authorisation was granted until 31 December 2008 as a transition period to enable a long-term solution to excessive vessel queues to be developed and implemented. See, ACCC, Final Determination for Application for revocation of authorisations A30239-A30241 and substitution of A91060-A91062 lodged by DBCT Pty Ltd, 29 February 2008.

savings and overall greater DBCT Coal Chain throughput.

Given the open nature of the DCCC, the export focus of the DBCT Coal Chain, and the highly competitive global market for coal, the DCCC is unlikely to have any material adverse effect on competition.

**Interface losses within the coal chain due to a lack of flexibility, transparency and coordination**

To optimise the efficient production and export of coal through the DBCT Coal Chain, a coal producer needs to align its:

- mine production and stockpiles;
- mine infrastructure and, in particular, load-out operations;
- track access (i.e. train paths);
- rail haulage;
- coal terminal and ship loading; and
- shipping.

This is a dynamic process.

The theoretical system capability of a coal supply chain is limited to the maximum capacity of the most constrained component (or “node”).

Interactions *between* nodes in an operational environment further limit and reduce the total achievable throughput of the supply chain, resulting in what can be termed “interface losses” – which, economically, are a form of transaction cost.

While interface losses also occur in vertically integrated processes, they require particular focus and operational management in multi user/multi service provider supply chains, such as the DBCT Coal Chain, where different operating modes, system governance (e.g. scheduling principles) and contracted capacity in relation to each node can become misaligned.

In any integrated supply system, the maximum achievable throughput is equal to that of its lowest nodal capability *less interface loss*. Overall system throughput in a multi-user coal supply chain can therefore be improved by:

- investing capital to increase capacity at the node with the lowest maximum capacity; and/or
- implementing arrangements that improve the degree of agility and alignment (contractual and operational) between nodes in order to reduce interface losses.

The primary objective of the DCCC is to make the DBCT Coal Chain more flexible in order to reduce interface losses through better and more coordinated planning and scheduling of requirements by participating coal producers and rail operators.

The specific areas in which interface losses arise in the current operation of the DBCT Coal Chain, and which will be addressed by the DCCC, include the following:

## **Misaligned operating assumptions between different parts of the coal chain**

Coal producers contract with Aurizon Network for network access (or contract with a rail operator who has network access rights) and DBCT Management for coal terminal usage.

The DBCT Terminal Regulations provide for the terminal to operate on a 'cargo assembly' basis.<sup>3</sup> This means that there is very limited dedicated stockpiling at the port, but rather that coal is railed to the port and assembled as required in order to meet the requirements of vessels as they are berthed at the Port.

The loading of ships at DBCT occurs on the basis of a 'turn of arrival' shipping queue, which means that ships are entitled to be loaded generally in the order that they arrive at port. In practice, this limits the degree of long term forecasting or scheduling of arrivals which can occur.

By its nature cargo assembly (in conjunction with a turn of arrival shipping queue) leads to highly variable demands being placed on other parts of the supply chain to ensure that coal is made available for loading as and when required.

Unlike operating parameters at the port, the regulatory framework and access agreements governing access to below rail rights for use of the Goonyella System provide for a fixed entitlement to rail network capacity and when undertaking scheduling Aurizon Network assumes that below rail usage by each user is constant across each day, week and month (the 'even railings' assumption).<sup>4</sup>

The combination of different and inconsistent operating assumptions and parameters at different nodes within the DBCT Coal Chain is set out in a simplified manner in Figure 1. below.

This operational misalignment between different nodes (and different producers) produces significant interface losses.

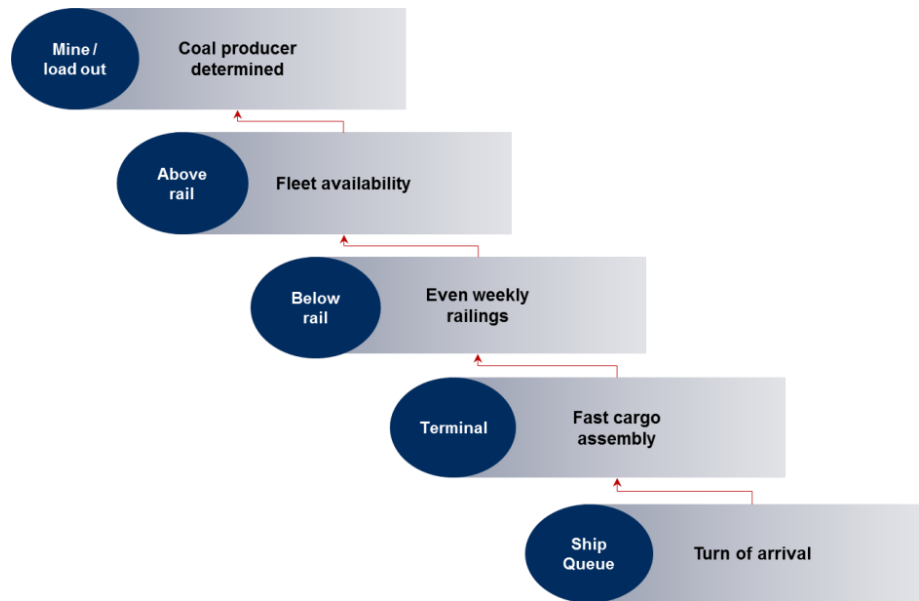
To date, there are a number of factors that have prevented coal producers and rail operators from mitigating the effect of the operational misalignment of DBCT and the Goonyella System, including:

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<sup>3</sup> DBCT Terminal Regulations, clause 2.2.

<sup>4</sup> As well as the even railings assumption, the rules governing the resolution of scheduling conflicts are also relatively rigid and set out in predetermined priority rules (the "contested train path decision making process") in QR Network's 2010 Access Undertaking, Approved 1 October 2010, Schedule F, Appendix 2.

**Figure 1. Interaction of different operating assumptions and parameters within the DBCT Coal Chain**



**A lack of scheduling flexibility between users *prior* to orders being made**

There is no framework for users to themselves coordinate their operational activities and train path orders with service providers (i.e. above rail operators) so as to be able to flexibly adjust orders to remove conflicts, where feasible, *prior* to them being submitted to DBCT Pty Ltd and Aurizon Network.

**A lack of transparency and direct involvement by coal producers in the scheduling process**

The scheduling of rail paths is undertaken by Aurizon Network, Dalrymple Bay Coal Terminal Pty Ltd (DBCT Pty Ltd) and the two rail operators that operate on the Goonyella System (Aurizon and Pacific National).<sup>5</sup> Coal producers have limited direct involvement in the process and no visibility as to other users' orders.

While a considerable amount of operational information is made available to coal producers, there is no means for them to use this information to coordinate activities between each other or with service providers to improve 'end to end' throughput. For example, this means that it has not been possible for coal producers (or other stakeholders) to take into account other important factors, such as out-loading capacity, mine stockpile levels, mine maintenance or other factors affecting coal availability, when developing rail and port schedules and orders.

The limited involvement in this process and lack of transparency across and between users means that opportunities amongst users to coordinate and optimise train orders to take into account the availability of the 'end to end' coal chain are not fully or effectively explored.

<sup>5</sup> The Applicants understand that a third, integrated operator, BMA Rail, commenced in January 2014.

### **Lower throughput**

A consequence of the lack of coordination across users of the DBCT Coal Chain is interface losses causing significantly lower throughput than its nominal capacity.

As noted above, the current nominal (and fully contracted) capacity of DBCT is approximately 85Mtpa. However the Applicants understand that actual throughput is approximately 65Mtpa. Operational or interface losses contribute to most of this significant underperformance.

### **Increased tariffs for rail and port infrastructure**

Both the rail and port infrastructure supporting the DBCT Coal Chain are governed by 'revenue cap' regulatory arrangements, in which the full capital cost of the infrastructure is recovered from users through volume-based regulated tariffs.

The lack of operational alignment of the DBCT Coal Chain means that the capacity in different parts of the system exceeds what is required in order to compensate for the interface losses between nodes.

As such, a failure to optimise throughput from this infrastructure increases the tariffs paid by all users, above an efficient level.

### **Increased vessel delays and associated demurrage costs**

The congestion constraints in the DBCT Coal Chain in turn result in longer turnaround times at the Port, vessel delays and higher demurrage costs to DBCT Coal Chain users.

### **These inefficiencies have been widely recognised**

The operational (and contractual) inefficiencies and costs were recognised in the previous O'Donnell review and by the ACCC in authorising vessel management arrangements at DBCT in 2005 and 2008.

Aurizon Network has recognised the risk of coordination failures in complex and fragmented supply chains such as the Central Queensland Coal Network (of which the DBCT Coal Chain forms part), and that these cause capacity losses and bottlenecks.<sup>6</sup>

Aurizon Network has also acknowledged the importance of coal producers and other stakeholders developing "local solutions" aimed at improving coordination to respond to these issues and costs.<sup>7</sup>

### **Previous consideration of the DBCT**

The ACCC previously considered coal chain coordination issues at DBCT in its authorisation in 2005 and 2008 of a queue management system (**QMS**).<sup>8</sup> The ACCC has also previously authorised a 'capacity balancing system' (**CBS**) at coal

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<sup>6</sup> Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p 168.

<sup>7</sup> Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p 175.

<sup>8</sup> ACCC, Final Determination for Application for revocation of authorisations A30239-A30241 and substitution of A91060-A91062 lodged by DBCT Pty Ltd, 29 February 2008.

## Coal Chain by the ACCC

terminals in Newcastle.<sup>9</sup> The DCCC involves arrangements that are substantially different to the QMS and CBS.

The QMS and CBS addressed capacity management and accountability at one point in the coal chain – the management of the shipping queue and terminal capacity. The focus of the QMS and the O'Donnell Review (in 2007) were both on ensuring alignment of investment and contracting of capacity across the DBCT Coal Chain. The CBS, amongst other things, also addressed how capacity shortfalls were to be allocated between users.

As noted above, the DCCC does not address capacity or contracting issues, or the allocation of capacity between Members. Rather, it is focussed on increasing throughput from existing infrastructure through improved operational coordination and reduced interface losses.

The Proposed Conduct is not able to be implemented within the scope of the existing industry coordination body (the Integrated Logistics Company or **ILC**), established following the O'Donnell review in 2007). The ILC's role is largely limited to planning and capacity forecasting, and it is not structured to facilitate direct producer communication, coordination and involvement in day to day operational or scheduling activities.

The Applicants see the operational arrangements being established through the DCCC as complementary to the ILC and other existing industry master planning and capacity forecasting arrangements.

## The Charter and the DCCC

The DCCC Members' Charter provides for coal producers and above rail operators using DBCT to become "Members" of the DCCC.

Under the Charter, Members agree to:

- (a) coordinate order requests to be made in relation to the scheduling of below rail train path entitlements between the Members' mines and DBCT;
- (b) each appoint a common "Scheduling Coordinator" to act on behalf of all Members in submitting orders to DBCT Pty Ltd and Aurizon Network on behalf of Members;
- (c) collectively discuss and agree amongst themselves matters relating to the coordinated order requests;
- (d) exchange mine, shipping and other relevant information (including mine 3-4 month production and stockpiling forecasts, and cargo information) to enable Members to cooperate and agree coordination of other parts of the DBCT Coal Chain, where the Members identify that this may improve the utilisation and efficient operation of the DBCT Coal Chain infrastructure. This may include making and giving effect to the coordinated management of:
  - (A) coal availability (reflecting mine production, stockpiling, load-out infrastructure availability, maintenance, and operations);

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<sup>9</sup> ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009

- (B) below rail arrangements; and
- (C) port loading and shipping arrangements.

Under the Charter, the DCCC comprises Members meeting in two groups:

- a **Joint Scheduling Group** – which will meet at least weekly to develop and coordinate scheduling for train paths on a weekly basis, as well as to discuss and resolve other operational matters related to the DBCT Coal Chain that affect the Members; and
- a **Management Committee** – which will meet at least monthly, to oversee the DCCC and to discuss wider DBCT Coal Chain issues (including any advocacy or other activities to be adopted on behalf of all Members) and to monitor the activities of the Joint Scheduling Group and resolve scheduling issues or disputes escalated to it from the Joint Scheduling Group from time to time.

The Management Committee appoints a Scheduling Coordinator tasked with leading the development, in consultation with the Joint Scheduling Group, of an optimised schedule of train paths for all of the Members on a pooled basis.

For the first 12 months, the Scheduling Coordinator will be Pacific National.

Each Member nominates the number of train paths which it wishes to have scheduled by the Scheduling Coordinator, through the DCCC process, following which it must use the DCCC exclusively to schedule those paths.

#### Application for authorisation

The Applicants seek authorisation under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for themselves and any future Members to make and give effect to the Charter, and to the agreements and arrangements contemplated by it.

Authorisation would extend to the proposed conduct under the Charter outlined above. The Applicants intend for any authorisation granted by the ACCC to extend to all future Members, as provided for under section 88(10) of the CCA.

For the sake of clarity, the Proposed Conduct does not include the making or giving effect to any contract, arrangement or understanding in relation to:

- joint marketing or collective bargaining activities in respect of any customers of a Member; or
- pricing arrangements in respect of any product supplied by Members.

#### Authorisation period

Authorisation is sought for the term of the Charter (including any extensions), up to a maximum period of 5 years.

This approach recognises that the DCCC is a starting point for developing improvements in the operation of the DBCT Coal Chain and that Applicants and that this is likely to require further development over coming years.

#### Rationale, public benefit and the counterfactual

The rationale of the DCCC is to reduce interface losses in the operation of the DBCT Coal Chain through better and more coordinated planning and scheduling of requirements by participating coal producers and rail operators.

For example:

- The Scheduling Coordinator will schedule and manage a single 'pool' of train path entitlements, providing flexibility in managing the different requirements of Members.
- When scheduling and managing rail entitlements for Members, the Scheduling Coordinator and Joint Scheduling Group will have the benefit of 'end to end' information from Members about their coal availability and infrastructure availability – and a forum in which that operational information can be exchanged and discussed quickly and effectively and its impact on efficient operation of infrastructure and scheduling agreed.
- The DCCC provides for scheduling principles and priorities to be developed over time by Members to improve the performance of the *overall DBCT Coal Chain*, rather than performance of the DBCT Coal Chain being determined based on different and rigid scheduling rules at different nodes (i.e. for below rail and port).
- Members will be able to discuss and coordinate short to medium term coal availability, to ensure that coal is consistently available for railing more evenly each month, rather than causing periods of congestion which impact on infrastructure use.

The benefits associated with day to day coordination will increase significantly through an increase in membership, so that there is no incentive on the founding Members to restrict or prevent others from joining.

If authorisation is not granted, the most likely counterfactual is a continuation of the status quo, in which decisions relating to the scheduling and coordination of infrastructure requirements (both rail and port) will be made by Aurizon Network and DBCT Pty Ltd, respectively, with limited involvement of coal producers and based on different, fixed and misaligned scheduling assumptions and principles.

Applicants and any other Members who might otherwise have participated in the future will be required to continue to place orders for train paths individually and without the benefits of coordination.

#### *Increased throughput and coal revenues for all users of the DBCT Coal Chain*

Compared to the counterfactual, the principal benefit of the Proposed Conduct is increased throughput and greater cost competitiveness at DBCT resulting from reduced interface losses and more efficient, flexible and coordinated operations.

Assuming, for simplicity, all coal through DBCT is priced at the current price for Australian metallurgical coal<sup>10</sup> of approximately USD130<sup>11</sup> (AUD145<sup>12</sup>), and an average monthly throughput at DBCT in 2013 of approximately 5.2Mt,<sup>13</sup> each 1% improvement in throughput from DBCT would be reflected in an additional 52,000t

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<sup>10</sup> The Applicants understand that approximately 85% of DBCT throughput is metallurgical coal, while the balance is made up of thermal and PCI.

<sup>11</sup> Based on the metallurgical coal spot price of \$129.41 as at 14 February 2014 (current spot price available at: <https://www.google.com/finance?cid=4931635#>)

<sup>12</sup> Based on the RBA USD exchange rate current as at 13 January 2014 of 0.8934.

<sup>13</sup> This reflects the average monthly throughput for DBCT during FY2012-13 (see Attachment C).



of throughput, or up to \$7.54m increased coal revenues per month.

If all users of DBCT were to participate in the DCCC (so that the efficiencies could be maximised across all tonnage), the Applicants estimate that the DCCC scheduling improvements (and associated coordination of related activities) would be likely to produce a 15 – 20% productivity improvement across the DBCT Coal Chain. This improved throughput allows extra tonnage to be delivered for all users of DBCT and the Goonyella System – and is not a benefit limited to Members of the DCCC.

Based only on their initial contribution of tonnes to the DCCC, the Applicants anticipate that a benefit of 3-5% throughput is achievable (N.B. the Applicants anticipate that this benefit will occur following establishment and ramp up of the DCCC's activities, so a more conservative benefit of 1-3% is estimated below during the first six month period, if interim authorisation is granted).

An increase of 3-5% throughput would equate (based on current utilisation and prices above) to increased coal revenues for all users of the DBCT Coal Chain of approximately \$22-38m per month, or up to \$450m per annum. Again, this is not a benefit for the Applicants, but is the value of the increased total throughput, and so would be shared across all users of the DBCT Coal Chain.

*Improved capital intensity – lower port and below rail tariffs and rail fleet costs*

In practical terms, 20Mtpa (the difference between current actual and nominal throughput at DBCT) constitutes the capacity of a new coal terminal.

This level of 'wasted' capacity is reflected in a higher cost base in a number of ways, including:

- Based on recent experience with the GAPE Expansion, the Applicants estimate that the potential capital investment that would be required in port or rail to compensate for the 15-20% throughput not achieved at DBCT is in the order of \$1.5bn.
- A lower capital intensity for rail and port infrastructure means that access tariffs for all users are higher than an efficient level (i.e. both rail and port tariffs are based on a regulated revenue cap model). Increasing throughput from DBCT, based on the existing infrastructure, would therefore have the effect of lowering tariffs for all users of the Goonyella System and DBCT.
- Capital costs associated with above rail assets (i.e. rolling stock) are higher due to the less intensive and efficient use of rail fleets (i.e. through cancellations and a requirement to invest in 'buffer' capacity to compensate for scheduling inefficiencies).

Each of these inefficient system-wide capital costs (which affect all users) can be improved through improved operational coordination.

*Other benefits*

Other public benefits of the DCCC include:

- (a) by minimising the total vessel time at DBCT – an estimated \$0.50 per tonne reduction on demurrage costs, which would constitute a saving of up to \$40m per annum if all users of DBCT participated and the full nominal throughput of 85Mtpa was achieved;

- (b) an improvement in the reputation and competitiveness of coal producers exporting through the DBCT in global markets, as well as relative to wholly-owned and vertically integrated coal chains in Australia and overseas;
- (c) the DCCC will facilitate more effective and informed engagement by Members (either jointly or separately) with other stakeholders in the DBCT Coal Chain, including DBCT Pty Ltd, Aurizon Network, the Queensland Competition Authority (QCA) and other producers and rail operators; and
- (d) other benefits flowing to the State of Queensland and Australia as a result of the above, including increased employment security and royalties.

A number of these public benefits have been recognised (and in some cases quantified) previously by the ACCC and by other public bodies and/or government reviews.<sup>14</sup>

The DCCC also provides a spring board for development by Members of other means of improving the operation of the DBCT Coal Chain. In this regard, the DCCC's activities are different to, but complement, higher-level planning and coordination activities currently undertaken by other groups operating in the DBCT Coal Chain, such as the ILC. These synergies may provide additional benefits for both the DCCC and ILC.

*The DCCC can be implemented quickly, cost-effectively and offers scope for future development*

The Applicants have developed the DCCC arrangements in order to achieve these benefits in a manner that involves limited direct cost to Members or other stakeholders and within existing contractual and regulatory arrangements.

The DCCC can be implemented quickly, and without the need for broad industry consensus to be achieved across disparate stakeholders – which is something that historically has proven difficult to achieve.

**No anti-competitive detriment**

The Applicants have not identified any, or any material, adverse effect on competition in any market in Australia likely to result from the Proposed Conduct.

The focus of the DCCC is strictly on operational coordination and not commercial coordination. Most of the information shared and used by the Joint Scheduling Group is already generally available to coal producers, and relates only to operational activities. Commercial information related to matters such as customers, marketing or price will not be shared or discussed.

DCCC scheduling decisions also only relate to users (and tonnage) which has been nominated by Members to be included in the DCCC. Decisions of the Scheduling Coordinator do not bind or apply to non-Members, which remain free to schedule their paths and other activities outside of the DCCC arrangements. The final decision about rail and port scheduling will continue to be made by Aurizon Network and DBCT Pty Ltd, respectively, and not by the DCCC.

There is no relevant competitive detriment in relation to the primary market

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<sup>14</sup> See for example, the ACCC's consideration of public benefits associated with the application for authorisation of Capacity Framework Arrangements at Port of Newcastle: ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009, p iv. See also the discussion of earlier analysis undertaken by the O'Donnell Review and other public analysis at section 5.

affected by the conduct, being the global market for thermal and metallurgical coal. This market is outside Australia and is highly competitive.

To the extent that the Proposed Conduct involves activities or related markets in Australia, the possibility of any adverse effects are mitigated by:

- participation in the Proposed Conduct being voluntary and available for all coal producers and rail operators that use the DBCT Coal Chain (subject to satisfying the eligibility criteria);
- there is also no minimum tonnage required to participate in the scheduling aspects of the DCCC. Unlike other coal chain groups, there is also no 'tonnage' basis for voting rights. In essence this gives all Members an equal say in decision making (i.e. one vote per Member, subject to a minimum involvement of 2Mpta in order to be eligible to vote as part of the Management Committee);
- the Scheduling Coordinator and Joint Scheduling Group do not schedule or allocate entitlements in any 'contestable' market, such as haulage – decisions about which above rail operators to use to haul the scheduled (below rail) train paths is a matter for individual coal producers;
- only operational information of Members (or information which is disclosed to the DCCC by other parties, such as Aurizon Network or DBCT Pty Ltd, for coordination purposes) will be shared and used in undertaking scheduling and other activities – no information of other coal producers or rail operators is required or disclosed;
- as noted above, no pricing, marketing or customer information is exchanged by Members (although some information about Members' shipping arrangements may be shared, from time to time, if it is identified by Members that coordinated shipping arrangements between them may reduce congestion and improve overall throughput);
- while the DCCC may act from time to time as a common representative in regulatory processes, the DCCC is not a joint buying group and will not engage in collective negotiations with other parties over the commercial terms of access (either for haulage, shipping, below rail access or port access rights);
- the DCCC structure does not involve the transfer of any contractual rights from or between Members; and
- to the extent that the Proposed Conduct provides for the alignment of production or stockpiling, this is limited to short-medium term planning and only for the purpose of ensuring efficient utilisation of infrastructure.

#### **Application for interim authorisation**

The Applicants request that the ACCC grant an interim authorisation in accordance with s 91(2) of the CCA so that they can immediately begin taking the steps necessary to implement the proposed DCCC arrangements and to allow the resulting benefits to be realised sooner.

Interim implementation of the DCCC will enable the Applicants to "prove up" the concept of the joint coordination under the DCCC in the trial phase (i.e. a 'soft launch'). The early implementation of the DCCC will enable the earlier achievement of significant public benefits. The Applicants note that there is no material public detriment associated with the Proposed Conduct.

**Interim implementation of the DCCC is required to enable operational coordination to be developed and tested in time to provide an important input to the current UT4 process**

Aurizon Network has acknowledged that coal chain coordination is a matter which needs to be led by industry through “local solutions”.

The current regulatory process will ‘lock in’ a new access undertaking (**UT4**) to apply to the Queensland industry for at least four years and potentially up to eight years.<sup>15</sup> A draft UT4 submission was lodged by Aurizon Network on 30 April 2013 and the QCA has been consulting on the proposal for almost a year, with a decision likely to be made during 2014.

The early implementation of the DCCC on a trial basis, early in 2014, therefore provides the only practical opportunity for the Applicants to implement and test operational coordination as a way to inform the QCA’s review of UT4.

**Immediate and substantial revenues and reduced costs for all users of the DBCT Coal Chain**

During an interim 6-month period, based on the tonnage initially contributed by the Applicants only, improvements of between 1-3% in throughput for DBCT are likely and would result in \$45-\$135m additional revenues for the Queensland coal industry (based on current utilisation and prices). This estimate is based only on the initial tonnage of the Applicants and has the potential to be higher if (as is hoped) other producers also join the DCCC during this period.

To the extent that the operation of the DCCC leads to increased throughput (and improved utilisation of rolling stock) during the interim period, this will also be reflected in due course in lower ‘take or pay’ obligations and/or access tariffs across rail and port contracts.

**Benefits are shared with the entire coal chain and increase with membership**

Increased revenues and any reduction in capital costs are shared across **all** users of the DBCT Coal Chain in proportion to their use of the terminal – and are not limited to the Applicants. The extent of public benefits achievable under the DCCC will increase as membership increases.

New Members are able to join the DCCC from 3-months after it becomes authorised (to allow time for the operational and staffing arrangements to be finalised). The earlier implementation and approval of the concept will provide valuable experience to support the decisions of other potential Members in joining the DCCC.

In relation to the matters identified in the ACCC Guidelines as relevant to its consideration of a request for interim authorisation, we note the following.

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<sup>15</sup> Aurizon Network has raised in its UT4 engagement with stakeholders the prospect of a longer access undertaking term to provide increased regulatory stability.

### **There is no harm to others if a request for interim authorisation is granted**

Interim implementation does not:

- affect the scheduling or operational processes or activities of any other coal producers or rail operators – the decisions of the DCCC only affect Members and then only nominated tonnage;
- involve any change to existing logistics contracts or require that either DBCT Pty Ltd or Aurizon Network undertake any additional steps – and both retain full control over final scheduling decisions;
- involve any change to coal supply contracts or undermine competitive incentives for coal supply; and
- have any material effect on competing DBCT Coal Chain users.

### **The proposed conduct does not have the potential to effect competition in the interim period**

The DCCC involves operational coordination between Members – and does not involve any coordination of commercial activities (i.e. pricing, marketing or customers).

While the DCCC may, from time to time, facilitate increased granularity and information about producer-specific issues of Members, it will not result in any material increase in the amount of information which is available to Members about operational activities. The rationale for the DCCC is to provide a mechanism that enables coal producers and rail operators to use this information more effectively and quickly to coordinate their individual operational activities and decisions to maximise throughput.

The DCCC does not, and is not intended to, restrict, limit or reduce the amount of coal that is transported through the DBCT Coal Chain, and on the contrary, will improve DBCT Coal Chain system usage, resulting in greater system throughput and coal production.

Given the longer term nature of coal supply contracts and associated logistics contracts, and associated decisions in relation to the production and supply of coal for export, the implementation of the DCCC on a trial basis within the interim period will have no effect on potential competition in relation to these matters.

### **No changes to any relevant market if interim authorisation is granted**

The DCCC will not have any material enduring and non-reversible effect in any relevant market. In the event that final authorisation is not granted, the Members will disband the DCCC, cease their coordination of operational activities and return to the existing scheduling arrangements.

### **In the absence of interim authorisation, no implementation of the DCCC will occur until final authorisation is granted**

The Applicants view the DCCC arrangements as integrated.

As such, they do not see it as being practical to attempt to implement a part of the DCCC activities in isolation, ahead of authorisation. This would also be inconsistent with the rationale of the DCCC that it provides a forum for coal

producers and rail operators to manage, discuss and coordinate their operational activities on an integrated, 'whole of coal chain' basis.

The Applicants also wish to ensure that authorisation is in place from 'day 1' to ensure that the absence of an authorisation does not act as a disincentive to other coal producers or rail operators from joining or participating.

#### **Public benefits can be assessed at this time**

A considerable body of evidence already exists that supports the conclusion that improved transparency and coordination across the DBCT Coal Chain will contribute to greater efficiency and significant public benefits through increased throughput and reduced costs (see the references to public reviews and the ACCC's own prior analysis).

The potential financial benefits for the Queensland economy from increased throughput at DBCT during the interim period are substantial.

Other important benefits, such as the importance of the DCCC as a test bed for assessing local coordination process during the current UT4 development process are also readily observable and can be verified.

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## **2 The Applicants**

The Applicants for authorisation are:

- Rio Tinto Coal Australia Pty Ltd (**RTCA**);
- Peabody Energy Australia Pty Ltd (**Peabody**); and
- Pacific National Pty Ltd (**Pacific National**).

'Applicants' also includes any successors, assigns or related bodies corporate, associated entities or joint venture partners of each Applicant.

A summary of the ownership and relevant activities of each of the Applicants is set out in Attachment B.

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## **3 The Queensland coal industry**

Coal production and export is a major source of wealth and economic growth in the Australian economy. Australian coal production is based predominantly in New South Wales and central Queensland, particularly the Bowen Basin.

Queensland produces the highest volume of black coal in Australia, and this output is continuing to grow. Most of the operational coal mines in central Queensland are located in the Surat, Bowen and Callide Basins.<sup>16</sup> The Galilee Basin, which is adjacent to the

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<sup>16</sup> Queensland Department of Employment, Economic Development and Innovation (**DEEDI**), *Queensland's coal – mines and advanced projects*, October 2013, p 1. Available at: <http://mines.industry.qld.gov.au/assets/coal-pdf/queensland-coal-mines-adv-projects-2013.pdf>.

Bowen Basin, does not currently produce coal but several projects are either proposed or under development.<sup>17</sup>

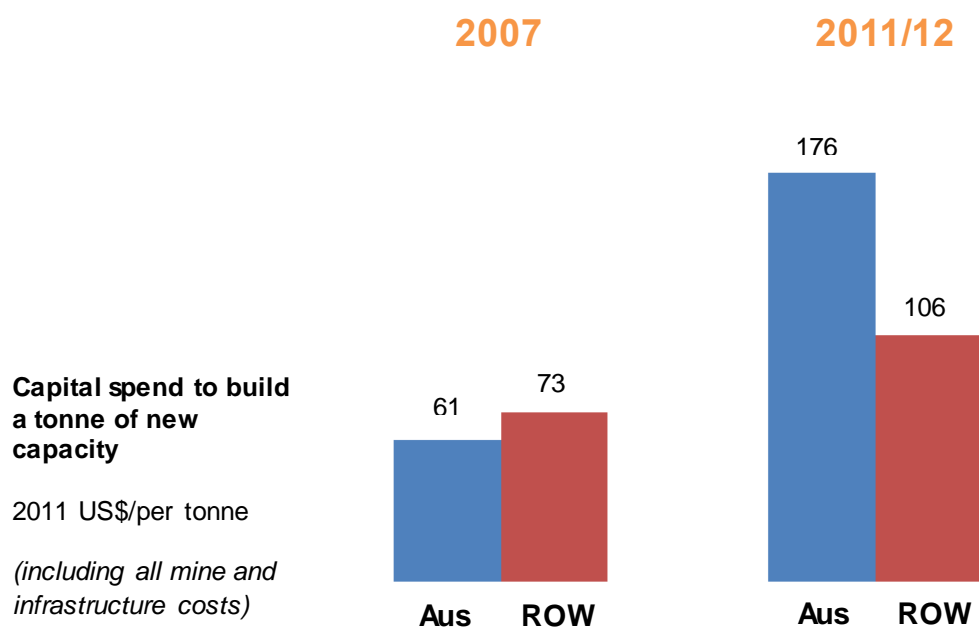
The Queensland Government has recognised coal as the State's largest export industry and that, over the next 20 years, the coal industry has the potential to increase output from 190 Mtpa to 340 Mtpa, depending on developments in the Surat and Galilee Basins.<sup>18</sup>

Approximately 86% of Queensland's coal output is exported. Many of the newer Queensland mines are dedicated to export trade, given their construction is the result of agreements with overseas buyers.

More recently, the Queensland (and Australian) coal industry has faced unprecedented cost and margin pressure. In 2012, Port Jackson Partners estimated that capital costs had contributed to Queensland thermal coal projects being 66% more expensive than the global average, putting the majority of the current project pipeline at risk.<sup>19</sup>

The total capital cost associated with exporting Australian coal has increased rapidly over recent years. This increase has exceeded the increase in capital costs experienced in other exporting countries, leading to Australia's cost-competitive position being weakened in global coal markets, as set out in Figure 2 below.

**Figure 2. Relative capital cost of thermal coal exports (Australia and rest of world)**



Source: Port Jackson Partners, May 2012

<sup>17</sup> DEEDI, *Queensland's coal – mines and advanced projects*, October 2013, p2. Available at: <http://mines.industry.qld.gov.au/assets/coal-pdf/queensland-coal-mines-adv-projects-2013.pdf>.

<sup>18</sup> Queensland Department of Infrastructure and Planning, *Coal Plan 2030: Laying the foundations of a future* (November 2010), p 2. Available at: <http://www.cabinet.qld.gov.au/documents/2010/aug/coalplan%202030/Attachments/coal-plan-2030.pdf>.

<sup>19</sup> Port Jackson Partners, *Opportunity at Risk, Regaining our competitive edge in Minerals Resources, Report commissioned for the Minerals Council of Australia*, p12. Quoted in, Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p30.

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## 4 The DBCT Coal Chain

### 4.1 Participants in the DBCT Coal Chain

The DBCT Coal Chain comprises:

- (a) 18 mines in the Bowen Basin in central Queensland owned by 8 different coal producers (or their associated JV entities);
- (b) the Goonyella System, which forms part of the CQCN, the coal rail network owned and operated by Aurizon Network. Access to the CQCN is regulated as a declared service under Part V of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**);<sup>20</sup>
- (c) above rail coal haulage on the Goonyella System to DBCT is currently provided by two rail operators Pacific National and Aurizon Coal; and
- (d) the DBCT, which is one of two export coal terminals located within, and which forms part of, the Port of Hay Point. The other terminal is the Hay Point coal terminal, owned and operated by joint venture or related parties of BHP Billiton.

Access to most rail and port infrastructure is subject to long term, take or pay obligations which underwrite the capital expenditure required to develop the capacity. In the case of the DBCT Coal Chain, access to the Goonyella System and DBCT is also subject to regulatory arrangements, including standard form access and user agreements.

More detail on the various participants and arrangements comprising the DBCT Coal Chain is set out in Attachment A.

### 4.2 DBCT

DBCT was established in 1983 by the Queensland Government.

In 2001, the Queensland Government awarded long-term leases over the terminal infrastructure to Prime Infrastructure (which temporarily changed its name to Babcock & Brown Infrastructure in 2005 until 2009). A satellite company known as DBCT Management was created to manage the DBCT assets in accordance with the terms and conditions of the Port Services Agreement.<sup>21</sup>

In 2009, Brookfield Asset Management of Canada purchased 39% of the Prime Infrastructure Group and 49.9% of the DBCT interests, and in 2010, Brookfield acquired the remaining stake of Prime Infrastructure and 100% ownership of DBCT.

DBCT operates as a multi-user port facility which means it receives, processes and ships coal for multiple coal miners.

DBCT is comprised of four berths, three manually operated ship loaders (with loading capacity of 7,200 tph), and encompasses purpose-built rail in-loading facilities and on shore stockpile yards. DBCT's wharf is 3.8 km offshore to permit ship loading in deep water and is serviced by conveyor systems. With innovative technology for automated

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<sup>20</sup> QCA Act, s 250.

<sup>21</sup> <http://www.dbctm.com.au/aboutdbct/history.aspx>.



coal stacking and reclaiming, DBCT is promoted as one of the most reliable coal export ports in the world, operating 24 hours a day and 365 days a year.<sup>22</sup>

The daily operations and maintenance functions of DBCT are sub-contracted under a Port Services Agreement to DBCT Pty Ltd, a service provider owned by a number of DBCT coal producers. DBCT Pty Ltd must also prepare a 'master plan' in respect of DBCT each year.

DBCT is viewed by customers as a "speciality" port where they can obtain multiple grades of both coking and PCI coal in the one stop. For example, the terminal processes three commercial coal types, namely coking coal, PCI coal and thermal coal, which can be blended into a number of products.<sup>23</sup>

The process for receipt and handling of coal at DBCT is set out below:

- Upon arrival at the port, the coal is discharged from rail wagons "on the move" through automatic bottom drop gates onto conveyor belts. The coal is transported by conveyor belt to stockpiles. Following the collapse of a coal reclaimer in 2004, producers no longer have dedicated stockpiles. Instead cargo assembly areas were established to facilitate loading of multi-cargo vessels.
- The coal is transported from the stockpiles to the wharf by conveyor. This process involves an out-loading system which has its own dedicated surge bin that acts as a buffer between stockyard reclaiming operations and the ship loaders.
- From the surge bins, the coal is conveyed along 3.8 km to transfer towers that feed the ship loaders via the wharf conveyors.
- Rail-mounted ship loaders transfer coal from the wharf conveyors into the holds of ships. While the size and cargo of each ship visiting the terminal can vary greatly, it takes about 22 hours to load the average 80,000 tonne cargo.<sup>24</sup>

#### 4.3 Operating models: dedicated stockpiles *vis* cargo assembly<sup>25</sup>

The principal reason for the high degree of variability in the DBCT Coal Chain is due its operation on a 'cargo assembly' basis, without dedicated stockpiles.

Under a dedicated stockpile operating assumption, each coal producer has a dedicated stockpile or stockpiles at the port and this stock of coal can then be used to supply ships as and when they arrive. The stockpile(s) can be maintained through a regular arrival of railed product each week and month (i.e. 'even railings'). The dedicated stockpile also provides the ability for a coal producer to manage any uncertainty around the timing of ship arrivals.

A cargo assembly terminal assembles the coal product needed for each ship when it arrives – which is to say that coal is 'pulled' to the terminal by the order of ship arrivals. In the case of DBCT, there is also limited space for stockpiling, which means that there are

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<sup>22</sup> <http://www.dbctm.com.au/aboutdbct/history.aspx>.

<sup>23</sup> Metallurgical coal can be broken up into two main categories: coking coal and PCI (pulverised coal injection), which is used in the steel industry, as opposed to the lower grade thermal coal used to generate electricity in power stations.

<sup>24</sup> <http://www.dbct.com.au/whatWeDo.cfm>.

<sup>25</sup> See generally on this issue, the DBCT Master Plan (2009), pp 22 - 27, available at: <http://www.dbctm.com.au/aboutdbct/masterplan.aspx>

currently no dedicated stockpiles. Instead, stockpiles at the terminal are used to assemble each load before it is loaded onto ships.

The cargo assembly operation involves careful management and scheduling of port operations to ensure that cargoes are stockpiled appropriately to avoid congestion at the port.

Throughput at a cargo assembly terminal, such as DBCT, is a factor of how quickly:

- coal can be 'pulled' to the terminal from the relevant mines by rail;
- the cargo assembled and loaded on to the ships; and
- the ship is turned over.

While the cargo assembly approach is more complex and requires greater operational flexibility, it is also less capital intensive than a dedicated stockpile process.

In the case of DBCT, given the number of different users and product needed, there are also a number of geographic constraints that mean that there is insufficient space for the number of stockpiles that would be required for it to operate entirely on a dedicated stockpile basis.

DBCT Pty Ltd is currently undertaking a trial of an alternative 'hybrid' operating approach which involves a combination of the existing cargo assembly model, together with a number of small, moveable stockpiles which are able to be used by some users. While the Applicants are supportive of testing this initiative (and indeed any initiative aimed at improving coal chain efficiency), it remains only a trial at this stage and is limited to increasing available 'buffer' capacity at the terminal. It does not address, and would not provide a solution for, interface losses of the kind addressed by the DCCC.

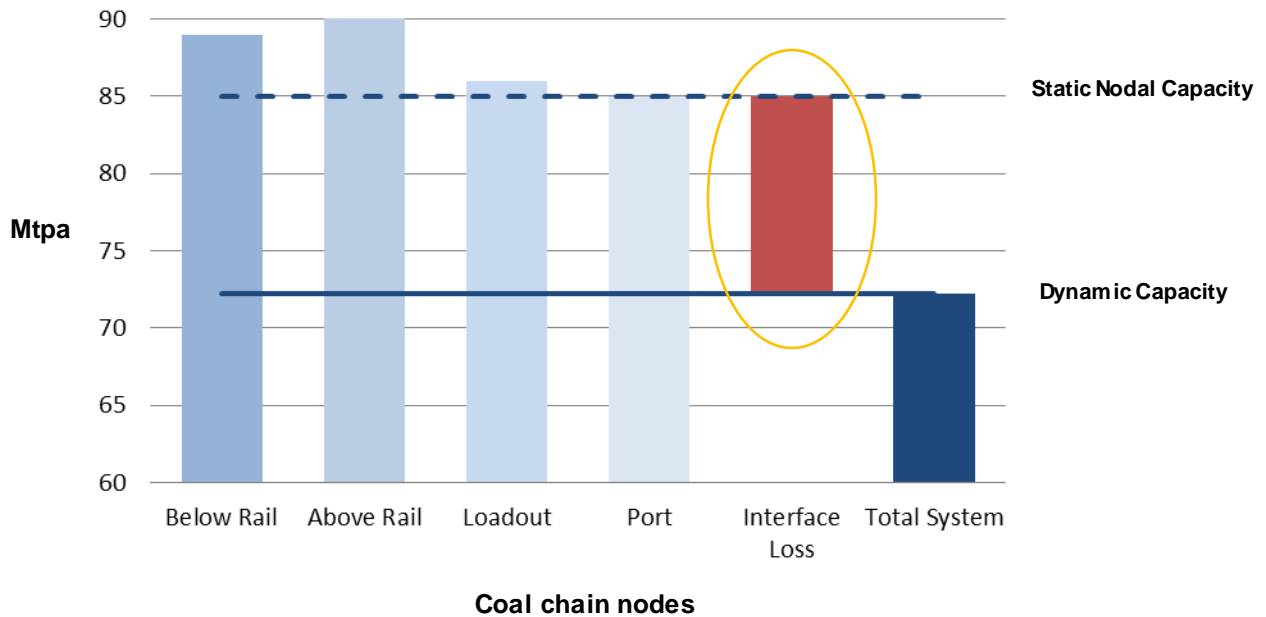
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## 5 Interface losses within the DBCT Coal Chain

Theoretical system capability of a coal supply chain will be limited by the most constrained component (or "node"). This is illustrated in Figure 3 where, for illustrative purposes, overall maximum system throughput (or Static Nodal Capacity) for DBCT is limited to the maximum capacity of the port (i.e. 85Mtpa).

The limiting node in a supply chain can move from between nodes or can arise at multiple nodes concurrently (i.e. a shifting bottleneck).

**Figure 3. An illustration of static and dynamic capacity and interface losses within a coal supply chain**



Interactions *between* nodes in an operational environment further limit and reduce the total achievable throughput of the supply chain, resulting in a form of transaction costs that can be termed “interface losses”.

While interface losses occur in vertically integrated processes, they can pose particular challenges, and can be particularly difficult to manage, in multi user/multi service provider supply chains. In environments involving different users, operators and infrastructure, the different operating modes, system governance arrangements (i.e. scheduling principles) and contracted capacity in relation to nodes can become misaligned.

In such systems, the maximum achievable throughput is equal to that of its lowest nodal capability *less interface loss*, as demonstrated in Figure 3 above.

Overall system throughput in a multi user coal supply chain can be improved both by:

- investing capital to increase capacity at the node with the lowest maximum capacity; and/or
- implementing arrangements that improve the degree of agility and alignment (contractual and operational) between nodes in order to reduce interface losses.

The costs associated with interface losses in the DBCT Coal Chain are substantial.

The nominal or “nameplate” capacity of DBCT is 85Mtpa – and this is the capacity which is currently paid for by users under long-term take or pay contracts. The actual throughput of DBCT is consistently and substantially less than this nameplate capacity, and has averaged over recent times at approximately 65Mtpa.<sup>26</sup>

<sup>26</sup> It is noted that, while the full 85Mtpa of capacity is subject to take or pay contracts, this full capacity may not be ordered by users from year to year – so that the amount of ‘scheduled’ throughput is also less than 85Mtpa. This can reflect a number of

An overview of each of nameplate and actual throughput for FY9-10 to 12-13 is set out in Figure 4 below.

**Figure 4. DBCT performance – tonnes throughput**

|                        | <b>FY2009-10</b> | <b>FY2010-11</b> | <b>FY2011-12</b> | <b>2012-13</b> |
|------------------------|------------------|------------------|------------------|----------------|
| <b>Nameplate</b>       | 85,000,000       | 85,000,000       | 85,000,000       | 85,000,000     |
| <b>Actual</b>          | 63,147,913       | 54,879,951       | 51,324,029       | 62,411,190     |
| <b>Act / Nameplate</b> | <b>74%</b>       | <b>65%</b>       | <b>60%</b>       | <b>73%</b>     |

*Source: North Queensland Bulk Ports*

A more detailed breakdown of DBCT throughput on a monthly basis for the 2012 calendar year and 2012-13 financial year is set out in Attachment C.

The approximate 20Mtpa difference between actual and nominal throughput at DBCT is equivalent to the entire throughput of a new coal terminal. Based on recent expansion experience in Queensland, the Applicants estimate that capital cost of expanding the system to deliver this through additional rail or port capacity, would be at least \$1.5bn.

The link between a lack of coordination in operational practices within a coal chain and this substantial underutilisation of contracted capacity is also well documented:

- (a) Mr Stephen O'Donnell has stated that he considers that a rigid rail scheduling approach in a multi-user environment requires other stakeholders in the coal chain to invest up to 10-20% more in capital expenditure than would otherwise be the case.<sup>27</sup>
- (b) In 2008, NSW Maritime noted a 15% increase in output from the Hunter Valley due to improvements in coordination over the period from 2004 to 2008.<sup>28</sup> RTCA estimates this as having a value of approximately \$1bn per annum.
- (c) In 2007, Stephen O'Donnell estimated the value of lost revenues and demurrage charges associated with inefficiency in the Goonyella Coal Chain at \$1.2bn per annum (being \$900m in lost revenue and \$300m in demurrage charges).<sup>29</sup>

Specific examples of interface difficulties being experienced within the DBCT Coal Chain include:

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factors, including a recognition of interface losses, events which reduce available coal (e.g. flooding etc) or that some producers hold rights in respect of more tonnage at the terminal than they can use to allow them a 'buffer' to deal with variability and losses in the wider system.

<sup>27</sup> Affidavit of S O'Donnell, 21 December 2007, filed on behalf of BHP Billiton Iron Ore Pty Ltd in *Application by Fortescue Metals Group Limited for Review of the deemed decision by the Commonwealth Treasurer of 23 May 2006 under section 44H(9) of the Trade Practices Act 1974 (Cth) in relation to the application for declaration of services provided by the Mt Newman Railway Line*.

<sup>28</sup> NSW Maritime, *Improving competitive outcomes and landside productivity at NSW ports*, September 2008. Available at: [http://www.maritime.nsw.gov.au/docs/wh/PMAA\\_BRS.pdf](http://www.maritime.nsw.gov.au/docs/wh/PMAA_BRS.pdf).

<sup>29</sup> Queensland Government, *Goonyella Coal Chain Capacity Review*, 2007. Available at: <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Goonyella-Coal-Chain-Capacity-Review.aspx>.

## 5.1 There is a mismatch between the operating and scheduling assumptions at different points in the DBCT Coal Chain

By its nature cargo assembly, combined with a 'turn of arrival' principle for management of the shipping stem, leads to variable demands being placed on other parts of the supply chain to ensure that coal is made available for loading as and when required.

However, the scheduling principles applied by Aurizon Network based on the terms of the 2010 access undertaking or UT3), are based on an assumption that coal producers use rail entitlements evenly across each day, week and month (the 'even railings' assumption). These interactions are set out in Figure 1 on page 4 above.

This operational mismatch between cargo assembly operation of DBCT and the even railings assumption applied by Aurizon Network produces significant interface losses.

One means of responding to this issue would be to seek to change the operating mode at DBCT. However, given the large number of users at DBCT (each of which may produce multiple products), changing the mode of operation from cargo assembly to a dedicated stockpile (where each user had its own stockpile space for each different product type) would require a substantial expansion of the existing stockyard, which is limited both by land space and, even if it were physically feasible, would be likely to involve substantial capital investment of over \$1bn.<sup>30</sup>

Similarly, it is not presently possible to respond to the current misalignment by varying the 'even railings' rail scheduling assumption, which Aurizon Network argues is hard-wired into both the current (and proposed) regulatory framework as well as existing below rail access agreements.<sup>31</sup>

## 5.2 While a considerable amount of operational information is available to users of the DBCT Coal Chain, current rail-port coordination and scheduling arrangements provide limited scope for coordination by coal producers and rail operators

Currently, coordination within the DBCT Coal Chain is fragmented between rail and port.

In its UT4 submission, Aurizon Network acknowledged that there are 'gaps' in the current contracting framework and the risk of coordination failures in complex and fragmented supply chains such as the CQCN can cause capacity losses and bottlenecks.<sup>32</sup>

Under the current arrangements, under user agreements and the Terminal Regulations, the terminal operator, DBCT Pty Ltd, acts as agent for coal producers that use the terminal to lodge weekly train orders with Aurizon Network (to match vessel arrivals). However, there is limited, if any, scope for coal producers to directly participate as part of this process.

DBCT Pty Ltd, Aurizon Network and the ILC also provide the following information to coal producers in relation to utilisation of the port and rail:

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<sup>30</sup> As noted at page 18 below, DBCT Pty Ltd is currently undertaking a trial of a 'hybrid' operating arrangement which involves a limited amount of stockpiling at port. This is still in a trial stage. The Applicants support any such initiatives aimed at improving efficiency, however as noted in this submission, the hybrid initiative at DBCT has limited scope to resolve the whole of coal chain operational misalignment which is the focus of the DCCC.

<sup>31</sup> See Part B, Schedule F 1.2(b) of the current access undertaking (UT3) and in the proposed access undertaking (UT4) at Schedule F, clause 1.3(e).

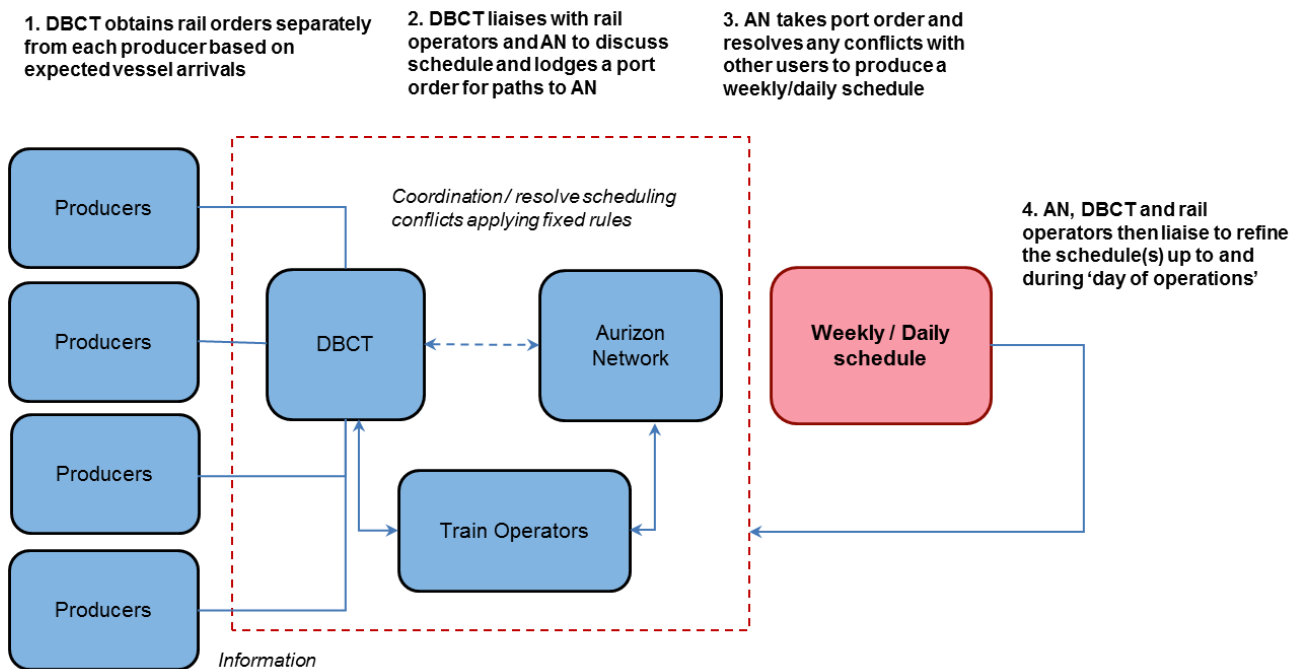
<sup>32</sup> Aurizon Network, 2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal, pp168 -169.

- *21 Day Plan and Coal Availability.* This is provided by DBCT Pty Ltd on a rolling daily basis and provides, for all vessels, the produce and tonnage required, mine and coal availability, and the number of trains needed.
- *A weekly train order summary* – This is provided several times per week and provides an overall ‘snapshot’ of port and rail utilisation and demand (based on train path orders).
- *DBCC 12 Week overview* – This is a monthly report that provides an overview of system capacity. Each user provides long term shipping forecasts and DBCT Pty Ltd reviews this against Terminal and system capacity to determine a 3-month forecast.
- *ILC Capability Forecast* – This is a more detailed system report provided by the ILC to its members twice a year. It provides an overview of the modelled performance of the DBCT Coal Chain for the coming 12 month period.
- *Critical Asset Calendars (CAC)* – These are developed by DBCT Pty Ltd and Aurizon Network, respectively, to provide an overview of the timing and (in the case of the rail network) location of maintenance activities on the system.

As a consequence, while producers have access to a considerable amount of information in relation to use and capacity of infrastructure, the current process provides little, if any, scope for coal producers to discuss and use it to coordinate their requirements *before* placing orders for the use of rail and port infrastructure.

At a high level, the current process for scheduling rail paths in the Goonyella System is set out in Figure 5 below.

**Figure 5. Simplified overview of the rail scheduling process for Goonyella System**



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## 6 The Integrated Logistics Company

Arising from the recommendations of the Goonyella Coal Chain Review, led by Stephen O'Donnell in 2006-2007, the Queensland coal industry established a centralised coordination body to increase the degree of transparency and coordination across the system, particularly in relation to capacity planning.<sup>33</sup>

A coordination body was established in April 2008 under a Memorandum of Understanding – and this structure was formalised with the incorporation of the Integrated Logistics Company (ILC) in October 2010.

The members of the ILC are all of the participants in the coal chain.<sup>34</sup>

The scope of the ILC's activities are defined in its Constitution and Shareholders Agreement and relate to planning functions, including most importantly the development of an annual master plan for the coal chain (taking into account the capacity requirements of both DBCT and Hay Point).

The ILC Master Plan is an input taken into account by both Aurizon Network and DBCT in their own master planning activities. The ILC can also facilitate the coordination of other tactical and operational planning by other participants, such as assisting to ensure alignment of maintenance windows between members – although it cannot direct any individual member to vary its plans.

The ILC does not play any role in operational matters such as rail or terminal scheduling or 'day of operations' coordination of requirements. While the ILC provides a degree of high level visibility and coordination in relation to longer-term capacity planning and maintenance, it does not have any binding role on participants and is currently unable to address operational issues within the DBCT Coal Chain that directly cause interface losses.

Under the Shareholders Agreement, any extension of the scope of the ILC requires the unanimous approval of all members. To date, there has not been consensus support for the ILC role to be expanded beyond the high level capacity assessment, planning and coordination which it presently undertakes.

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## 7 Proposed Conduct

### 7.1 Why the DCCC?

The Applicants have recognised that current industry arrangements, including the ILC, do not currently respond to the challenge presented by interface losses in the DBCT Coal Chain caused by misalignment between the operating assumptions at each node and a failure to enable producers and rail operators to effectively coordinate their 'end to end' use of system infrastructure.

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<sup>33</sup> Queensland Government, Goonyella Coal Chain Capacity Review, 2007. Available at: <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Goonyella-Coal-Chain-Capacity-Review.aspx>.

<sup>34</sup> These are the DBCT owner (DBCT Management), operator (DBCT Pty Ltd), the relevant port authority (North Queensland Bulk Ports), both rail operators, Aurizon Network and all coal producers that export through either DBCT or the Hay Point coal terminal. See, <http://www.ilco.com.au/dnn/AboutUs.aspx>.

The DCCC is intended to increase total throughput from the DBCT Coal Chain by providing visibility and improved coordination in relation to those parts of the DBCT Coal Chain which are able to be managed in short timeframes (i.e. in the period from 1-3 months up to the day of operation).

This includes:

- a framework to support and facilitate improved coordination of the Members in relation to their respective use of the DBCT Coal Chain;
- a “Joint Scheduling Group” to facilitate the scheduling of coal throughput by Members on a coordinated basis, as well as other matters which may affect coal availability, including production, maintenance, stockpiling, train path management, rail transportation, cargo assembly planning and vessel queuing at the DBCT, where this assists the efficient operation of the DBCT Coal Chain;
- the appointment of a common “Scheduling Coordinator” to act for and on behalf of the Members in relation to scheduling train paths;
- establishment of a Management Committee, to oversee the operation of the DCCC and to develop further initiatives to improve the coordinated management, planning and operation of the DBCT Coal Chain; and
- provisions to coordinate advocacy to Government Agencies and other stakeholders in relation to issues affecting the efficient and coordinated operation of the DBCT Coal Chain Infrastructure.

Because it focusses principally on operational interface issues, the DCCC’s activities are different to, but complement, the higher-level planning activities undertaken by the ILC. However, it is anticipated that the DCCC may work with the ILC to develop new and improved operational practices, where this can improve the utilisation of existing capacity and/or improve throughput.

## **7.2 The Charter and associated arrangements**

The Applicants have entered into the Charter, subject to a condition that it will not be taken to be made or come into effect unless the Proposed Conduct is authorised by the ACCC.

Both a confidential and non-confidential copy of the Charter is included with this Application.

Key elements of the DCCC as established by the Charter are:

### *Membership*

- (a) The membership of the DCCC is open to all coal producers and rail operators which use (or rail to) DBCT, subject to some minimum eligibility criteria.
- (b) There is a 3-month period prior to the acceptance of any applications for membership, to provide an opportunity for a number of the operational arrangements to be put in place.
- (c) At the time that they apply for membership, each Member nominates the number of train paths (‘nominated train paths’) which are to be scheduled on a pooled basis with other Members’ nominated paths on its behalf through the DCCC.



- (d) If a producer is a haulage customer of a Rail Operator Member (currently, only Pacific National), the producer needs to nominate all of its contracted entitlements with that Rail Operator Member for scheduling by the DCCC.

#### *Structure and governance*

- (e) Under the Charter, the DCCC comprises Members meeting in two distinct groups:
  - (i) a **Joint Scheduling Group** – which will meet at least weekly to develop and coordinate scheduling for train paths on a weekly basis, as well as to discuss and resolve other operational matters related to the DCCC Coal Chain that affect the Members; and
  - (ii) a **Management Committee** – which will meet at least monthly, to oversee the DCCC and to discuss wider DBCT Coal Chain issues (including any advocacy or other activities to be adopted on behalf of all Members) and to monitor the activities of the Joint Scheduling Group and resolve scheduling issues or disputes escalated to it from the Joint Scheduling Group from time to time.

#### *Scheduling Coordinator*

- (f) The Management Committee appoints a Scheduling Coordinator tasked with leading the development, in consultation with the Joint Scheduling Group, of an optimised schedule of train paths for all of the Members on a 'pooled' basis.
- (g) The Scheduling Coordinator will also act as the joint representative of all Members in liaising with DBCT Pty Ltd and Aurizon Network to seek to obtain train paths through the existing scheduling and ordering processes.
- (h) For the first 12 months, the Scheduling Coordinator will be Pacific National.

#### *Joint Scheduling Group*

- (i) The primary role of the Joint Scheduling Group is to meet as required, but at least weekly, to discuss and coordinate scheduling requirements. It is anticipated that there will also be daily interaction between members to deal with 'day of operations' issues and coordination.
- (j) The Joint Scheduling group will share information with each other and the Scheduling Coordinator, including:
  - (i) 3-4 month production forecasts;
  - (ii) historical performance against the Weekly Indicative Plan;
  - (iii) the most current "21 day plan" produced by the DBCT Operator;
  - (iv) site issues around projected production, stocks and off-take;
  - (v) shipping and co-shipper issues;
  - (vi) system and site outages;
  - (vii) above rail fleet availability;
  - (viii) track access availability; and

- (ix) details of below rail and port access agreements.
- (k) As well as weekly meetings to discuss the scheduling of train paths, the Joint Scheduling Group will also meet on a monthly basis to discuss other information which may affect coal throughput over the short-medium term.
- (l) Members may also discuss and/or make or give effect to arrangements related to coal availability or other issues (such as amending load out rates or adjusting shipping arrangements), where they identify that this may assist to ease potential congestion or to otherwise improve the overall coal chain throughput and efficiency.

#### *Scheduling Principles*

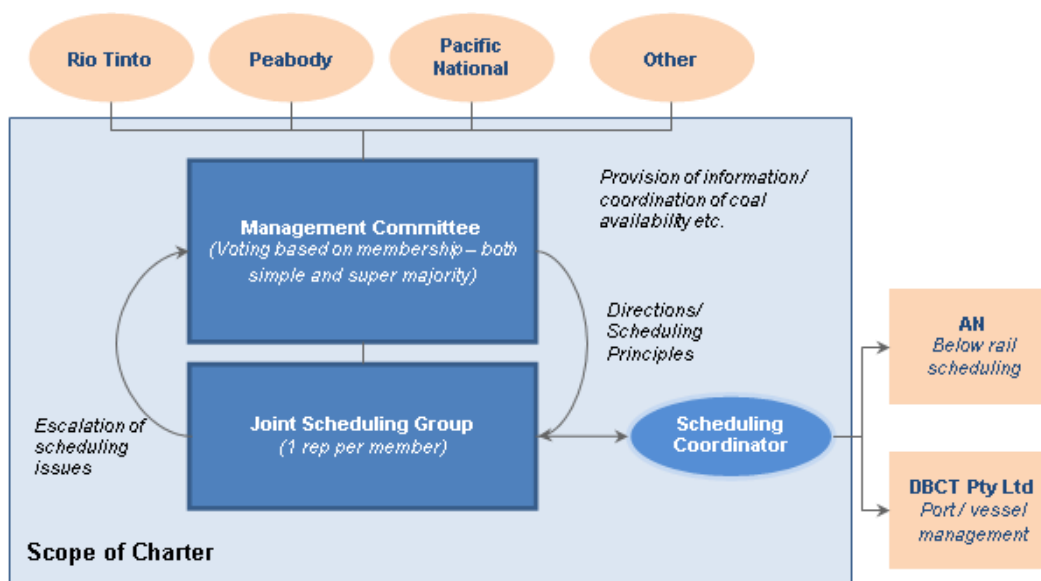
- (m) In undertaking scheduling activities under the Charter, the Joint Scheduling Group and the Scheduling Coordinator must comply with a set of Scheduling Principles, which are directed to optimising the total amount of coal throughput requested by Members each month.
- (n) In doing this, the Joint Scheduling Group and the Scheduling Coordinator must:
  - (i) seek to maximise and optimise port capacity for all Members (including taking into account its cargo assembly operations and seeking to minimise vessel turnaround time);
  - (ii) maximise the availability and utilisation of below and above rail infrastructure and assets;
  - (iii) take into account other coal chain factors, such as coal availability, train load-out capacity, ship loading order, etc.
- (o) The Scheduling Principles as set out in the Charter may be modified or augmented from time to time, by direction given to the Joint Scheduling Group and the Scheduling Coordinator by the Management Committee. This may include where particular scheduling issues or disputes have arisen and been escalated.

#### *Management Committee*

- (p) The Management Committee will meet monthly to oversee the DCCC and to discuss wider DBCT Coal Chain issues (including any advocacy or other activities to be adopted on behalf of all Members).
- (q) As well as undertaking weekly and day to day rail scheduling activities, the DCCC through the Management Committee may also undertake other activities of general assistance to the DBCT Coal Chain, including:
  - (i) facilitating engagement with the QCA over regulatory issues affecting the DBCT Coal Chain; and
  - (ii) agreeing joint positions or other advocacy to be undertaken for Members by or through the DCCC.
- (r) Decisions of the Management Committee are made by a vote, based on one vote per Member. A Member is not entitled to vote unless they have been a Member for at least 3 months.
- (s) Arrangements governing coordination of contractual entitlements are not within the initial scope of the DCCC.

The overall structure of the DCCC is set out in Figure 6 below.

**Figure 6. Proposed DCCC scope and structure**



### 7.1 Contrasting the DCCC with earlier ‘queue management system’ (QMS) authorisations at DBCT and ‘capacity balancing system’ (CBS) at Newcastle

The ACCC has previously considered and authorised QMS and CBS arrangements by the operators of DBCT and the Hunter Valley coal terminals (Port Waratah and Newcastle Coal Infrastructure Group (NCIG)).<sup>35</sup> The DBCT arrangements operated for a period from 2005 until 2008.

The DBCT authorisation (which was similar to the authorisation sought for CBS arrangements at Newcastle) addressed industry and public concerns over the economic and reputational damage caused by extensive vessel queues forming at DBCT and Newcastle during the early 2000s.

The QMS provided for increased flexibility and capacity accountability in managing capacity at the terminal. Most relevantly, this involved:

- establishment of an independent process for establishing ‘system capacity’;
- increased flexibility in the allocation of capacity through establishing an ‘auction’ system for port capacity; and
- the introduction of accountability measures to encourage efficient use of port capacity by producers.

During the period that the QMS was in place at DBCT, from 2005 to 2008, the State Government also commissioned the O’Donnell Review to consider long term

<sup>35</sup> ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009; ACCC, Final Determination for Application for authorisations A30239 – A30241 lodged by DBCT Pty Ltd, 15 December 2005; ACCC, Final Determination for Application for revocation of authorisations A30239-A30241 and substitution of A91060-A91062 lodged by DBCT Pty Ltd, 29 February 2008.

improvements to the operation of the DBCT Coal Chain. This Review published its final report in early 2008 and identified the need for greater centralised coordination of the DBCT Coal Chain.<sup>36</sup>

In both its 2005 and 2008 decisions, the ACCC recognised that the QMS should operate as a transitional arrangement while more long term solutions were identified and the QMS authorisation expired on 31 December 2008.

At the time of the 2008 process, ACCC Commissioner Dr Stephen King noted:<sup>37</sup>

*Any solution will require participants in the Goonyella coal chain to coordinate their activities and in some circumstances may require participants to act in a way that is not in their individual short-term interest but that is in the long-term interest of all participants in the chain.*

...

*This does not mean that the ACCC will be washing its hands of the problems in the Goonyella coal chain. As I have already noted the longer term solution will inevitably require coordination between coal chain participants. It is likely that this coordination will require authorisation under the Trade Practices Act. The concern here is not with the need for authorisation but rather the need to see significant progress towards a solution for the coal chain difficulties.*

The DCCC proposal involves conduct different to that which has previously been authorised by the ACCC – and responds to the challenge identified by Professor King by establishing a mechanism for operational communication and coordination between participating coal producers and rail operators, on a whole of coal chain basis.

The QMS (and the outcome of the O'Donnell Review) were largely focussed on alignment of **contracted capacity and investment** within the DBCT Coal Chain, such that there was not misalignment of contracted capacity at different nodes. The Proposed Conduct in the current application is not focussed on aligning the investment or contracting of capacity – but rather on reducing the **operational interface losses** which result from a failure by coal producers and other stakeholders to efficiently coordinate their use of contracted capacity.

Put differently, the QMS and QBS were both principally mechanisms to ration and allocate constrained capacity between users and/or to align investment to relieve capacity constraints. The DCCC is instead directed towards operational coordination and scheduling aimed at increasing capacity available using the existing infrastructure to satisfy total demand.

The Charter therefore does not require or involve any coordination of capacity or investment or any material change to contractual arrangements (i.e. any transfer of rights or establishment of any anti-hoarding or other accountability measures).

This also means that the DCCC complements the existing industry coordination arrangements established following the O'Donnell Review, which are focussed on

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<sup>36</sup> Goonyella Coal Chain Capacity Review, January 2008 (available at: <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Goonyella-Coal-Chain-Capacity-Review.aspx>).

<sup>37</sup> *The ACCC's role in coal chain logistics*, Address by Dr Stephen King to CEDA Queensland Export Infrastructure Conference, 15 July 2008, at page 4 (at: <http://www.accc.gov.au/system/files/The%20ACCC%27s%20role%20in%20coal%20chain%20logistics.pdf>).

coordinated planning of capacity and investment, and which do not provide a structure for communication or operational coordination between coal producers and rail operators of the DBCT Coal Chain on a day to day basis (see sections 6 and 9.8).

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## 8 Request for authorisation

The Applicants seek authorisation under sections 88(1A) and 88(1) of the CCA for themselves and any future Members to make and give effect to the DCCC, as contemplated in the Charter, including to:

- (a) coordinate order requests to be made in relation to the scheduling of below rail train path entitlements between the Members' mines and DBCT;
- (b) each appoint the Scheduling Coordinator to act on behalf of all Members in submitting orders to DBCT Pty Ltd and Aurizon Network on behalf of Members;
- (c) collectively discuss and agree amongst themselves matters relating to the coordinated order requests;
- (d) exchange mine, shipping and other relevant information (including 3-4 month production, stockpile and cargo information) to enable Members to cooperate and agree coordination of other parts of the DBCT Coal Chain, where the Members identify that this may improve the utilisation and efficient operation of the DBCT Coal Chain infrastructure. This may include making and giving effect to the coordinated management of:
  - (i) coal availability (reflecting production, stockpiling, load-out infrastructure availability, maintenance, and operations);
  - (ii) below rail arrangements; and
  - (iii) port loading and shipping arrangements; and
- (e) reject applications for membership where a prospective or existing Member fails to comply with defined eligibility criteria.

### (the **Proposed Conduct**)

Authorisation is sought on the basis that the Proposed Conduct may be construed as making or giving effect to a cartel provision within the meaning of Division 1 of Part IV of the CCA, making or giving effect to an exclusionary provision or otherwise giving rise to a substantial lessening of competition within the meaning of section 45 of that Act.

For the sake of clarity, the proposed DCCC arrangements **do not** include:

- (a) joint marketing, joint buying or any other collective bargaining activities in respect of any customers of a Member; or
- (b) arrangements related to pricing of any product supplied by a Member.

### 8.2 Future Members

At the time of commencement, the DCCC will comprise three Founding Members (RTCA, Peabody and Pacific National). This will simplify the establishment phase while practical aspects of the scheduling process, in particular, are being developed.

Once established (and authorised), membership will be open to all coal producers that utilise DBCT and any rail operators which provide haulage services for customers using DBCT, subject to the following eligibility criteria:

*For coal producers, each Member must:*

- control an operating mine that utilises the DBCT Coal Chain;
- hold or control Nominated Coal Throughput<sup>38</sup> that can be scheduled by the Scheduling Coordinator in a manner consistent with the Charter;
- hold or control sufficient below rail and port capacity entitlements to meet its Nominated Coal Throughput requirements;
- if the coal producer is a haulage customer of a Rail Operator Member or Members, the coal producer's Nominated Coal Throughput must include 100% of its contracted entitlements with that Rail Operator Member or Members; and
- not have resigned as a Member, or had its membership to the DCCC terminated, within the previous 6 months, assessed at the time of application.

The intention of the fourth criteria (which requires a coal producer to include all paths hauled by any rail operator that is a Member) is to ensure that there is alignment between producers and rail operators over the scheduling of paths, so that paths can be managed in a non-discriminatory manner. It would be impractical, and would undermine the effectiveness of the DCCC scheduling process, if the same train paths were sought to be managed differently and separately by a producer (outside the DCCC) and a related rail operator (through the DCCC).

The quarantine period (fifth criteria) has been included because Members are free to exit the DCCC at any time, without cost. The purpose of the DCCC is to establish a long term, stable pool of scheduling entitlements that can be managed by the Scheduling Coordinator. The quarantine period ensures that Members do not game the DCCC process in a way that undermines this stability (by dropping in and out of the arrangements on a month to month basis).

*For rail operators, each Member must:*

- have in place a current haulage agreement with at least one Producer Member for the provision of haulage services utilising the DBCT Coal Chain Infrastructure; and
- not have resigned as a Member, or had its membership to the DCCC terminated, within the previous 6 months, assessed at the time of application.

Pursuant to section 88(10) of the CCA, the Applicants request that the authorisation, if granted, be expressed so as to apply to future Members.

### **8.3 Voluntary participation**

Participation in the DCCC is voluntary and Members are free to exit the arrangements (and take over their own separate scheduling of train paths) at any time, at no cost.

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<sup>38</sup> This term refers to a monthly amount (in tonnes), determined by multiplying the number of train paths nominated by the Member for scheduling by the DCCC by a standard nominal payload per path.

As noted above, in the event of exit, a Member is restricted from re-entry for a period of 6-months.

#### 8.4 Duration of the authorisation

The DCCC Members request that the ACCC grants an authorisation for a period reflecting the term of the Charter, up to a maximum period of 5 years.

The initial term of the Charter is two years, subject to extension by the Members. The approach to the duration of the authorisation reflects that the Applicants anticipate that the Charter is establishing a framework which will develop over time and the Applicants anticipate that, with that in view, the Charter will be extended.

This timeframe is substantially less than what the ACCC has previously endorsed in the context of other authorisations related to long-term rail or export terminal arrangements, which have typically been 15 years.<sup>39</sup>

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## 9 Public benefits arising from the Proposed Conduct

### 9.1 Introduction

The Applicants consider that the DCCC gives rise to significant public benefits which substantially outweigh any public detriment.

Public benefit is not defined in the CCA. However, the Australian Competition Tribunal (**Tribunal**) has stated that the term should be given its widest possible meaning. In particular, it includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements...the achievement of the economic goals of efficiency and progress.*<sup>40</sup>

Public detriment is also not defined in the CCA but the Tribunal has also 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 principle elements the achievement of the goal of economic efficiency.*<sup>41</sup>

The ACCC has on previous occasions assessed the likely public benefits generated by the various capacity balancing systems that have operated at Australia's coal ports,

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<sup>39</sup> See, for example, ACCC, Final Determination for Application for authorisation A91208 lodged by Gladstone Ports Corporation & Ors, 24 April 2010; ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009; ACCC, Final Determination for Application for authorisation A91212 lodged by NWIOA Ops Pty Ltd, 29 April 2010; ACCC, Final Determination for Application for authorisation A91278 lodged by Carabella & Ors, 16 February 2012. The period of authorisation in each of these decisions was 15 years.

<sup>40</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42, 677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012, 17,242.

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



including at DBCT. A number of the public benefits below have previously been considered and accepted by the ACCC in that context.<sup>42</sup>

### **9.2 Public benefit – reduction in interface losses resulting in improved utilisation of system capacity and increased throughput**

The primary objective of the DCCC is to make the DBCT Coal Chain more flexible in order to reduce interface losses through better and more coordinated planning and scheduling of requirements by participating coal producers and rail operators.

Given a price for Australian metallurgical coal in the global market of USD130<sup>43</sup> (AUD145<sup>44</sup>) and an average monthly throughput at DBCT in 2013 of approximately 5.2Mt,<sup>45</sup> each 1% improvement in throughput from DBCT would be reflected in an additional 52,000t of throughput, or approximately \$7.54m increased coal revenues per month.

If all users of DBCT were to participate in the DCCC (so that the efficiencies could be maximised across all tonnage), the Applicants estimate that the DCCC scheduling improvements (and associated coordination of related activities) would be likely to produce a 15 – 20% productivity improvement across the DBCT Coal Chain. This improved throughput allows extra tonnage to be delivered for all users of DBCT and the Goonyella System – and is not a benefit limited to Members of the DCCC.

Based only on their initial contribution of tonnes to the DCCC, the Applicants anticipate that a benefit of 3-5% throughput is initially achievable. This degree of increased throughput would equate (based on current utilisation and prices) to increased coal revenues for all users of the DBCT Coal Chain of approximately \$22-38m per month, or up to \$450m per annum. Again, this is not a benefit for the Applicants, but is the value of the increased total throughput, and so would be shared across all users of the DBCT Coal Chain.

### **9.3 Improved capital intensity - reduced need for capital investment in 'excess' capacity and lower port and below rail tariffs, and rail fleet costs**

Below rail and coal terminal infrastructure incurs high capital costs. The high relative costs of capital projects have recently been identified as a key competitive weakness of the Australian resources industry, and the coal industry in particular.

As noted above, in 2012, Port Jackson Partners estimated that capital costs had contributed to Queensland thermal coal projects being 66% more expensive than the global average, putting the majority of the current project pipeline at risk.<sup>46</sup> Based on recent direct experience, RTCA estimates that the share of new project capital costs associated with rail infrastructure in Queensland has risen to approximately 30% of the effective commitment for a new mining project.

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<sup>42</sup> ACCC, Final Determination for Application for authorisations A30239 – A30241 lodged by DBCT Pty Ltd, 15 December 2005; ACCC, Final Determination for Application for revocation of authorisations A30239-A30241 and substitution of A91060-A91062 lodged by DBCT Pty Ltd, 29 February 2008.

<sup>43</sup> Based on the metallurgical coal spot price of \$129.41 as at 14 February 2014 (current spot price available at: <https://www.google.com/finance?cid=4931635#>)

<sup>44</sup> Based on the RBA USD exchange rate current as at 13 January 2014 of 0.8934.

<sup>45</sup> This reflects the average monthly throughput for DBCT during FY2012-13 (see Attachment C).

<sup>46</sup> Port Jackson Partners, Opportunity at Risk, Regaining our competitive edge in Minerals Resources, Report commissioned for the Minerals Council of Australia, p12. Quoted in, Aurizon Network, 2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal, p 30.



The nominal maximum throughput of DBCT is 85Mtpa, however it has consistently achieved actual throughput of less than 65Mtpa (see Figure 4), despite both the terminal and associated rail infrastructure being fully contracted and capable of supporting the nominal capacity of 85Mtpa.

The difference between potential and actual throughput (approximately 20-25Mtpa) is the capacity of an entire new coal terminal and reflects, conservatively, at least \$1.5bn in “excess” capital expenditure. That is, to provide new terminal and rail infrastructure elsewhere to compensate for 20Mtpa in interface losses would require an investment of at least \$1.5bn.

As well as avoiding the need for additional investment, an increase in throughput from existing infrastructure will lower access tariffs for all users of the port and rail network – both of which are subject to ‘revenue cap’ tariff arrangements, calculated on the basis of fully contracted capacity (i.e. the full nominal volume of 85Mtpa).

Improved coordination in scheduling and associated activities would also reduce the capital costs associated with above rail assets (i.e. rolling stock), because better coordination of train path scheduling between producers will result in more efficient management of the rail fleet.

Other efficiencies include:

- (i) a reduction in idle rail capacity through fewer cancelled services; and
- (ii) increased certainty for producers regarding their scheduled capacity thereby reducing the need for producers to request more train paths than they actually require as a means of ensuring they have sufficient capacity.

The operational efficiencies and potential capital savings associated with more flexible and coordinated scheduling are significant and are shared across all users of the DBCT Coal Chain (irrespective of whether or not they participate) – enabling re-investment of those savings.

#### **9.4 Public benefit - reduced demurrage costs**

Demurrage charges are economically inefficient dead-weight losses. They involve coal producers paying very substantial sums to shipping companies to have empty ships sit idle off the coast of Australia.

The implementation of the DCCC scheduling protocols beyond the trial period will result in substantial savings of demurrage compared to the counterfactual, where inflexible scheduling rules do not respond to ‘last minute’ changes to coal producers’ train needs.

As well as improved flexibility in railings to align with vessel arrivals, as part of the DCCC proposed arrangements, producers may also identify opportunities to better align shipping arrangements with rail and mine production. Some of these opportunities may be agreed directly between producers (e.g. joint shipping arrangements), while others are matters which producers and/or the Scheduling Coordinator will need to liaise with DBCT Pty Ltd to implement (e.g. agreed variations to the vessel queue).

In 2007, Stephen O'Donnell estimated the value of lost revenues and demurrage charges associated with inefficiency in the Goonyella Coal Chain at \$1.2bn per annum (being \$900m in lost revenue and \$300m in demurrage charges).<sup>47</sup>

Preliminary estimates by the Applicants are that the Proposed Conduct, if effective in improving throughput and flexibility, could contribute approximately 50c/tonne in reduced demurrage costs, or approximately \$40m per annum, if all users participated and DBCT achieved its nominal throughput of 85Mtpa. This also represents an amount that would be available to coal producers for re-investing.

The ACCC has acknowledged previously that reduced demurrage is a substantial benefit.<sup>48</sup>

#### **9.5 Public benefit – improve DBCT's international reputation and cost competitiveness**

The importance of maintaining Australia's reputation as a reliable coal supplier in the global coal market is long established.<sup>49</sup> The certainty and timeliness of delivery of coal influences the purchasing decision of global coal buyers.

There is then a clear benefit to implementing operational practices that improve the coordination and reliability of the DBCT Coal Chain and improve its international reputation as an efficient, timely and flexible supplier.

The Applicants submit that maintaining or improving the international reputation of the DBCT Coal Chain in this way constitutes a public benefit.

#### **9.6 Public benefit – provides a 'local solution' that is low cost, can be implemented quickly and that offers a springboard for greater coordination and efficiency**

Aurizon Network has noted that developing solutions for coal chain coordination need to be localised and driven by industry, rather than through the existing regulatory framework.

Aurizon Network stated as follows in its UT4 submission:

These considerations underline the fact that effective coordination mechanisms must be tailored to the circumstances and issues facing particular supply chains. A prescriptive 'one size fits all' approach will simply not work. This view underpins the approach in the 2013 Undertaking of providing a framework which supports cooperative, industry-driven coordination initiatives, rather than seeking to impose a single coordination framework via the access undertaking.<sup>50</sup>

The DCCC represents such an industry-driven solution. The DCCC arrangements (including the Proposed Conduct) offer the benefits of being able to be established quickly, at low cost and within the existing contractual and regulatory framework.

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<sup>47</sup> Queensland Government, Goonyella Coal Chain Capacity Review, 2007. Available at: <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Goonyella-Coal-Chain-Capacity-Review.aspx>.

<sup>48</sup> ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009, p 62.

<sup>49</sup> See, for example, *Delivering Reliable Australian Coal Exports to the World: Coal Transport Infrastructure*, Australian Government Senior Officials Group on Coal Transport Infrastructure, 2005. Available at: <http://www.ncc.gov.au/images/uploads/DERaFoSu-034.pdf>

<sup>50</sup> Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p 176.

The structure of the DCCC is flexible and scalable and enables Members to develop integrated reporting and share operational system information that will assist significantly in developing other related improvements, including potentially as a means of collective engagement with the QCA, Queensland Government and other stakeholders about wider improvements to the DBCT Coal Chain and its operations and planning.

The Proposed Conduct is distinct from, complements, and is likely to enhance the effectiveness of, other industry structures such as the ILC and the DBCT User Group (see section 9.8 below).

The practicality of the DCCC arrangements, including its ease of implementation and its complement to existing arrangements are further public benefits of the Proposed Conduct.

### **9.7 Public benefit – wider economic benefit to Queensland and Australia from increased throughput at DBCT (i.e. royalties and employment)**

A reduction in interface losses within the DBCT Coal Chain will increase throughput and reduce costs, increasing the volume of coal which is without the need for substantial additional capital expenditure. An increase in export volumes without increased capital costs will increase coal royalties.

Challenging market conditions resulting from falling prices and increased capital and other costs have led to a number of coal projects being delayed or not progressed and which the Queensland Resources Council has estimated has led to 8000 fewer positions in the industry across Queensland since mid-2012.<sup>51</sup>

The ACCC has previously recognised that wider economic benefits, including royalties and improved employment security are public benefits.<sup>52</sup>

### **9.8 The Counterfactual – what will occur absent the DCCC**

Currently, there are a number of industry organisations that operate within the Queensland coal industry assisting to promote the interests of the industry.

Most relevantly, these include:

- **ILC** – as noted above, this includes all of the participants in the DBCT Coal Chain (including all coal producers, Aurizon Network, both rail operators, DBCT Management Pty Ltd (owner of DBCT) and DBCT Pty Ltd (the operator of DBCT).

As noted above, the diversity of membership and scope of activities undertaken by the ILC mean that it principally provides input into master planning and capacity forecasting processes for rail and port infrastructure.

- **DBCT User Group** – this comprises those coal producers that use DBCT and provides a forum to deal with operational, planning or other issues related to the terminal.

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<sup>51</sup> Coal mine closure a sign of the times, Queensland Resources Council Media Release, 10 December 2013 (Available at: [https://www.qrc.org.au/01\\_cms/details.asp?ID=3372](https://www.qrc.org.au/01_cms/details.asp?ID=3372)). See also, *Coal mining in dire straits as job losses mount*, The Australian, 29 June 2013 (Available at: <http://www.theaustralian.com.au/business/mining-energy/coalmining-in-dire-straits-as-job-losses-mount/story-e6f9g9cf-1226671663515#>).

<sup>52</sup> ACCC, Final Determination for Application for authorisations A91147 – A91149 & A91168 & A91169 lodged by Port Waratah Coal Services & Ors, 9 December 2009, p 63.

- **Queensland Resources Council** – this is the peak industry body for the mining industry in Queensland and is the State-based affiliate of the Mining Council of Australia.

While each of the above plays an important role in the Queensland industry and the DBCT Coal Chain, their roles are focussed either on higher level activities (planning, forecasting, lobbying) or at particular nodes within the system (i.e. port or rail). As such, none is well suited to facilitating ‘day of operations’ scheduling and coordination between coal producers for the DBCT Coal Chain in a manner that will achieve a direct reduction in interface losses.

In the absence of the DCCC and the Proposed Conduct, the Applicants anticipate that sharing of operational information and coordination of scheduling and other activities between DBCT Coal Chain producers and rail operators, if any, would remain ad hoc and limited.

If authorisation is not granted, the most likely counterfactual is therefore a continuation of the status quo, in which decisions relating to the scheduling and coordination of infrastructure requirements (both rail and port) will be made by DBCT Pty Ltd and Aurizon Network, respectively, with limited direct involvement of coal producers.

## 9.9 Conclusion

The DCCC Members submit that, when assessed against the status quo, the public benefits flowing from the DCCC and the Proposed Conduct are significant.

Moreover, the DCCC provides a foundation for developing further coordination and contractual flexibility that offers additional potential public benefits (although subject to future authorisation, if required).

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## 10 Market definition

The DCCC arrangements are principally targeted at improving the competitive position of the DBCT Coal Chain in the global market for the supply and acquisition of thermal and metallurgical coal (the “**global coal market**”).

Other markets that have been identified by the Applicants as potentially relevant to the ACCC’s assessment of the Proposed Conduct are:

- (a) the market for the supply and acquisition of below rail services on the Goonyella rail system;
- (b) the supply and acquisition of coal rail haulage services in North Queensland; and
- (c) the supply and acquisition of coal loading services for bulk coal carrying ships in North Queensland.

(the “**related markets**”)

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## 11 Anti-competitive detriment

### 11.1 The proposed conduct is limited to operational and not commercial coordination between Members and the information shared for this purpose is similarly limited

The DCCC operates as a forum to facilitate improved operational coordination between participating coal producers and rail operators.

The information to be shared by Members (mostly through the Joint Scheduling Group) relates principally to infrastructure utilisation and coal availability. As noted above at section 5.2, most of this information is already made available to individual producers by DBCT Pty Ltd or the ILC. However, there has previously not been an effective mechanism for this and related information to be discussed, shared and acted upon quickly (up to 'day of operations') by coal producers and rail operators to facilitate better and more coordinated operational decisions – which is the principal purpose of the DCCC.

The DCCC arrangements do not involve or facilitate any sharing of commercial information related to customers, product decisions, marketing or pricing. The DCCC is not a body intended to facilitate collective bargaining.

## 11.2 No competitive detriment in global thermal or coking coal markets

DBCT Coal Chain is export-orientated. The principal market affected by the Proposed Conduct is therefore the global coal market and it therefore does not give rise to conduct with any direct effect on the Australian public.

To the extent that the Proposed Conduct provides for the alignment of production or stockpiling, this is limited to short-medium term planning (i.e. 3-4 month forecasts) and only for the purpose of ensuring efficient utilisation and operation of infrastructure.

The Proposed Conduct does not include or extend to:

- any joint marketing or collective bargaining activities in respect of any customers of a Member, including international coal customers; and
- sharing of any customer, pricing, product specifications or marketing information;
- pricing arrangements in respect of any product or service supplied by a Member, such as shipping or product pricing.

To the contrary, for the reasons set out above, the Proposed Conduct will *enhance* the competitive position of the DBCT Coal Chain in the global coal market – a benefit which will be shared between all producers in the DBCT Coal Chain (and potentially other Queensland coal chains), irrespective of whether they participate in the DCCC.

The Applicants note that the Goonyella System is shared by the vertically-integrated coal chain operated by BMA/BMC and which exports coal through the dedicated, Hay Point Coal Terminal. The BMA/BMC operations are supported by a dedicated above rail operator (BMA Rail) which was due to commence operations on 1 January 2014.

BMA/BMC has described its own integrated and coordinated activities as follows:<sup>53</sup>

*BMA/BMC integrates its coal chain logistics planning to optimally match coal production, raiing, and shipping resources with customer demand in the operational planning horizon (0-24 months) and within the identified and emerging constraints of the CQCN. Furthermore BMA/BMC interfaces directly with the global BHP Billiton Marketing function to provide an integrated logistics solution which extends to customers.*

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<sup>53</sup> BMA Issues and concerns with Aurizon Network's (AN's) 2013 Draft Amending Undertaking (DAU), at pages 10-11 (available: <http://www.qca.org.au/files/R-BMABMC-Submission-AurizonNetwork2013DAU-1013.pdf>)

The Applicants acknowledge the benefits which BMA has identified in seeking to optimally match nodes within the coal chain with constraints and operating parameters of the rail and port. Indeed, these reflect many of the efficiencies that the DCCC is trying to achieve for users of DBCT, although to a more limited extent.

While the Applicants would be open to the DCCC arrangements being extended to also include throughput of Hay Point, if that was requested by BMA/BMC, they understand that this is unlikely. BMA/BMC made its position in this regard clear in its UT4 response:

*It is essential BMA/BMC continues to exercise its own co-ordination of our mines, HPCT terminal, contracts with third party coal terminals and contracts with Aurizon and AN to maintain efficient rail to stock services, and not be constrained by any System Rules or procedures that try to impose a degree of conformance with a very different operating mode of another coal supply chain. In addition, from 1 January 2014, BMA Rail will enter the above rail market in the Goonyella System and will be providing dedicated rail haulage services from our Goonyella mines to HPCT.*

Although the Applicants expect that it is therefore unlikely that HPCT capacity will be included in the DCCC arrangements, BMA/BMC would nonetheless stand to benefit from the more reliable and efficient use by Members of below rail paths over the Goonyella System (which BMA/BMC shares).

Evidently, to the extent that BMA/BMC uses some capacity at DBCT (and/or operates as a rail operator to DBCT in relation to that tonnage) it may also choose to participate in the DCCC as a Member in relation only to that DBCT tonnage.

### **11.3 No material competitive detriments in any related markets**

The proposed DCCC arrangements are unlikely to have a material adverse effect on competition in any related markets, given that the DBCT Coal Chain operates as an integrated system used only for the export of coal.

To the extent that any coordination between Members lessens competition in any of these markets (which is not clear to occur in any case), this will be outweighed by the public benefits resulting from the proposed DCCC arrangements.

Any risk of competitive detriment in related markets is further mitigated by the following:

- (a) *DCCC improves the operation and transparency associated with the monopoly below rail market*

There is no workably effective competition in the market for the supply or acquisition below rail services to DBCT. The supply of this service by Aurizon Network on the Goonyella System is declared under the QCA Act.

The DCCC arrangements complement the existing regulatory arrangements by giving Members (and particularly coal producers) a greater degree of transparency of, and involvement in, the below rail operational and scheduling arrangements than is currently the case under the regulatory regime (see section 9.8 above).

The DCCC may also provide Members with a greater countervailing bargaining position in negotiations with Aurizon Network over operational issues affecting the below rail network and scheduling.

The DCCC also complements the work of other existing industry groups such as the ILC, QRC and DBCT Users Group.

*(b) No exclusion of any other users of the DBCT Coal Chain*

Membership in the DCCC is open to all coal producers and rail operators that use the DBCT Coal Chain, subject only to limited eligibility criteria. Continuing participation is voluntary and there are no restrictions on exit.

There is also no minimum tonnage required to participate in the scheduling aspects of the DCCC. Unlike other coal chain groups, there is also no 'tonnage' basis for voting rights. In essence this gives all Members an equal say in decision making (i.e. one vote per Member).

It is however necessary for a Member to nominate at least 2Mtpa of tonnage before it is eligible to vote as part of the Management Committee. This limited requirement reflects the need to ensure that, in the absence of a tonnage-based voting mechanism, a user is not able to disrupt the development and decision making of the DCCC, based on contributing only a small volume of tonnage into the DCCC.

Moreover, there are clear incentives for the DCCC to encourage further membership (i.e. to not exclude involvement from other producers and rail operators) as the scheduling efficiencies associated with the DCCC increase as the pool of train paths under the management of the DCCC increases.

*(c) The arrangements do not competitively disadvantage other producers or rail operators that choose not to become members*

While the benefits associated with the DCCC increase as additional Members join, the DCCC does not disadvantage participants within the DBCT Coal Chain that choose not to participate, including in any of the related markets.

Pacific National will operate as the Scheduling Coordinator for a minimum period of 12 months. This reflects the operational and technical expertise that is required to establish and operate the 'day of operation' coordination activities of the DCCC. These are presently tasks undertaken by rail operators and not directly by coal producers. However, this would not prevent or restrict any other rail operator (such as Aurizon) from also participating in the DCCC and therefore benefiting from the ability to coordinate and share operational and scheduling information with other participants.

Other features of the DCCC which ensure that it will not lessen competition in any related markets include:

- the Scheduling Coordinator and Joint Scheduling Group only coordinate the rights of Members – there is no scope to bind other stakeholders and all scheduling decisions are still ultimately made by Aurizon Network and DBCT Pty Ltd;
- the Scheduling Coordinator and Joint Scheduling Group do not schedule or allocate entitlements in any 'contestable' market, such as haulage – decisions about which above rail operators to use to haul the scheduled (below rail) train paths is a matter for individual coal producers;
- only information of Members (or information which is disclosed to the DCCC by other parties, such as Aurizon Network or DBCT Pty Ltd, for coordination purposes) will be shared and used in undertaking scheduling and other activities – no information of other coal producers or rail operators is required or disclosed;
- no pricing, marketing, product or customer information is exchanged by Members (although some information about Members' shipping arrangements may be shared, from time to time, if it is identified by Members that coordinated shipping



arrangements between them may reduce congestion and improve overall throughput);

- while the DCCC may act from time to time as a common representative in regulatory processes, the DCCC is not a joint buying group and will not engage in collective negotiations with other parties over the commercial terms of access (either for haulage, shipping, below rail access or port access rights); and
- the DCCC structure does not involve the transfer of any contractual rights from or between Members.

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## 12 Application for an interim authorisation

Pending the ACCC's consideration of the Applicants' application for authorisation, the Applicants request that pursuant to s 91 of the CCA the ACCC grant an interim authorisation of the DCCC so that the DCCC Members can begin to implement the DCCC on a trial basis (i.e. a 'soft launch').

In particular, the Applicants wish to immediately commence developing the operational arrangements involved in joint scheduling, including putting in place staffing and other practical arrangements.

The early implementation of the DCCC will enable the earlier achievement of the significant public benefits set out in section 9.

As a general guide to the public benefits available during the interim period:

### 12.1 Interim authorisation enables the benefits and approach of industry-led coordination to be tested in time to contribute to UT4

As noted above, the regulatory framework for the CQCN (including the Goonyella System) is currently under review by the QCA, in a process that will continue during the interim period. As part of its UT4 proposal, Aurizon Network has acknowledged the risk of coordination failures in complex and fragmented supply chains such as the CQCN (of which the DBCT Coal Chain is part), and that these cause capacity losses and bottlenecks.<sup>54</sup>

Aurizon Network has also recognised the importance of coal producers and other stakeholders developing "local solutions" aimed at improving coordination to respond to these issues and costs.<sup>55</sup>

The current approval process is well advanced, with a draft UT4 proposal lodged by Aurizon Network in April 2013 and a decision likely to be made by the QCA towards the end of 2014.

Early implementation of the DCCC on a trial basis, pursuant to interim authorisation is therefore likely to provide the only opportunity available to the Applicants (and other stakeholders) to gain valuable experience with industry-led coordination to inform the UT4 process.

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<sup>54</sup> Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p 168.

<sup>55</sup> Aurizon Network, *2013 Draft Access Undertaking, Volume 2: The 2013 Undertaking Proposal*, p 175-176.



Moreover, the UT4 process will involve consideration by Aurizon Network and the QCA of important changes to regulatory and contractual arrangements that have long-term consequences for the DCCC and options for its future development, such as potential changes to the way in which access rights are transferred and the potential introduction of short term 'trading' of entitlements. Discussion about these matters has already commenced with industry participants and is likely to be substantially advanced during the first half of 2014.

## **12.2 Immediate and substantial increased revenues, and reduced costs, can be achieved during the interim period, during a period of immense cost pressure for the Queensland industry**

The substantial potential benefits associated with increased throughput from DBCT have already been demonstrated.

During an interim 6-month period, based on the tonnage initially contributed by the Applicants only, improvements of between 1-3% in throughput for DBCT are likely and would result in \$45-\$135m additional revenues for the Queensland coal industry (based on current utilisation and prices). This is less than the improvement expected from this amount of tonnage over the longer term (3-5%, as above), given that the Applicants accept that there will be an establishment and ramp up period before the full operational benefits are achieved.

This estimate is also based only on the initial tonnage of the Applicants and has the potential to be higher if (as is hoped) other producers also join the DCCC during this period. As noted above, the extent of public benefits achievable under the DCCC will increase as membership increases. New Members are able to join the DCCC from 3-months after it becomes authorised.

The earlier implementation and approval of the concept will provide valuable experience to support the decisions of other potential Members in joining the DCCC, thus facilitating the more rapid expansion of the DCCC and the earlier achievement of more substantial public benefits.

In relation to the specific matters identified in the ACCC Guidelines<sup>56</sup> as relevant to its consideration of a request for interim authorisation, we note the following:

## **12.3 The possible harm to others (such as customers and competitors) if a request for interim authorisation is granted or denied**

The DCCC will not have any direct or adverse effect on any other coal producers or rail operators. It is noted that interim implementation of the DCCC does not:

- involve any change to existing logistics contracts or require that either the DBCT operator or Aurizon Network undertake any additional steps. Rather it is the Members who will coordinate amongst themselves before interacting with the DBCT Pty Ltd and Aurizon Network;
- impose obligations or costs on other stakeholders in the DBCT Coal Chain – scheduling decisions of the DCCC are limited to the tonnage of Members;
- involve any change to coal supply contracts or in any way undermine the competitive incentives of the users in relation to coal supply; or

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<sup>56</sup> ACCC, *Authorisation Guidelines*, June 2013, p 71.

- have any likely detrimental effect on competition (or participants) in any related markets – see above at 11.3(c).

To the contrary, these other users of the DBCT Coal Chain stand to benefit by:

- being able to join the DCCC, if they choose to; and
- in any event, gaining the benefit of sharing in any increased throughput achieved at DBCT by virtue of improved coordination between Members (including through reduced tariffs and more reliable and efficient operation of the DBCT Coal Chain).

While the Applicants do see benefits for customers from the implementation of the DCCC, the application for interim authorisation is not advanced on the basis that its denial will cause harm to customers.

#### **12.4 The proposed conduct does not have any likely adverse effect on competition in the interim period**

For the reasons set out earlier in this submission, the DCCC will not have any, or any material, adverse effect on competition in a relevant market.

The DCCC will not adversely interfere with, restrain or otherwise alter the individual competitive decisions of the Members as to coal supply (and therefore mine production) and the associated decisions in relation to contracting for rail and terminal capacity and rail operator services or shipping.

In particular, and as noted above, the DCCC does not, and is not intended to, restrict, limit or reduce the amount of coal that is transported through the DBCT Coal Chain. On the contrary, it is the objective of the DCCC to increase throughput from the DBCT Coal Chain.

Further, given the longer term nature of coal supply contracts and associated logistics contracts, and associated decisions in relation to the production and supply of coal for export, the implementation of the DCCC on a trial basis within the interim period will have no effect on potential competition in relation to these matters.

#### **12.5 No changes to any relevant market if interim authorisation is granted**

Consistent with the observations above, the interim implementation of the DCCC is unlikely to have any material enduring and non-reversible effect in any relevant market. There is no impediment to an immediate return to the status quo in the event that final authorisation is not granted.

No contractual rights are being assigned or modified as part of the implementation of the DCCC.

While interim implementation of the DCCC will facilitate a meaningful framework for coordination in the DBCT Coal Chain, to the benefit of all existing and future Members, in the event that final authorisation is not granted, the approach taken by Members to rail scheduling (and related activities) will simply return to its pre-authorisation state.

#### **12.6 The possible harm, if any, to the applicant if a grant of interim authorisation is denied**

The harm to the Applicants (and other stakeholders in the DBCT Coal Chain) if interim authorisation is denied is principally the delayed implementation of the DCCC and the

delayed achievement of the benefits of the DCCC, including a failure to improve throughput from DBCT and reduce interface costs during the interim period.

In addition, opportunities will be lost for:

- early demonstration of the benefits to other potential Members, potentially delaying the achievement of benefits if authorisation is subsequently granted; and
- the trial implementation of the DCCC to play a role as a 'local solution' in helping to positively inform and shape the UT4 process, due to be completed during 2014 (after which, this opportunity will largely be lost).

## **12.7 Public benefits or detriments that the ACCC can assess at the time of considering the request for interim authorisation**

While it is noted that granting interim authorisation does not require the ACCC to determine whether the relevant authorisation test is, or is likely to be, satisfied, it is the case that the ACCC can be reasonably satisfied that enhanced DBCT Coal Chain coordination will result in public benefits.

In this regard, it has been noted that prior reviews of the DBCT Coal Chain have identified the potential for public benefits through enhanced coordination, including in the O'Donnell Review<sup>57</sup> and the ACCC's authorisation of vessel management arrangements at DBCT.<sup>58</sup> Further, as also noted above, Aurizon Network has also recognised the benefits of local coordination in removing coal chain bottlenecks and congestion. BMA has also separately recognised the benefits and value associated with coordination of the coal supply chain (see above at page 38).

While cost savings associated with reduced capital expenditure in long-lived infrastructure (such as rail and port) are unlikely to occur during the interim period, immediate cost savings are likely to be available from more efficient use of the above rail fleet.

## **12.8 In the absence of interim authorisation, no implementation of the DCCC will occur until final authorisation is granted**

The Applicants view the DCCC arrangements as integrated.

As such, they do not see it as being practical to attempt to implement a part of the DCCC activities in isolation, ahead of authorisation. This would also be inconsistent with the rationale of the DCCC that it provides a forum for coal producers and rail operators to manage, discuss and coordinate their operational activities on an integrated, 'whole of coal chain' basis.

The Applicants also wish to ensure that authorisation is in place from 'day 1' to ensure that the absence of an authorisation does not act as a disincentive to other coal producers or rail operators from joining or participating.

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<sup>57</sup> Queensland Government, Goonyella Coal Chain Capacity Review, 2007. Available at: <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Goonyella-Coal-Chain-Capacity-Review.aspx>.

<sup>58</sup> ACCC, Final Determination for Application for authorisations A30239 – A30241 lodged by DBCT Pty Ltd, 15 December 2005; ACCC, Final Determination for Application for revocation of authorisations A30239-A30241 and substitution of A91060-A91062 lodged by DBCT Pty Ltd, 29 February 2008.

## Attachment A DBCT Coal Chain

| Stage  | Description   | Managed by   | Contractual framework   |
|--|---|--|---|
| 1. <b>Mine production and stockpile management</b> | <p>Management of mine operations and production profile is aimed at matching coal availability with customer demand and infrastructure availability</p> <p>Mine stockpiles are used to manage coal availability and provide an important 'buffer' to manage variability</p> <p>'Load out' infrastructure and speed can be an important element affecting system capacity.</p>   | Coal producer  | <p>None –</p> <p><i>Although timing ultimately subject to demand under customer and shipping contracts</i></p>  |
| 2. <b>Below rail access</b>                        | <p>Below rail access rights are obtained under access agreements with Aurizon Network put in place under its access undertaking.</p> <p>During 2012, the QCA approved a third and alternative contracting structure under which access rights would not be held by <i>either</i> the operator <i>or</i> the coal producer, but instead were 'split' so that a coal producer held access rights and the operator contracted separately with AN as the nominated operator of those rights.</p> <p>AN accounts for consumption of 'take or pay' rights on a monthly basis, with any payment required to be made each year, based also on a 'system test' (whereby take or pay rights are not payable by individual access holders if the overall contracted system capacity was used).</p> | <p>Aurizon Network allocates below rail rights</p> <p>Access rights are either held directly by a producer or through rail operator(s)</p> | <p>Below rail access is contracted under long term 'take or pay' contracts entered into with Aurizon Network</p> <p>(typically 10-year rolling term contracts, depending on the vintage of contract).</p> |
| 3. <b>Above rail (haulage) rights</b>              | <p>Involves the management of a fleet of rolling stock to haul coal for coal producers from mines to the terminal, utilising associated below rail access rights.</p> <p>Presently, the two above rail operators operating on the Goonyella system are Pacific National (a subsidiary of Asciano) and Aurizon Coal (a related entity of Aurizon Network). These operators contract with coal producers in a number of forms.</p>  | Rail operators   | Commercial haulage agreements between rail operators and coal producers – <i>unregulated</i>  |

| Stage                     | Description   | Managed by                       | Contractual framework   |
|---------------------------|---|----------------------------------|---|
|                           | <p>BMA/BMC<sup>59</sup> have also announced an intention to establish their own above rail operations.</p> <p><i>Scheduling of 'train paths' to enable haulage</i></p> <p>Before a train can operate to haul coal, it must be scheduled a slot or 'train path' on the network.</p> <p>Rail scheduling is ultimately the responsibility of Aurizon Network, as provided for in Schedule G of the current 2010 access undertaking (UT3). The rail scheduling process is governed by System Rules published and approved by QCA. These provide for Aurizon Network to schedule a monthly, weekly and daily train plan based on train path orders lodged on behalf of coal producers. For DBCT, scheduled rail path orders are 'locked own' and finalised 48 hours prior to the start of the day of operations.</p> <p>Where there are scheduling conflicts, these are resolved by Aurizon Network applying 'contested train path principles' set out in Appendix 2, Schedule G of UT3.</p> <p>While Aurizon Network ultimately determines the train schedule, under the Terminal Regulations, DBCT Pty Ltd (as the operator of the terminal) is responsible for scheduling train orders on behalf of all users to match vessel arrivals, and must do so having regard to equity between producers and using its best endeavours to minimise the aggregate cost to each producer (including demurrage and rail freight).<sup>60</sup></p> | Aurizon Network and DBCT Pty Ltd | Scheduling – Goonyella System Rules and the DBCT Terminal Regulations                 |
| 4. <b>Terminal access</b> | <p>Port access at DBCT is governed by long term take or pay user agreements, structured to permit a maximum annual tonnage to be handled for the producer.</p> <p><i>Management of vessel arrivals</i></p> <p>Vessel management is undertaken by DBCT</p>   | DBCT Pty Ltd                     | Standard User Agreements (and regulated under the DBCT 2010 Access Undertaking (UT3)) |

<sup>59</sup> BHP Billiton Mitsubishi Alliance (**BMA**) and BHP Billiton Mitsui Coal (**BMC**) are the BHP Billiton JV entities that use the HPCT.

<sup>60</sup> Schedule 1, clauses 1 and 9 of the Terminal Regulations (clause 1 is also reflected in Schedule 3 of the DBCT Standard User Agreement).

| Stage                           | Description   | Managed by                 | Contractual framework  |
|---------------------------------|---|----------------------------|--|
|                                 | Pty Ltd applying the principles set out in the Terminal Regulations. DBCT operates on a strict 'order of arrival' basis under clause 2.3 of the Terminal Regulations (there is some flexibility, although limited). |                            | Scheduling of the vessel queue governed by the DBCT Terminal Regulations |
| 5. <b>Shipping arrangements</b> | Shipping contracts for coal are held either by the coal producer or directly by the customer, depending on the commercial arrangements.   | Coal producers / Customers | Commercial shipping contracts  |

More information on the ownership and operation of each of these coal chain elements is set out below.

## 1 Coal producers using DBCT

DBCT is currently used by eight coal producers (either directly or through subsidiaries or joint venture arrangements) which operate 20 different mines as set out below:

| Producer  | Mine   |
|---|--|
| Anglo American Metallurgical Coal                       | <ul style="list-style-type: none"> <li>• German Creek</li> <li>• Foxleigh</li> <li>• Moranbah North</li> </ul>   |
| BHP Billiton Mitsubishi Alliance<br><i>(Indirectly)</i> | <ul style="list-style-type: none"> <li>• Goonyella Riverside</li> <li>• Broadmeadow</li> <li>• Peak Downs</li> <li>• Saraji</li> <li>• Daunia</li> </ul>                   |
| BHP Mitsui Coal ( <b>BMC</b> )                          | <ul style="list-style-type: none"> <li>• South Walker Creek</li> <li>• Poitrel</li> </ul>  |
| Jellinbah Resources                                     | <ul style="list-style-type: none"> <li>• Lake Vermont</li> </ul>   |
| Peabody   | <ul style="list-style-type: none"> <li>• North Goonyella</li> <li>• Eaglefield</li> <li>• Millenium</li> <li>• Burton</li> <li>• Moorvale</li> <li>• Coppabella</li> </ul> |

| Producer                | Mine   |
|-------------------------|--|
| RTCA                    | <ul style="list-style-type: none"> <li>• Hail Creek</li> <li>• Clermont<sup>61</sup></li> <li>• Kestrel</li> </ul> |
| Vale Australia          | <ul style="list-style-type: none"> <li>• Carborough Downs</li> </ul>   |
| Bowen Central Coal      | <ul style="list-style-type: none"> <li>• Isaac Plains</li> </ul>   |
| Xstrata Coal Queensland | <ul style="list-style-type: none"> <li>• Oaky Creek</li> </ul>   |

Of particular relevance to management of the DBCT Coal Chain are the mine stockpiling and out-loading infrastructure and arrangements used by each producer.

The availability of coal and the time taken to load wagons to enable raiing to port are important factors contributing to the total 'cycle time' of each train and overall system capacity – particularly if it causes delays in coal required at the terminal or prevents rolling stock from becoming available on time for later tasks.

## 2 The Goonyella System and Aurizon Network

The Goonyella System is located approximately 40 kilometres south of Mackay and comprises 924 kilometres of track. As well as the terminals located at the Port of Hay Point, the Goonyella System also interconnects to other central Queensland coal terminals:

- (a) to the north, the multi-user terminal at the Port of Abbot Point, via the Goonyella Abbot Point Expansion rail link (**GAPE**) and Newlands rail system; and
- (b) to the south, terminals at the Port of Gladstone, via the interlinked Blackwater rail system.

The Goonyella system was constructed in the late 1960's, with later stages added in the 1980's (including electrification). The system carries over 100 million tonnes of coal each year on 26.5 tonne axle loads. A map with a description of the load points and track associated with the Goonyella System is set out in Attachment A.<sup>62</sup>

The Goonyella System (and the entire CQCN) is owned and operated by Aurizon Network, a wholly owned subsidiary of Aurizon Holdings Ltd. The primary function of Aurizon Holdings is to manage its 2,670 kilometre below-rail network and negotiate access with parties seeking to use its network in accordance with the Access Undertaking approved by the Queensland Competition Authority.<sup>63</sup>

<sup>61</sup> Note that on 25 October 2013, Rio Tinto announced that it had reached a binding agreement for the sale of its majority stake in Clermont to Glencore. The transaction has not yet closed, but is expected to do so during Q1 2014. See [http://www.riotinto.com/documents/131024\\_Rio\\_Tinto\\_agrees\\_sale\\_of\\_interest\\_in\\_Clermont\\_Mine.pdf](http://www.riotinto.com/documents/131024_Rio_Tinto_agrees_sale_of_interest_in_Clermont_Mine.pdf).

<sup>62</sup> See also the description of the Goonyella system provided in Aurizon Network, *UT4 Maintenance Submission*, 30 April 2013, p 146 (<http://www.qca.org.au/files/R-Aurizon-QR2013DAU-ExMatMaint-0513.pdf>).

<sup>63</sup> See generally, <http://www.qca.org.au/rail/>.

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### 3 Above rail operators – rail haulage

There are currently two rail operators that haul coal to DBCT using the Goonyella System, Pacific National and Aurizon Coal.

**Pacific National** Pacific National is the wholly owned subsidiary of the ASX-listed entity, Asciano.

Pacific National provides bulk rail haulage services for the export and domestic coal markets in New South Wales, Queensland and South Australia. Pacific National operates a fleet of more than 5,900 coal wagons and 245 locomotives across Australia.

**Aurizon** Aurizon Holdings Ltd, along with Pacific National, is one of two national coal haulage enterprises.<sup>64</sup>

It has the largest fleet of coal-hauling locomotives and wagons in Australia.<sup>65</sup> In total, it has 829 locomotives and its 18,546 wagons, which are not exclusively used for Aurizon's coal operations, however, the bulk is concentrated in the CQCN.<sup>66</sup>

**BMA Rail** BHP Billiton has indicated that it intends to commence its own dedicated above rail operations on the Goonyella System to its Hay Point Coal Terminal, commencing 1 January 2014.<sup>67</sup>

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<sup>64</sup> Ibis World Company Report, *Asciano Limited*, 30 June 2013, p 13.

<sup>65</sup> <http://www.aurizon.com.au/ourservices/coal>.

<sup>66</sup> <http://www.theaustralian.com.au/business/companies/rail-company-aurizon-to-take-197m-charge-on-fleet-reduction/story-fn91v9q3-1226784435378#>.

<sup>67</sup> [http://www.bhpbilliton.com/home/investors/reports/Documents/2013/130529\\_CoalBriefing.pdf](http://www.bhpbilliton.com/home/investors/reports/Documents/2013/130529_CoalBriefing.pdf). See also BMA Issues and concerns with Aurizon Network's (AN's) 2013 Draft Amending Undertaking (DAU), at pages 10-11 (available: <http://www.qca.org.au/files/R-BMABMC-Submission-AurizonNetwork2013DAU-1013.pdf>)



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## Attachment B Applicants

### **Rio Tinto Coal Australia**<sup>68</sup>

Rio Tinto Coal Australia is an Australian coal mining organisation, and wholly owned member of the Rio Tinto Group.

RTCA produces both thermal and coking coal from its six operations in Australia – in the Hunter Valley in New South Wales and Queensland's Bowen Basin. The thermal and coking coal products are sold to customers all around the world, however due to Australia's geographic location, the bulk of these customers are in Asia.

In Queensland, the company operates the Hail Creek, Kestrel and Clermont mines. In New South Wales, Rio Tinto Coal Australia manages Coal & Allied's operations at Mount Thorley Warkworth, Hunter Valley Operations and Bengalla.

In 2012, Rio Tinto Coal Australia produced 51 million tonnes of coal, with around 70% of this (36 million tonnes) being thermal coal.

### **Peabody Energy Australia**<sup>69</sup>

Peabody Energy is an Australian proprietary company that explores for, develops and mines a range of metallurgical and thermal coals. The company's products are distributed globally, as well as to electricity generators in Australia and Asia. Peabody Energy is a wholly-owned subsidiary of the Peabody Energy Corporation, based in the United States.

Peabody's operations serves Australia's export and domestic markets with a diverse product range of coal provided through its mining operations across Queensland (with mines in North Goonyella and Burton) as well as New South Wales.

In 2012, Peabody's Australian operations achieved total sales of 33 million tonnes primarily to steel producers in Japan, Europe, Taiwan, India and South America, as well as to electricity generators in Australia and Asia.

### **Pacific National**<sup>70</sup>

Pacific National is the second largest coal haulage operator in Australia, operating in New South Wales, Queensland and South Australia, providing rail haulage services for the domestic and export coal markets. Pacific National is fully owned by Asciano Ltd.

Pacific National delivered approximately 83 million tonnes of coal per annum by rail to both domestic and export markets. As well as Queensland operations, Pacific National hauls from the Hunter Valley and Southern and Western coalfields to the ports of Newcastle and Port Kembla, as well as domestic coal to power stations and steelworks located in NSW. Additionally coal is hauled in South Australia from Leigh Creek to the power station in Port Augusta. Pacific National operates a fleet of more than 5,900 coal wagons and 245 locomotives across Australia.<sup>71</sup>

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<sup>68</sup> <http://www.riotinto.com/ourbusiness/rio-tinto-coal-australia-4713.aspx#>.

<sup>69</sup> Ibis World Company Report, Peabody Energy, 31 December 2012.

<sup>70</sup> <http://www.pacificnational.com.au/corporate/about.asp>.

<sup>71</sup> <http://www.asciano.com.au/pacific-national-coal/>.

## Attachment C DBCT throughput

DBCT Performance – Tonnes Throughput By Month 2012 Calendar Year

|                              | Jan       | Feb       | Mar       | Apr       | May       | Jun       | Jul       | Aug       | Sep       | Oct       | Nov       | Dec       | Total      |
|------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| <b>Nameplate</b>             | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 85,000,000 |
| <b>Actual</b>                | 4,169,510 | 3,874,220 | 3,669,045 | 4,280,192 | 3,984,319 | 4,573,888 | 3,697,997 | 5,251,177 | 5,281,210 | 5,255,955 | 6,103,390 | 5,830,002 | 55,940,905 |
| <b>Actual/<br/>Nameplate</b> | 59%       | 55%       | 52%       | 60%       | 56%       | 65%       | 52%       | 74%       | 75%       | 74%       | 86%       | 82%       | 66%        |

DBCT Performance – Tonnes Throughput By Month 2012/2013 Fiscal Year

|                              | Jul 12    | Aug 12    | Sep 12    | Oct 12    | Nov 12    | Dec 12    | Jan 13    | Feb 13    | Mar 13    | Apr 13    | May 13    | Jun 13    | Total      |
|------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| <b>Nameplate</b>             | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 7,083,333 | 85,000,000 |
| <b>Actual</b>                | 3,697,997 | 5,251,177 | 5,281,210 | 5,225,955 | 6,103,390 | 5,830,002 | 4,924,336 | 5,192,108 | 4,647,533 | 5,183,734 | 5,635,465 | 5,438,283 | 62,411,190 |
| <b>Actual/<br/>Nameplate</b> | 52%       | 74%       | 75%       | 74%       | 86%       | 82%       | 70%       | 73%       | 66%       | 73%       | 80%       | 77%       | 73%        |

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**Attachment D    DCCC Charter**

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# **Dalrymple Bay Coal Chain Coordinator**

## Members' Agreement and Charter

19 December 2013

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## Contents

|   | Page |
|---|------|
| Parties   | 5    |
| Background  | 5    |
| 1 Defined terms and interpretation                            | 5    |
| 1.1 Definitions in the Dictionary                             | 5    |
| 1.2 Interpretation  | 6    |
| 2 Conditions precedent and conditions subsequent              | 6    |
| 2.1 Conditions precedent                                      | 6    |
| 2.2 Sunset Date   | 6    |
| 2.3 Condition subsequent                                      | 6    |
| 2.4 Consideration   | 7    |
| 3 Competition and Consumer Act                                | 7    |
| 4 Establishment of the DCCC                                   | 7    |
| 4.1 Establishment of the DCCC                                 | 7    |
| 4.2 Objectives of the DCCC                                    | 8    |
| 5 Membership of the DCCC                                      | 8    |
| 5.1 Membership  | 8    |
| 5.2 Application for Membership                                | 8    |
| 5.3 Ongoing eligibility and condition compliance              | 10   |
| 5.5 Suspension or termination of Membership                   | 11   |
| Suspension or termination following events of default         | 11   |
| Termination   | 12   |
| 5.6 Resignation   | 12   |
| 5.7 Effect of termination or resignation                      | 13   |
| 5.8 Conflict protocol   | 13   |
| 6 General Member obligations                                  | 14   |
| 6.1 General obligations                                       | 14   |
| 6.2 Members' obligations in respect of Member Representatives | 14   |

|      |   |    |
|------|---|----|
| 6.3  | Future agreements or arrangements                                       | 15 |
| 6.4  | Protection of intellectual property                                     | 15 |
| 7    | Nominated Coal Throughput   | 15 |
| 7.1  | Nominated Coal Throughput   | 15 |
| 7.2  | Warranties of sufficiency   | 15 |
| 7.3  | Modifications to Nominated Coal Throughput                              | 15 |
| 8    | DCCC Management Committee   | 16 |
| 8.1  | Establishment of the Management Committee                               | 16 |
| 8.2  | Role and Functions of the Management Committee                          | 16 |
| 9    | Joint Scheduling Group  | 17 |
| 9.1  | Establishment of the Joint Scheduling Group                             | 17 |
| 9.2  | Role and functions of the Joint Scheduling Group                        | 17 |
| 9.3  | Scheduling Principles   | 17 |
| 9.4  | Modification of Scheduling Principles by the Management Committee       | 18 |
| 10   | Scheduling Coordinator  | 19 |
| 10.1 | Appointment of the Scheduling Coordinator                               | 19 |
| 10.2 | Role and functions of the Scheduling Coordinator                        | 20 |
| 10.3 | Exclusivity of the Scheduling Coordinator for Nominated Coal Throughput | 20 |
| 10.4 | Independence of the Scheduling Coordinator                              | 20 |
| 10.5 | Indemnity protection  | 21 |
| 10.6 | Financial provisions  | 21 |
| 10.7 | Replacement of Scheduling Coordinator                                   | 21 |
| 10.8 | Management Committee does not include Scheduling Coordinator            | 21 |
| 10.9 | Information shared with the Scheduling Coordinator                      | 22 |
| 11   | Review and variation of the Charter                                     | 22 |
| 11.1 | Review of the Charter   | 22 |
| 11.2 | Variation of the Charter  | 22 |

|    |  |    |
|----|--|----|
| 12 | Liability exclusions and limitations                         | 23 |
| 13 | Term and termination   | 23 |
|    | 13.1 Term  | 23 |
|    | 13.2 Termination of this Charter                             | 23 |
|    | 13.3 No prejudice and survival                               | 24 |
| 14 | Confidentiality  | 24 |
|    | 14.1 Protection of Confidential Information                  | 24 |
|    | 14.2 Permitted disclosures                                   | 24 |
|    | 14.3 Return of Confidential Information                      | 25 |
|    | 14.4 Recipient's security obligations                        | 25 |
|    | 14.5 Right to injunctive relief                              | 25 |
| 15 | Disputes   | 25 |
|    | 15.1 Raising a dispute                                       | 25 |
|    | 15.2 Negotiation   | 25 |
|    | 15.3 Senior management escalation                            | 25 |
|    | 15.4 Court proceedings                                       | 25 |
| 16 | General  | 26 |
|    | 16.1 Assignment, novation and other dealings                 | 26 |
|    | 16.2 Counterparts  | 26 |
|    | 16.3 Cumulative rights                                       | 26 |
|    | 16.4 Entire agreement  | 26 |
|    | 16.5 Further assurances                                      | 26 |
|    | 16.6 Survival  | 27 |
|    | 16.7 Notices   | 27 |
|    | 16.8 Rights, duties, obligations and liabilities are several | 28 |
|    | 16.9 Severability  | 28 |
|    | 16.10 No third party rights                                  | 28 |
|    | 16.11 Waiver   | 28 |
|    | 16.12 Limitation of Charter                                  | 28 |

|   |    |
|---|----|
| 16.13 Public disclosure                                 | 29 |
| 16.14 Binding Agreement                                 | 29 |
| 16.15 Governing law                                     | 29 |
| Schedule 1 Dictionary and Interpretation                | 30 |
| Schedule 2 Member details and Nominated Coal Throughput | 35 |
| Schedule 3 Eligibility Criteria                         | 37 |
| Schedule 4 Confidentiality Covenants                    | 38 |
| Schedule 5 Management Committee Governance Principles   | 43 |
| Schedule 6 Joint Scheduling Group                       | 47 |
| Schedule 7 Deed of Accession                            | 51 |
| Execution page  | 53 |



## Parties

Each person identified as a Member in Schedule 2.

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## Background

- A. The Members, either in their capacity as Producers or Rail Operators, use the rail infrastructure of the Goonyella System to supply coal to export customers of the Producers through the Dalrymple Bay Coal Terminal (**DBCT Coal Chain Infrastructure**).
  - B. The Members recognise and agree that the operation and throughput of the DBCT Coal Chain Infrastructure could be more efficiently and effectively managed through improved coordination between Producers, Rail Operators and other DBCT coal chain participants.
  - C. The Members have agreed to establish coordination arrangements, with a view to improving coordination between the Members using the DBCT Coal Chain Infrastructure.
  - D. Accordingly, this Charter documents and establishes:
    - a. a framework to support and facilitate improved coordination of the Members in relation to their respective use of the DBCT Coal Chain Infrastructure;
    - b. a Management Committee, to oversee the operation of the Dalrymple Bay Coal Chain Coordinator (**DCCC**) and to develop further initiatives, where agreed and consistent with the Objectives, to improve the coordinated management, planning and operation of the DBCT Coal Chain Infrastructure;
    - c. a Joint Scheduling Group, to facilitate the scheduling of coal throughput by Members on a coordinated basis, as well as other matters which may affect coal availability, including production, maintenance, stockpiling, Train Path management, rail transportation, cargo assembly planning and vessel queuing at the DBCT, where this assists the efficient operation of the DBCT Coal Chain Infrastructure;
    - d. the appointment by Members of a Scheduling Coordinator to act for and on behalf of the Members in relation to scheduling Train Paths and associated interaction with the DBCT Operator and Aurizon Network;
    - e. provisions to coordinate advocacy to Government Agencies and other stakeholders in relation to issues affecting the efficient and coordinated operation of the DBCT Coal Chain Infrastructure; and
    - f. a process for Members to review the scope and mandate of the DCCC.
  - E. The Members' agreement in this regard is documented in the terms of this Charter.
- 

## 1 Defined terms and interpretation

### 1.1 Definitions in the Dictionary

A term or expression starting with a capital letter which is defined in the Dictionary in Schedule 1 (Dictionary), has the meaning given to it in the Dictionary.

## 1.2 Interpretation

The interpretation clause in Schedule 1 (Dictionary) sets out rules of interpretation for this Charter.

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## 2 Conditions precedent and conditions subsequent

### 2.1 Conditions precedent

- (a) Unless all the Founding Members agree in writing otherwise, clauses 3 to 11 (inclusive) of this Charter (and the Schedules associated with those clauses) do not become binding on the Members, and will not be taken to have been made or to have otherwise come into force or effect unless and until those provisions, and conduct of the Members contemplated by them, receive ACCC interim or final authorisation under the CCA (**Condition Precedent**).
- (b) Each Member must promptly notify the other Members in writing if it becomes aware that the Condition Precedent has been satisfied or has become incapable of being satisfied.
- (c) The Members are jointly responsible for preparing and applying for authorisation from the ACCC, in order to satisfy the Condition Precedent (**Authorisation Application**). In this regard, however, RTCA will take primary carriage of the coordination and preparation of the Authorisation Application for and on behalf of all Members. In doing so, RTCA acknowledges that it does not have the power to bind any other Member in relation to any aspect of the Authorisation Application without the express written consent of that Member.
- (d) Each Member must provide all reasonable assistance in connection with the preparation and support of the Authorisation Application, and must use all reasonable endeavours to ensure that the Condition Precedent is satisfied (including through the implementation of any stakeholder engagement strategy agreed between the Founding Members) as expeditiously as possible and in any event before the Sunset Date.

### 2.2 Sunset Date

A Member may, on no less than 5 Business Days' notice to the other Members, terminate this Charter at any time if:

- (a) the Condition Precedent is not satisfied by 31 December 2014 (or such later date agreed by the Members in writing) (**Sunset Date**); or
- (b) the Members agree that the Condition Precedent will not be satisfied.

### 2.3 Condition subsequent

If:

- (a) the ACCC revokes or withdraws any authorisation (including any interim authorisation) granted under the CCA in respect of the relevant conduct contemplated by this Charter; or
- (b) any authorisation (including any interim authorisation) granted under the CCA in respect of the relevant conduct contemplated by this Charter expires and is not

renewed or replaced with a new authorisation which is reasonably acceptable to a Super Majority of the Members;

then:

- (c) the provisions of this Charter which give effect to the relevant conduct will be suspended and have no operation or effect unless and until the relevant conduct is re-authorised (including through an interim authorisation) by the ACCC; and
- (d) to the extent commercially practicable, and consistent with the Objectives, the remaining provisions of this Charter will continue in accordance with their terms.

## **2.4 Consideration**

Each Member acknowledges that it enters into this Charter in consideration of the mutual exchanges and promises given by it and each other Member under this Charter.

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# **3 Competition and Consumer Act**

- (a) The Members are mindful that they may be:
  - (i) competitors in the supply of coal and the acquisition or supply of associated services; and / or
  - (ii) competitors in the supply of coal haulage services.
- (b) The Members wish to ensure full compliance with the CCA, and the terms of any ACCC authorisation(s), and acknowledge that the coordination which is contemplated by this Charter does not extend to:
  - (i) joint marketing or collective bargaining activities in respect of any customer(s) of a Member; or
  - (ii) pricing arrangements in respect of any product or service supplied by the Members.

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# **4 Establishment of the DCCC**

## **4.1 Establishment of the DCCC**

- (a) On and from the Effective Date, the DCCC will be established in accordance with the terms of this Charter.
- (b) The DCCC will comprise all Members and the following governance arrangements:
  - (i) a Management Committee, established in accordance with, and for the purposes of carrying out the functions described in, clause 8 (DCCC Management Committee);
  - (ii) a Joint Scheduling Group, established in accordance with, and for the purposes of carrying out the functions described in, clause 9 (Joint Scheduling Group); and

- (iii) a Scheduling Coordinator, appointed in accordance with, and for the purposes of carrying out the functions described in, clause 10 (Scheduling Coordinator).

#### 4.2 Objectives of the DCCC

The objectives of the DCCC are, for the benefit of Members, to:

- (a) maximise throughput of the Members through the DBCT Coal Chain Infrastructure in an equitable and fair manner;
- (b) facilitate the efficient and coordinated use and operation of the DBCT Coal Chain Infrastructure and associated equipment and infrastructure (including, where relevant, coordination of Member production arrangements, stockpiling and port arrangements) and to minimise waste;
- (c) minimise costs associated with the operation of the DBCT Coal Chain Infrastructure and associated arrangements, including through reducing demurrage charges, reducing handling costs and improving the utilisation of capacity entitlements;
- (d) facilitate the fair, equitable, transparent and non-discriminatory scheduling of capacity entitlements held by Members;
- (e) improve the agility, competitiveness and cost-effectiveness of the DBCT Coal Chain Infrastructure;
- (f) facilitate engagement by Members (either jointly or separately) with other stakeholders or DBCT coal chain participants, including the DBCT Operator, Aurizon Network, the Queensland Competition Authority and other producers / stakeholders using the DBCT Coal Chain Infrastructure; and
- (g) consider and, if appropriate, advocate on behalf of Members in respect of issues or matters relevant to the DBCT Coal Chain Infrastructure, including in relation to relevant regulatory processes,

(each an **Objective** and together the **Objectives**).

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## 5 Membership of the DCCC

### 5.1 Membership

The Members at the Effective Date of this Charter are set out in Schedule 2 (**Founding Members**).

### 5.2 Application for Membership

- (a) At any time, after 3 months from the Effective Date, any person (**Prospective Member**) may apply to become a Member by lodging with the Chair an application for membership in such form as prescribed by the Management Committee from time to time:
  - (i) signed by the Prospective Member by its authorised representative;

- (ii) supported by details as may be required by the Management Committee to determine the Prospective Member's fulfilment of the Eligibility Criteria, including those details required to complete the table in Schedule 2;
  - (iii) setting out the fax, email and physical address of the Prospective Member for the purposes of receiving notices under this Charter;
  - (iv) setting out the Prospective Member's proposed Management Committee Representative and Scheduling Representative, for the purpose of clauses 8 and 9 of this Charter; and
  - (v) for a Prospective Member, setting out that Prospective Member's Nominated Coal Throughput.
- (b) The application must also be accompanied by:
- (i) an undertaking made by the Prospective Member, addressed to each of the then existing Members, confirming that the Prospective Member holds sufficient below rail, above rail and port capacity entitlements to meet its Nominated Coal Throughput requirements; and
  - (ii) subject to clause 5.2(c) below, a written notification, addressed to each of the then existing Members, confirming that the Prospective Member has no potential or actual material conflict, bias or other matter that may reasonably impact upon the ability of the Prospective Member to act in a manner consistent with the Charter (**Conflict**).
- (c) If, at the time of application, the Prospective Member notifies the Management Committee that the Prospective Member has a Conflict and/or is unable to provide the undertaking in the terms set out in clause 5.2(b)(i), the Management Committee may, at its discretion:
- (i) agree to waive the Conflict, and the requirement for the notification under clause 5.2(b)(ii), with or without conditions; and/or
  - (ii) agree to waive the requirement for the undertaking in clause 5.2(b)(i), with or without conditions; or
  - (iii) reject the application of the Prospective Member.
- (d) If:
- (i) the Management Committee is satisfied that the Prospective Member meets the eligibility requirements referred to in Schedule 3 (Eligibility Criteria);
  - (ii) the application contains the details set out in clause 5.2(a) and 5.2(b), and any other details or matters prescribed by the Management Committee;
  - (iii) there is a Conflict in the manner set out in clause 5.2(b)(ii) and the Management Committee has agreed to waive the Conflict in accordance with clause 5.2(c)(iii) and provided that, if any conditions have been imposed as part of the waiver, the Prospective Member has agreed to comply such conditions;
  - (iv) the Prospective Member has executed a Deed of Accession in the form set out in Schedule 7 (Deed of Accession), or such other form as the

Management Committee may from time to time by Super-Majority Decision decide (**Deed of Accession**); and

- (v) the Management Committee has, acting in good faith, approved the application,

then a representative of the Management Committee will notify the Prospective Member that the application has been approved (and the agreed conditions associated with that approval, if any) and on and from the date specified by the Management Committee (taking into account the need to maintain certainty in the operation of the then current Weekly Indicative Plan or Optimised Weekly Plan), the Prospective Member will become a Member.

- (e) Unless otherwise agreed by a Super-Majority Decision of the Management Committee, a new Member shall not be entitled to vote on matters under this Charter within 3 months of the date it becomes a Member.

### **5.3 Ongoing eligibility and condition compliance**

During the term of this Charter, and without limiting the obligations otherwise set out in this Charter, each Member must:

- (a) continue to satisfy the eligibility requirements for membership set out in Schedule 3 (Eligibility Criteria); and
- (b) comply with any conditions imposed by the Management Committee under clause 5.2(c)

### **5.4 Register of Members**

- (a) The Management Committee will establish and maintain a list of Members containing the following details for each Member:
  - (i) the name, address and current contact details of the Member;
  - (ii) the date on which they became a Member;
  - (iii) their relevant status as a Member, whether it be as a Producer or Rail Operator;
  - (iv) their Nominated Coal Throughput;
  - (v) the name of the Member's Management Committee Representative;
  - (vi) the name of the Member's Scheduling Representative; and
  - (vii) any other details as set out in the tables in Schedule 2.
- (b) Members must promptly notify the Management Committee of any changes to the details specified in clause 5.4(a).

## 5.5 Suspension or termination of Membership

### Suspension or termination following complaint

- (a) Without compromise to clause 5.5(g)(iii), any Member may make a written complaint to the Management Committee, either directly or through its Management Committee Representative, that another Member:
  - (i) no longer meets the eligibility requirements for membership as set out in Schedule 3 (Eligibility Criteria) or any conditions imposed by the Management Committee under clause 5.2(c); or
  - (ii) has:
    - (A) refused or neglected to comply with a term or condition of this Charter;
    - (B) acted in a manner prejudicial to the interests of the DCCC as a whole and/or in a manner inconsistent with the Objectives; or
    - (C) acted in a manner relating to the DCCC that has had an adverse impact on another Member.
- (b) The written complaint must also be served on the Member complained of, and that Member then has 14 days from the time the notice is served to make written submissions to the Management Committee in connection with the complaint.
- (c) After receiving any written submissions, the Management Committee must, as soon as reasonably practicable, convene a meeting to consider the complaint.

### Suspension or termination following events of default

- (d) If a Member (**Defaulting Member**):
  - (i) commits a material breach of this Charter that is incapable of remedy;
  - (ii) commits a material breach of this Charter and fails to remedy that breach within 14 days of receiving a notice from the Management Committee requiring it to do so;
  - (iii) commits at least 2 breaches of this Charter in any 3 month period (whether or not the Defaulting Member remedies those breaches);
  - (iv) has a complaint made against it in accordance with clause 5.5(a), and the Management Committee has considered the complaint, determined (by Super-Majority Decision) that it is material and that the complaint is proven; or
  - (v) suffers an Insolvency Event,then the Management Committee may, by providing 5 Business Days' written notice to the Defaulting Member and following a Super-Majority Decision:
  - (vi) suspend some or all of the Defaulting Member's rights under this Charter (for example, the right to attend and vote at meetings of the Management Committee and Joint Scheduling Group, and/or to receive reports); and/or
  - (vii) terminate the DCCC membership of the Defaulting Member.

### **Exercising suspension rights**

- (e) The Management Committee will act reasonably, and in proportion to the relevant conduct of a Member, in determining the scope of any suspension under this Charter.
- (f) If the Management Committee decides to suspend a Member's membership under this Charter, that membership is suspended:
  - (i) if the suspension is in response to a specific event of default, for so long as the event giving rise to the suspension subsists and is not remedied to the satisfaction of the Management Committee; and
  - (ii) if the suspension is not in response to a specific event of default, for the period determined by the Management Committee, such period not to exceed 12 months.

### **Termination**

- (g) A Member's membership of the DCCC will cease and terminate:
  - (i) if terminated by the Management Committee under clause 5.5(d);
  - (ii) if the Member resigns their membership under clause 5.6;
  - (iii) if a Member fails to maintain compliance with the eligibility requirements for membership set out in Schedule 3 (Eligibility Criteria); or
  - (iv) if the Member:
    - (A) being a body corporate is wound up or placed in liquidation, and such termination will be effective from the date of winding up or liquidation; or
    - (B) being any other type of entity, if an event substantially similar to those set out in clause 5.5(g)(iv)(A) occurs in relation to that Member or an entity comprising that Member.

## **5.6 Resignation**

### **Resignation of Members**

- (a) Membership of the DCCC is voluntary. A Member may resign from membership of the DCCC at any time by delivering written notice to the Management Committee.
- (b) Nothing in this Charter will prevent a resigning Member from applying to become a new Member in the future, in accordance with the process set out in clause 5.2, however, if this occurs, that resigning Member is not eligible to reapply for a period of 6 months from the effective date of the resignation, unless the Management Committee decide otherwise through a Super-Majority Decision.

### **Resignation of Scheduling Coordinator**

- (c) Appointment as the Scheduling Coordinator is voluntary. The Scheduling Coordinator can resign from the position of Scheduling Coordinator at any time by delivering written notice to the Management Committee.



- (d) Nothing in this Charter will prevent the resigning Scheduling Coordinator from applying to be reappointed as the Scheduling Coordinator in the future.

## **5.7 Effect of termination or resignation**

- (a) Subject to clause 5.7(c), with effect from the date of termination or resignation of a Member, the applicable Member:
  - (i) will have no rights under this Charter or otherwise in connection with the activities of the DCCC; and
  - (ii) is released from further performance of any obligation under this Charter, provided that any Nominated Coal Throughput of the applicable Member that is the subject of a current schedule at the date of termination or resignation will not be affected.
- (b) If the appointment of the Scheduling Coordinator ends, including through termination or resignation of:
  - (i) a Member who is, at the time of the termination or resignation, appointed as the Scheduling Coordinator; or
  - (ii) through the resignation of the Scheduling Coordinator under clause 5.6(c), then:
    - (iii) in the case of a resignation, the Scheduling Coordinator must give no less than 30 days' written notice to the Management Committee;
    - (iv) the Management Committee must immediately convene to appoint a replacement Scheduling Coordinator; and
    - (v) notwithstanding the exclusivity commitments under clause 10.3, and only until the appointment in clause 5.7(b)(iv) above is effective, each Member may undertake the Scheduling Functions in relation to its own Nominated Coal Throughput.
- (c) The termination or resignation of a Member does not affect any rights or obligations, or accrued liabilities, existing at the date of the termination or resignation or which may arise or crystallise after that date out of or by reason of any facts or circumstances occurring at or before that date.

## **5.8 Conflict protocol**

- (a) A Member who faces any actual or potential:
  - (i) material conflict, bias or other matter that may materially impact upon the ability of the Member to act in a manner consistent with the Charter (other than a Conflict waived in accordance with clause 5.2(c)(i)); or
  - (ii) conflict of interest in relation to any matter that is being considered, or is to be considered, at a Management Committee meeting, including in circumstances in which that Member prefers its own interests or the interests of a third party ahead and to the detriment of the interests of the DCCC (whether through a contractual arrangement or otherwise),

must:

- (iii) disclose such conflict to the Management Committee and the Management Committee will determine how that conflict will be managed.
- (b) Notwithstanding anything else in this Charter:
- (i) during the period in which a Member is subject to any of the events described in clauses 5.5(d)(i) to 5.5(d)(v);
  - (ii) if the Management Committee is determining whether to suspend or terminate a membership under this Charter; and
  - (iii) if the Management Committee is determining how to deal with an actual or potential conflict notified in accordance with clause 5.8(a),

the applicable Member is not entitled to participate or vote generally (in the context of (i) above) and on that matter as it comes before the Management Committee (in the context of (ii) and (iii) above) and will not be counted for the purpose of determining a quorum at any applicable meeting of the Management Committee.

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## 6 General Member obligations

### 6.1 General obligations

Each Member must, in its capacity as a Member:

- (a) cooperate with the other Members in good faith and use all reasonable endeavours to ensure that the DCCC is conducted in order to achieve the Objectives;
- (b) promptly and without undue delay make or cause to be made all decisions required of that Member in good faith having regard to the Objectives of the DCCC;
- (c) at all times act in good faith in relation to that Member's activities and dealings with the other Members and other parties in connection with this Charter;
- (d) not use, disclose or share Confidential Information or allow Confidential Information to be used, disclosed or shared in a manner:
  - (i) other than as provided for in this Charter; or
  - (ii) reasonably likely to be detrimental to the interests of the DCCC or another Member; and
- (e) not unreasonably delay any action, determination or decision which is required of a Member under this Charter.

### 6.2 Members' obligations in respect of Member Representatives

In addition to any other obligations contained in this Charter, each Member will ensure their respective Member Representatives:

- (a) punctually attend Management Committee and Joint Scheduling Group meetings, unless they are genuinely unavailable;
- (b) comply with the conflict protocols set out in clause 5.8;

- (c) as far as it is permitted by Law, act in a manner so as to give effect to the terms of this Charter; and
- (d) at all times act in good faith in relation to the Member Representative's activities and dealings with the Member Representatives of other Members.

### **6.3 Future agreements or arrangements**

Subject to its obligations at Law, each Member agrees that it will not enter into any new legally binding arrangements with third parties affecting the DBCT Coal Chain Infrastructure which would put that Member in conflict with their obligations under this Charter.

### **6.4 Protection of intellectual property**

Nothing in this Charter transfers to, or gives a Member any ownership rights in or to, any of the other Members' Intellectual Property Rights.

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## **7 Nominated Coal Throughput**

### **7.1 Nominated Coal Throughput**

- (a) As set out in clause 5.2(a)(v), as part of an application for membership, a Member must specify its Nominated Coal Throughput.
- (b) The Nominated Coal Throughput for each of the Founding Members is as set out in Schedule 2 (Members).

### **7.2 Warranties of sufficiency**

Each Member, as a continuing warranty to each of the other Members, confirms that it holds or controls at all times sufficient below rail, above rail and port capacity entitlements to meet its Nominated Coal Throughput requirements, as they arise from time to time.

### **7.3 Modifications to Nominated Coal Throughput**

- (a) As soon as practicable after a Member becomes aware that it no longer holds or controls sufficient below rail, above rail and port capacity entitlements to meet its Nominated Coal Throughput requirements, it must notify the Management Committee in writing:
  - (i) that it no longer holds or controls sufficient below rail, above rail and port capacity entitlements to meet its Nominated Coal Throughput requirements; and
  - (ii) of the modified Nominated Coal Throughput able be scheduled and ordered by the Scheduling Coordinator, on its behalf, in accordance with clause 10.1, which must be no more than the amount of rail, above rail and port capacity entitlements which it holds or controls.
- (b) At the next meeting following receipt of a notice under clause 7.3(a), the Management Committee must update the Register of Members under clause 5.4 to reflect the updated Nominated Coal Throughput for the relevant Member.
- (c) Without limitation to clause 7.3(a), a Member may modify its amount of Nominated Coal Throughput at any time by notifying the Management Committee in writing.

- (d) A modification of Nominated Coal Throughput will take effect on and from the date specified by the Management Committee, taking into account the need to maintain certainty in the operation of the then current weekly schedule(s) and to avoid prejudicing the then current Requested Coal Throughput of all Members.
- 

## **8 DCCC Management Committee**

### **8.1 Establishment of the Management Committee**

- (a) On and from the Effective Date, the Management Committee is established, consistent and in accordance with clause 1 of Schedule 5 (Management Committee Governance Principles).
- (b) The composition of the Management Committee and the manner in which business (including meetings and decisions) of the Management Committee will be carried out, are set out in Schedule 5 (Management Committee Governance Principles).

### **8.2 Role and Functions of the Management Committee**

The role and functions of the Management Committee are to:

- (a) oversee the operation and development of the DCCC in a manner that gives effect to the Objectives, including by periodically reviewing the Objectives, and in any case at least 6 monthly, to assess the operation of the DCCC against the Objectives;
- (b) monitor and review the operation of the Charter and to decide matters, and give directions and instructions, regarding the management and operation of the DCCC, including proposing changes to this Charter to the Members, as appropriate;
- (c) facilitate the sharing of information between Members consistent with this Charter for the purpose of facilitating the Objectives;
- (d) monitor the performance of the Joint Scheduling Group, and give direction where required including resolving any matters referred to it under this Charter by the Joint Scheduling Group, the Scheduling Coordinator or a Member;
- (e) decide on the appointment and removal of the Scheduling Coordinator and to monitor the performance of the Scheduling Coordinator;
- (f) consider and resolve disputes referred under clause 15 (Disputes);
- (g) facilitate agreement by Members of any joint engagement through the DCCC with other stakeholders or DBCT coal chain participants, including the DBCT Operator, Aurizon Network, the Queensland Competition Authority, ACCC and other producers / stakeholders using the DBCT Coal Chain Infrastructure;
- (h) agree on any joint positions or other advocacy to be undertaken for Members by or through the DCCC, including in relation to relevant regulatory processes; and
- (i) carry out such other functions as are set out in this Charter or the Members otherwise agree, from time to time.

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## 9 Joint Scheduling Group

### 9.1 Establishment of the Joint Scheduling Group

- (a) On and from the Effective Date, the Joint Scheduling Group is established, consistent and in accordance with clause 1 of Schedule 6 (Joint Scheduling Group).
- (b) The composition of the Joint Scheduling Group and manner in which business (including meetings and decisions) of the Joint Scheduling Group will be carried out, are set out in Schedule 6 (Joint Schedule Group).

### 9.2 Role and functions of the Joint Scheduling Group

The role and functions of the Joint Scheduling Group are to:

- (a) provide a forum for Members to share information in connection with production, stockpiling, rail transportation and port activities to facilitate more efficient management and scheduling of Nominated Coal Throughput;
- (b) seek to agree the inputs to the Weekly Indicative Plan, to ensure the scheduling of Requested Coal Throughput is coordinated and efficient;
- (c) .provide recommendations to the Scheduling Coordinator around the Weekly Indicative Plan and the Optimised Weekly Plan including to identify, assess and, where appropriate, respond to any material differences between the Weekly Indicative Plan and the Optimised Weekly Plan (as it affects Members);
- (d) work collaboratively during the 'day of operations' environment to ensure flexible and efficient operation of the DBCT Coal Chain Infrastructure, for the benefit of Members;
- (e) identify operational or technical improvements, from time to time, which may improve the overall performance of the DBCT Coal Chain Infrastructure, for the benefit of Members;
- (f) undertake periodic assessments of opportunities to collaborate to improve the performance of DBCT Coal Chain Infrastructure and related arrangements beyond the weekly planning cycle; and
- (g) undertake any other joint or coordinated planning or operational activities referred to it from time to time by the Management Committee,

in each case consistent with the Objectives.

### 9.3 Scheduling Principles

The Joint Scheduling Group and Scheduling Coordinator must schedule the Nominated Coal Throughput under this Charter and otherwise undertake their roles and functions consistent with the following principles (**DCCC Scheduling Principles**):

#### ***Achieve total Requested Coal Throughput for each Member***

- (a) to the maximum extent possible, and subject to a Member holding sufficient port, rail and haulage capacity entitlements, deliver the total amount of coal throughput requested by each Member each month (**Requested Coal Throughput**). The

Members acknowledge, however, that scheduling may require or result in a Member obtaining more or less than its Requested Coal Throughput in a particular month where this:

- (i) results in an optimal outcome for all Members, assessed as a whole; and
- (ii) occurs in an equitable and fair manner;

***Optimise use of port capacity by Members***

- (b) to the maximum extent possible, scheduling must take into account and seek to:
  - (i) maximise the availability and efficient utilisation of port capacity, in respect of the Nominated Coal Throughput, for all Members;
  - (ii) optimise cargo assembly at DBCT; and
  - (iii) minimise vessel turnaround time at DBCT;

***Optimise use of below rail infrastructure by Members***

- (c) to the maximum extent possible, maximise the availability and efficient utilisation, of each Member's Train Service Entitlements, in respect of the Nominated Coal Throughput;

***Optimise haulage arrangements by Members***

- (d) to the maximum extent possible, scheduling must take into account and seek to achieve the optimal availability and efficient utilisation of rolling stock underpinning rail haulage capacity held by Members in respect of the Nominated Coal Throughput;

***Other coal chain factors***

- (e) to the maximum extent possible, and amongst other things, scheduling must take into account:
  - (i) coal availability, including production and stock levels (both at port and mine), maintenance and loading rates;
  - (ii) access by a Member to train load-outs;
  - (iii) the loading order of ships at DBCT;
  - (iv) the requirements of the Terminal Regulations; and
  - (v) any natural events or other incidents (e.g. derailments or equipment breakdowns) that might reasonably be expected to have an effect on scheduling.

**9.4 Modification of Scheduling Principles by the Management Committee**

The Management Committee may from time to time by Super-Majority Decision modify or expand the DCCC Scheduling Principles, where it determines that the DCCC Scheduling Principles as modified would better facilitate the achievement of the Objectives. Without limitation, this may occur in order to resolve a scheduling dispute referred to the Management Committee by the Joint Scheduling Group.

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## 10 Scheduling Coordinator

### 10.1 Appointment of the Scheduling Coordinator

- (a) On and from the Effective Date, and then on each anniversary of the Effective Date, the Members (through the Management Committee) will appoint one of its Members (**Scheduling Coordinator**) to act on their behalf in:
  - (i) preparing a weekly plan of Train Path orders, for submitting to the DBCT Operator, taking into consideration each Member's Requested Coal Throughput (**Weekly Indicative Plan**);
  - (ii) submitting each Member's proposed train orders in respect of its Requested Coal Throughput, in accordance with the Weekly Indicative Plan;
  - (iii) managing against the weekly train plan prepared by Aurizon Network (**Optimised Weekly Plan**) and any variations to that plan; and
  - (iv) otherwise coordinating and overseeing the day-of-operation management and scheduling of Nominated TSE (monthly) orders forming part of a Member's Requested Coal Throughput, including with Aurizon Network and the DBCT Operator.
- (b) For the purposes of clause 10.1(a), the Members agree that:
  - (i) no Member can be compelled, by a decision of the Management Committee or otherwise, to take on the role of the Scheduling Coordinator;
  - (ii) the Scheduling Coordinator will be appointed for a 12 month period, subject to removal, resignation and renewal procedures set out in this Charter; and
  - (iii) Pacific National will be the Scheduling Coordinator for the first 12 month period (commencing on and from the Effective Date) and Pacific National hereby confirms that it is able to fulfil the Scheduling Functions and other obligations of the Scheduling Coordinator set out in this Charter.
- (c) The Members (through a Super-Majority Decision of the Management Committee) may appoint a person, firm or company, other than a Member, to be the Scheduling Coordinator (**Independent Scheduling Coordinator**), including to replace an existing Scheduling Coordinator in accordance with clause 10.7. In this circumstance, the Members acknowledge and agree:
  - (i) the terms and conditions of appointment of the Independent Scheduling Coordinator will be on an arms-length basis as determined by the Management Committee;
  - (ii) unless otherwise agreed by the Management Committee, the terms and conditions of appointment referred to above will include terms that ensure the independence of the Independent Scheduling Coordinator and will contain confidentiality covenants similar in all material respects to those set out in Schedule 4; and
  - (iii) the Independent Scheduling Coordinator may need to be contracted by one of the Members (for and on behalf of the DCCC) or by a corporate entity established for this purpose, and in this case the Members will, in good faith, work together to this end

and for the avoidance of doubt, without limiting the obligation of good faith, no Member can be compelled by a decision of the Management Committee to contract, for and on behalf of the DCCC, with the Independent Scheduling Coordinator in the manner set out in clause 10.1(c)(iii).

## **10.2 Role and functions of the Scheduling Coordinator**

- (a) The role and functions of the Scheduling Coordinator (**Scheduling Functions**) are to:
- (i) undertake the various tasks and requirements set out in clause 10.1(a)(i);
  - (ii) make itself available, at all reasonable times, to liaise with the Joint Scheduling Group, and individual Members (as required), regarding the coordinated scheduling and ordering of Requested Coal Throughput;
  - (iii) determine, in collaboration with the Joint Scheduling Group, the Weekly Indicative Plan in accordance with Schedule 6 (Joint Scheduling Group);
  - (iv) liaise directly with the DBCT Operator and Aurizon Network on behalf of Members in respect of the weekly schedule of orders for Requested Coal Throughput and related matters, including where this needs to be modified up to or during the day-of-operations;
  - (v) keep each Scheduling Representative fully informed of the status of its scheduled Requested Coal Throughput as well as any relevant communications with the DBCT Operator and Aurizon Network; and
  - (vi) undertake and perform various additional scheduling duties as directed or determined by the Management Committee from time to time,

at all times and in each case in a manner consistent with Schedule 6, the Objectives and the DCCC Scheduling Principles.

## **10.3 Exclusivity of the Scheduling Coordinator for Nominated Coal Throughput**

- (a) Subject to clause 10.7(c), a Member will not undertake the Scheduling Functions set out in clause 10.2 in respect of its Nominated Coal Throughput other than through the Scheduling Coordinator as contemplated in this Charter.
- (b) For the avoidance of doubt, nothing in this Charter prevents a Member from liaising directly with the DBCT Operator or Aurizon Network, provided it does not do so in a manner that undermines the role of the Scheduling Coordinator and/or the achievement of the Objectives.

## **10.4 Independence of the Scheduling Coordinator**

- (a) The Members acknowledge the importance of the Scheduling Coordinator being able to fulfil the Scheduling Functions in an impartial and fair manner.
- (b) Without limitation to clause 6.1, the Scheduling Coordinator will undertake its role representing the Members and undertaking the Scheduling Functions in good faith and in an impartial and fair manner, in the interest of Members as a whole.



## 10.5 Indemnity protection

Provided the Scheduling Coordinator has complied with its obligations under this Charter, and subject to clause 12, each Member shall:

- (a) each release the Scheduling Coordinator from and against any claims by the Members arising directly or indirectly from the carrying out by the Scheduling Coordinator of the Scheduling Functions; and
- (b) indemnify the Scheduling Coordinator from and against any claim it may incur by reason only of its carrying out the Scheduling Functions for or on behalf of that Member.

## 10.6 Financial provisions

The Scheduling Functions will be undertaken by the Scheduling Coordinator without additional remuneration, compensation or payment unless and to the extent otherwise determined by the Management Committee through a Super-Majority Decision.

## 10.7 Replacement of Scheduling Coordinator

- (a) Without limitation to clause 10.7(b), the Management Committee may, through Super-Majority Decision and on notice from the Chair in writing to the Scheduling Coordinator, replace the Scheduling Coordinator if the Management Committee concludes that:
  - (i) the Scheduling Coordinator has not complied with its Scheduling Functions, the Objectives and / or its obligations under clause 10.4(b); or
  - (ii) the Scheduling Coordinator is not in a position to comply with its Scheduling Functions, including due to the consequences of default

Replacement under this clause is to take effect on the date of the notice, unless otherwise determined by the Management Committee.

- (b) At any time after the date which is 12 months after the Effective Date, the Management Committee may in its absolute discretion, through Super-Majority Decision and on notice in writing from the Chair to the Scheduling Coordinator, give notice that the Scheduling Coordinator is replaced and, for that purpose, of the date from which the current Scheduling Coordinator is to cease acting in the role. ..
- (c) If the Scheduling Coordinator is replaced in accordance with this clause, or resigns in accordance with clause 5.6, during any period up until the Management Committee appoints a replacement Scheduling Coordinator and that appointment becomes effective, each Member may undertake the Scheduling Functions set out in clause 10.2 in respect of its own Nominated Coal Throughput.

## 10.8 Management Committee does not include Scheduling Coordinator

During the period in which the Management Committee exercises its rights under clause 10.7, the then current Scheduling Coordinator is not entitled to participate or vote on any matter coming before the Management Committee in relation to the conduct of the Scheduling Coordinator and will not be counted for the purpose of determining a quorum or voting thresholds at any meeting of the Management Committee at which such matters are considered. For clarity, while the Member appointed as Scheduling Coordinator is not entitled to participate in any vote in relation to its removal, it remains entitled to vote in

respect of the appointment of any replacement Scheduling Coordinator (or Independent Scheduling Coordinator).

### **10.9 Information shared with the Scheduling Coordinator**

- (a) The Scheduling Coordinator will give the Confidentiality Covenants in favour of each Member by promptly executing the Deed Poll in Schedule 4 (Confidentiality Covenants). In consideration for and in reliance upon the Confidentiality Covenants given to them by the Scheduling Coordinator, the Members will each punctually provide to the Scheduling Coordinator the information required by the Scheduling Coordinator from time to time for the sole purpose of enabling the Scheduling Coordinator to perform its Scheduling Functions.
- (b) Each Member agrees that nothing in this Charter requires a Member to provide the Scheduling Coordinator with Confidential Information if that Member has an existing binding legal obligation not to disclose that information.

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## **11 Review and variation of the Charter**

### **11.1 Review of the Charter**

- (a) The Members acknowledge that the Charter may need to change over time, including to address potential increases in scope, ensure the appropriateness of current scope or address proposals made by particular Members, and in this regard:
  - (i) individual Members may propose changes, through their Management Committee Representative; and
  - (ii) the Management Committee will set out, and notify all members, of any process or information requirements applicable to Members, as necessary to enable a decision to be made.
- (b) At least 3 months prior to each anniversary of the Effective Date, the Management Committee will review:
  - (i) the operation of this Charter (including the performance of the Management Committee, the Joint Scheduling Group and the Scheduling Coordinator);
  - (ii) the Objectives;
  - (iii) whether the establishment and activities of the DCCC has improved the efficiency of the DBCT Coal Chain Infrastructure,and as part of this review, the Management Committee will also consider whether any aspect of the Charter should change.
- (c) The Management Committee will conclude the considerations referred to in clause 11.1(b) above by no later than 1 month prior to the relevant anniversary.

### **11.2 Variation of the Charter**

- (a) Subject to clauses 9.4 and 11.2(b), no variation of this Charter is effective unless made in writing and signed by all Members.

- (b) The Management Committee may, by Super-Majority Decision, vary the terms of this Charter provided that:
  - (i) the effect of the variation does not have any retrospective effect or impact on a Member's ability to exit the DCCC (and contractual commitments in this Charter) upon implementation of the variation; and
  - (ii) if the variation requires authorisation from the ACCC under the CCA (whether on an interim basis or final), the variation is conditional on receipt of that authorisation.

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## 12 Liability exclusions and limitations

- (a) Subject to clauses 12(b) and 12(c) and to the maximum extent permitted by law, each Member's liability (including a Member in its capacity as Scheduling Coordinator) to any other Member for any loss, damage, cost or expense arising under or in connection with this Charter, whether in contract, tort (including negligence) or otherwise, is excluded.
- (b) The exclusion of liability for a Member in clause 12(a), and the release and indemnity in favour of the Member in its capacity as the Scheduling Coordinator under or in connection with this Charter in clause 10.5, do not apply to the extent:
  - (i) any negligent or wilful acts or omissions of that Member cause death or personal injury;
  - (ii) any negligent or wilful acts or omissions of that Member cause damage to tangible property; or
  - (iii) any acts or omissions of that Member constitute fraud,and, to the extent permitted by law, a Member's liability (including liability arising from the Member's negligence) arising from any event set out in this clause 12(b), will be limited in the aggregate to \$1 million.
- (c) Despite any other provision of this Charter, no Member (including a Member in its capacity as Scheduling Coordinator) will be liable to another Member for any indirect, special, consequential or incidental loss or for any loss of profits, loss of business or loss of opportunity or goodwill arising out of a claim in connection with this Charter.

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## 13 Term and termination

### 13.1 Term

This Charter commences on the date on which it is signed by the Founding Members and will continue for an initial period of 24 months from the Effective Date, unless:

- (a) terminated sooner in accordance with the terms of this Charter; or
- (b) extended by the Management Committee through Super-Majority Decision.

### 13.2 Termination of this Charter

- (a) This Charter will terminate:

- (i) in accordance with clause 2.2 (Sunset Date);
- (ii) at any time by written agreement of all of the Members;
- (iii) for a Member, when the Member ceases to be a Member under the terms of this Charter (including as a result of resignation or termination under the terms of this Charter); or
- (iv) automatically where there is no more than one remaining Member.

### 13.3 No prejudice and survival

Termination of this Charter will not prejudice any accrued rights, obligations or liabilities of a Member and is subject to any surviving obligations as set out in clause 16.6.

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## 14 Confidentiality

### 14.1 Protection of Confidential Information

Where a Member (**Recipient**) receives Confidential Information of or from a disclosing party (**Disclosing Party**) in connection with this Charter or the activities of the DCCC, the Recipient:

- (a) may use that Confidential Information solely for the purposes of performing its obligations under this Charter; and
- (b) must keep the Confidential Information confidential and not disclose it to any third party except:
  - (i) with the consent of the other Members; or
  - (ii) as permitted by clause 14.2.

### 14.2 Permitted disclosures

The Recipient may disclose Confidential Information:

- (a) to the Recipient's directors, employees, consultants and contractors (**Representatives**) to the extent that:
  - (i) those Representatives need to know the Confidential Information for the purposes of this Charter;
  - (ii) those Representatives are under an obligation to the Recipient to keep the Confidential Information confidential on terms similar in all material respects to the terms set out in this clause 14; and
  - (iii) the Recipient ensures that those Representatives keep the Confidential Information confidential in accordance with this clause 14; and
- (b) to the extent that the disclosure is required by Law and provided that:
  - (i) the Recipient immediately notifies the Management Committee; and

- (ii) the Recipient takes all such steps required by the Management Committee to prevent the disclosure or to ensure that it occurs subject to an obligation of confidence.

### **14.3 Return of Confidential Information**

On demand by the Disclosing Party, the Recipient must return, destroy or delete the Disclosing Party's Confidential Information except to the extent it is impracticable to do so, or to the extent necessary to comply with the Recipient's internal governance processes, or any applicable Law.

### **14.4 Recipient's security obligations**

The Recipient must, at its own cost, establish and maintain effective security measures to safeguard Confidential Information from unauthorised access or use.

### **14.5 Right to injunctive relief**

The Recipient acknowledges that if it breaches its obligations under this clause 14:

- (a) monetary damages may not be a sufficient remedy; and
- (b) the Disclosing Party will be entitled, without limiting any of its other rights or remedies, to injunctive or equitable relief to deal with the breach.

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## **15 Disputes**

### **15.1 Raising a dispute**

A Member claiming that a dispute has arisen must give written notice to the Management Committee setting out the nature of the dispute (**Dispute Notice**).

### **15.2 Negotiation**

- (a) Within 5 Business Days of receipt of a Dispute Notice, the Management Committee must meet and in good faith seek to resolve the dispute by negotiation, and for this purpose the relevant Management Committee Representatives must have regard to, and seek to give effect to, the Objectives.
- (b) All aspects of the meeting referred to in clause 15.2(a), except the fact of its occurrence, must be kept confidential and all communications of the Management Committee at the meeting are made on a without prejudice basis.

### **15.3 Senior management escalation**

If the Management Committee is unable to resolve the dispute within 10 Business Days, the dispute will be further escalated to the Chief Executive Officers or such other senior manager(s) as nominated in writing by each applicable Member for resolution.

### **15.4 Court proceedings**

- (a) A Member may not commence court proceedings relating to a Dispute unless it complies with this clause 15.
- (b) If the applicable Members are unable to resolve a dispute referred to the persons set out in clause 15.3 within 20 Business Days (or such other period agreed

between the Members) of its referral to them, the impacted Member will be entitled to take such action as may be available at law, including court proceedings.

- (c) Nothing in this Charter limits the rights of Members to commence court proceedings relating to a dispute under this Charter where:
  - (i) a party seeks urgent injunctive relief; or
  - (ii) the dispute relates to compliance with this clause.

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## 16 General

### 16.1 Assignment, novation and other dealings

A Member must not assign or novate its rights or obligations under this Charter or otherwise deal with the benefit of it or a right under it, or purport to do so, without the prior written consent of each other Member, such consent not to be unreasonably withheld.

### 16.2 Counterparts

This Charter may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.

### 16.3 Cumulative rights

Except as expressly provided in this Charter, the rights of a Member under this Charter are in addition to and do not exclude or limit any other rights or remedies provided by Law.

### 16.4 Entire agreement

- (a) Subject to clause 16.4(c) and (d), this Charter is the entire agreement between the Members about the matters dealt with in this Charter and replaces all previous agreements, understandings, representations and warranties about that subject matter.
- (b) Each Member represents and warrants that it has not relied on any representations or warranties about the subject matter of this Charter except as expressly provided in this Charter.
- (c) The Founding Members are parties to a document titled "Cost Sharing Agreement", dated 19 December 2013, and nothing in this Charter is intended to amend, limit or negate the commitments made under that agreement.
- (d) Nothing in this Charter is intended to amend, limit or negate any of the rights or obligations of a Member under any rail or port access agreement(s) or haulage agreement(s) to which that Member is a party, provided at all times that the Member has complied with clause 5.2 in respect of any Conflict arising from such agreements.

### 16.5 Further assurances

Except as expressly provided in this Charter, each Member must, at its own expense, do all things reasonably necessary to give full effect to this Charter and the matters contemplated by it.

## 16.6 Survival

- (a) Expiry or termination of this Charter, or resignation or removal of a Member, does not affect any accrued rights, obligations or liabilities of a Member up to that point in time.
- (b) Termination or expiry of this Charter for any reason does not affect any rights or obligations of the Members which by their nature survive termination or expiry, including clauses 12 (Liability), 14 (Confidentiality) and 16 (General).

## 16.7 Notices

- (a) A notice, consent or other communication under this Charter is only effective if it is:
  - (i) in writing and in legible English, signed by or on behalf of the Member(s) giving it;
  - (ii) addressed to the Member(s) to whom it is to be given; and
  - (iii) either:
    - (A) sent by pre-paid mail or delivered to that party's address;
    - (B) sent by fax to that party's fax number; or
    - (C) sent by email to that party's email address.
- (b) Subject to clause 16.7(a) a notice, consent or other communication under this Charter is, in the absence of earlier receipt, regarded as given and received:
  - (i) if it is delivered, on delivery at the address of the relevant Member(s);
  - (ii) if it is sent by fax, at the time and on the day it was successfully sent;
  - (iii) if it is sent by mail, on the 3rd Business Day after the day of posting, or if to or from a place outside Australia, on the 7th Business Day after the day of posting; or
  - (iv) if it is sent by email, at the time of successful receipt by the recipient at the email address specified by the relevant Member (and if receipt is outside working hours (addressee's time) on a working day, at the start of the next working day). Successful receipt may be evidenced by (without limitation):
    - (A) the transmission of an electronic read receipt from the recipient; or
    - (B) other acknowledgment of receipt by the recipient (whether electronic or otherwise),but where an "out of office" reply or similar response is delivered to the sender's email, the email will not be taken to be received.
- (c) If a notice, consent or other communication under this Charter is given and received on a day that is not a Business Day or after 5.00 pm (local time in the place of receipt) on a Business Day, it is regarded as being given and received at 9.00 am on the next Business Day.

- (d) For the purposes of this clause 16.7, a Member's address, fax number and email address are those set out in Schedule 2 (Members) or as otherwise notified in writing to the Management Committee.
- (e) Where this Charter contemplates a notice or direction being provided
  - (i) to the Management Committee by a Member, such notice is to be made to the Chair, with copies given to all other Members' Management Committee Representatives; and
  - (ii) to the Scheduling Coordinator by the Management Committee, such notice is to be made by the Chair to the Scheduling Coordinator, with copies given to all Management Committee Representatives.

#### **16.8 Rights, duties, obligations and liabilities are several**

The rights, duties, obligations and liabilities of the Members under this Charter are several in nature.

#### **16.9 Severability**

Any term of this Charter which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this Charter is not affected.

#### **16.10 No third party rights**

Except as expressly provided in this Charter:

- (a) each person who executes this Charter does so solely in its own legal capacity and not as agent or trustee for or a partner of any other person; and
- (b) only those persons who execute this Charter, or accede to its terms through the Deed of Accession, have a right or benefit under it.

#### **16.11 Waiver**

- (a) No waiver of a right or remedy under this Charter is effective unless it is in writing and signed by each other Member. It is only effective in the specific instance and for the specific purpose for which it is granted.
- (b) A single or partial exercise of a right or remedy under this Charter does not prevent a further exercise of that or of any other right or remedy.
- (c) Failure to exercise or delay in exercising a right or remedy under this Charter does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

#### **16.12 Limitation of Charter**

The Members agree that, except as expressly provided in this Charter:

- (a) nothing in this Charter constitutes or can be construed to constitute a Member as the partner, agent, employee or representative of another Member;
- (b) no Member has power to incur obligations on behalf of or pledge the credit of any other Member or Members in any manner; and



- (c) except as specifically provided in this Charter, a Member has no authority to act for, or to create, or assume, any responsibility or obligation for, another Member.

#### **16.13 Public disclosure**

A Member must not make any public disclosure, communication or announcement about this Charter or the contents of this Charter except:

- (a) with the prior written consent (conditional or otherwise):
  - (i) prior to the Effective Date – of all of the Founding Members; and
  - (ii) on or after the Effective Date - of the Management Committee; or
- (b) subject to clause 14.2(b), to comply with accounting, legal or other requirements of a competent Authority.

#### **16.14 Binding Agreement**

This Charter will be binding upon and inure for the benefit of the Members and to their respective administrators, personal representatives, successors and permitted agents.

#### **16.15 Governing law**

This Charter is governed by the laws of Queensland and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Queensland.

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## Schedule 1 Dictionary and Interpretation

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### 1 Dictionary

In this Charter:

**ACCC** means the Australian Competition and Consumer Commission.

**Annualised Nominated Coal Throughput** has the meaning set out in Schedule 2.

**Aurizon Network** means Aurizon Network Pty Ltd (ACN 132 181 116).

**Authorisation Application** has the meaning set out in clause 2.1(c).

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public body.

**Associate** has the meaning set out in clause 1(d) of Schedule 5.

**Business Day** means a day on which banks are open for business in Brisbane, other than a Saturday, Sunday or public holiday in Brisbane.

**CCA** means the Competition and Consumer Act 2010 (Cth).

**Chair** means a chair of the Management Committee, appointed under clause 1(g) of Schedule 5.

**Charter** means this agreement, including all schedules and attachments to this agreement.

**Condition Precedent** has the meaning set out in clause 2.1(a).

**Confidential Information** means any information of a Disclosing Party which:

- (a) is confidential or can reasonably be inferred to be confidential from the circumstances in which it is disclosed; and
- (b) is disclosed to or observed by a Recipient in connection with the activities of the DCCC,

and all notes, compilations, analyses, extracts, summaries and other records prepared by or for the Recipient based on or incorporating that information, but does not include information which:

- (c) is in or comes into the public domain, other than through breach of this Charter;
- (d) at the time of first disclosure to or observation by the Recipient, was already in its lawful possession (except where the Recipient has knowledge that it received that information from a third person in breach of a duty of confidence owed (directly or indirectly) by that third person to the Disclosing Party); or
- (e) is disclosed to or observed by the Recipient from a third party entitled to disclose it.

**Confidentiality Covenants** means the covenants on the part of the Scheduling Coordinator, as contained in the form of Confidentiality Deed Poll set out in Schedule 4 (Confidentiality Covenants).

**DBCT** means the Dalrymple Bay Coal Terminal.

**DBCT Coal Chain Infrastructure** has the meaning set out in the Background to this Charter.

**DBCT Operator** means Dalrymple Bay Coal Terminal Pty Ltd or any successor or replacement operator of DBCT.

**DCCC** means the coal chain coordination group, established pursuant to the terms of this Charter.

**DCCC Scheduling Principles** has the meaning set out in clause 9.3.

**Deed of Accession** means the form of deed set out in Schedule 7.

**Defaulting Member** has the meaning set out in clause 5.5(d).

**Disclosing Party** has the meaning set out in clause 14.1.

**Dispute Notice** has the meaning set out in clause 15.1.

**Effective Date** means the date on which the Condition Precedent is satisfied, in accordance with this Charter.

**Founding Members** has the meaning set out in clause 5.1 (and as are set out in Schedule 2).

**Goonyella System** means the Rail Infrastructure servicing the coal mining area of the Bowen Basin, carrying coal to the Hay Point Coal Terminal and the Dalrymple Bay Coal Terminal.

**Independent Scheduling Coordinator** has the meaning set out in clause 10.1(c).

**Intellectual Property Rights** include all rights in the nature of ownership created or able to be created under or by copyright, design registration, patent registration, trademark registration, obligations of confidentiality and all other rights in intangible property including rights of present and future intangible property and rights and information granted by Law or equity from time to time under the law of any jurisdiction throughout the world but does not include goodwill.

**Insolvency Event** means in relation to a Member:

- (a) the appointment of an administrator, receiver, liquidator or provisional liquidator to that Member;
- (b) that Member resolves to enter into any settlement, moratorium or similar arrangement for the benefit of its creditors; or
- (c) that Member is unable to pay its debts when they are due.

**Joint Scheduling Group** means the scheduling group established under clause 9.

**Law** includes any requirement of any statute, regulation, proclamation, ordinance, or mandatory standards, present or future and whether state, federal or otherwise.

**Management Committee** means the committee established under clause 8.

**Management Committee Representative** has the meaning set out in Schedule 5 (Management Committee Governance Principles).

**Member** means each of the Founding Members and any entity that becomes a new Member in accordance with clause 5.2(c), but excludes any Member that has resigned as a Member under clause 5.6 or been removed as a Member under clause 5.5.

**Member Representative** means the Scheduling Representative and/or the Management Committee Representative, as applicable.

**Nominated Coal Throughput** means, the amount of coal nominated by a Member as subject to scheduling by the Joint Scheduling Group and Scheduling Coordinator under this Charter, and calculated for each Member in accordance with the formula set out in Schedule 2 as modified from time to time under clause 7.3.

**Objectives** means the objectives for which the DCCC is established, as set out in clause 4.2, as amended from time to time in accordance with this Charter.

**Optimised Weekly Plan** has the meaning set out in clause 10.1(a)(iii).

**Pacific National** means Pacific National Pty Ltd.

**Peabody** means Peabody Energy Australia Pty Ltd.

**Port Request** means the request made by the DBCT Operator to Aurizon Network in relation to weekly train orders, from which Aurizon Network produces the Optimised Weekly Plan.

**Producer** means a coal producer with an ownership interest or management right in relation to a mine on the Goonyella System, who uses the DBCT Coal Chain Infrastructure.

**Prospective Members** has the meaning set out in clause 5.2.

**Rail Infrastructure** has the meaning given to it in Aurizon Network's 2010 Access Undertaking.

**Rail Operator** means the accredited railway operator that is contracted by a Producer, or who contracts directly with Aurizon Network, to operate train services using the DBCT Coal Chain Infrastructure on behalf of that Producer.

**Recipient** has the meaning set out in clause 14.1.

**Requested Coal Throughput** has the meaning set out in clause 9.3(a).

**RTCA** means Rio Tinto Coal Australia Pty Ltd.

**Scheduling Coordinator** has the meaning set out in clause 10.1.

**Scheduling Functions** has the meaning set out in clause 10.2.

**Scheduling Representative** has the meaning set out in Schedule 6.

**Sunset Date** has the meaning set out in clause 2.2(a).

**Super-Majority Decision** means the following decisions or resolutions made by the Management Committee:

- (a) any decision to suspend or terminate DCCC membership of any Member;
- (b) any decision to appoint, suspend, or remove the Scheduling Coordinator;
- (c) any decision to vary the Objectives of this Charter; and
- (d) any other decisions that are expressed in this Charter to be “Super-Majority Decisions”.

**Terminal Regulations** means the Terminal Regulations applying in respect of DBCT from time to time.

**Train Path** means a Train Service Entitlement granted by Aurizon Network and held or controlled by a Producer and/or Rail Operator.

**Train Service Entitlement (or TSE)** has the meaning given to that term in Aurizon Network’s 2010 Access Undertaking.

**Weekly Indicative Plan** has the meaning set out in clause 10.1(a)(i).

**Year** means the calendar year period from 1 January to 31 December.

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## 2 Interpretation

In this Charter the following rules of interpretation apply unless the contrary intention appears:

- (a) headings are for convenience only and do not affect the interpretation of this Charter;
- (b) the singular includes the plural and vice versa;
- (c) words that are gender neutral or gender specific include each gender;
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (e) the words 'such as', 'including', 'particularly' and similar expressions are not used as, nor are intended to be, interpreted as words of limitation;
- (f) a reference to:
  - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
  - (ii) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (iii) a party includes its successors and permitted assigns;
  - (iv) a document includes all amendments or supplements to that document;

- (v) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this Charter;
  - (vi) this Charter includes all schedules and attachments to it;
  - (vii) an agreement other than this Charter includes an undertaking, or legally enforceable arrangement or understanding, whether or not in writing; and
  - (viii) a monetary amount is in Australian dollars;
- (g) an agreement on the part of two or more persons binds them severally;
  - (h) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day;
  - (i) in determining the time of day, where relevant to this Charter, the relevant time of day is:
    - (i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located; or
    - (ii) for any other purpose under this Charter, the time of day in the place where the party required to perform an obligation is located; and
  - (j) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Charter or any part of it.

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## Schedule 2 Member details and Nominated Coal Throughput

### PART A – Member details and Nominated Coal Throughput

The following table documents each Member’s details, including the Member’s Nominated Coal Throughput and Annualised Nominated Coal Throughput, as defined as follows:

$$\text{“Annualised Nominated Coal Throughput” or “Annualised NCT”} = \text{NCT} \times 12$$

Where:

$$\text{Nominated Coal Throughput or “NCT”} = \frac{\text{Nominated TSE (monthly)} \times \text{Nominal Payload}}{2}$$

$$\text{Nominal Payload} = 10,020 \text{ tonne}$$

**Nominated TSE (monthly)** means the number of monthly TSE nominated by a Member (or potential Member) to be scheduled under this Charter. The maximum number of monthly TSEs for a Member will typically be the “Monthly Train Service Levels” set out under a relevant Access Agreement with Aurizon Network.

For the purpose of this Charter, a Rail Operator Member is taken to have Annualised Nominated Coal Throughput, Nominated Coal Throughput and Nominated TSE (monthly) equivalent to the throughput associated with all haulage contract(s) that it holds or controls relating to Producer Members’ Annualised Nominated Coal Throughput, Nominated Coal Throughput or Nominated TSE (monthly), respectively. For example, where Producer Member A and Producer Member B hold an Annualised NCT of 10Mtpa each, and both use the same Rail Operator in respect of all of that tonnage, the relevant Rail Operator Member would have an Annualised NCT of 20Mtpa.

Member details

| Name of Member                   | ACN (if applicable) | Address, email and fax number  | Membership type | Mine(s)          | Year 1       |                         | Year 2       |                         | Management Committee Representative | Joint Scheduling Group Representative |
|----------------------------------|---------------------|--|-----------------|------------------|--------------|-------------------------|--------------|-------------------------|-------------------------------------|---------------------------------------|
|                                  |                     |  |                 |                  | NCT (tonnes) | Annualised NCT (tonnes) | NCT (tonnes) | Annualised NCT (tonnes) |                                     |                                       |
| Rio Tinto Coal Australia Pty Ltd | 010 542 140         | 123 Albert Street<br>Brisbane Qld 4000<br><br><a href="mailto:Xiaofan.zhuang@riotinto.com">Xiaofan.zhuang@riotinto.com</a><br><a href="mailto:lan.gibbons@riotinto.com">lan.gibbons@riotinto.com</a><br><br>Fax: 07 3625 3001            | Producer        | ██████           | ██████       | ██████                  | ██████       | ██████                  | ██████<br>██████                    | ██████                                |
| Peabody Energy Australia Pty Ltd | 096 909 410         | Level 13, BOQ Building<br>259 Queen Street<br>Brisbane, Qld 4000<br><br><a href="mailto:MSmith2@peabodyenergy.com">MSmith2@peabodyenergy.com</a><br><a href="mailto:PDunn@peabodyenergy.com">PDunn@peabodyenergy.com</a><br><br>Fax: TBA | Producer        | ██████<br>██████ | ██████       | ██████                  | ██████       | ██████                  | ██████                              | ██████                                |
| Pacific National (QLD) Pty Ltd   | 107 180 183         | Level 6, 15 Blue Street<br>North Sydney NSW 2060<br><br><a href="mailto:Chris_wicks@pacificnational.com.au">Chris_wicks@pacificnational.com.au</a><br><br>Fax: 07 3002 3777  | Rail Operator   | █                | ██████       | ██████                  | ██████       | ██████                  | ██████                              | ██████<br>██████                      |



**A Producer Member (including if this Member is also a Rail Operator Member) must:**

- (a) control an operating mine that utilises the DBCT Coal Chain Infrastructure;
- (b) hold or control Nominated Coal Throughput that can be scheduled by the Scheduling Coordinator in a manner consistent with the Charter;
- (c) hold or control sufficient below rail and port capacity entitlements on the DBCT Coal Chain Infrastructure to meet its Nominated Coal Throughput requirements;
- (d) if the Producer Member is a haulage customer of a Rail Operator Member or Members, the Producer Member's Nominated Coal Throughput must include 100% of its contracted entitlements with that Rail Operator Member or Members; and
- (e) not have resigned as a Member, or had its membership to the DCCC terminated, within the previous 6 months, assessed at the time of application.

**A Rail Operator Member must:**

- (a) have in place a current haulage agreement with at least one Producer Member for the provision of haulage services utilising the DBCT Coal Chain Infrastructure; and
- (b) not have resigned as a Member, or had its membership to the DCCC terminated, within the previous 6 months, assessed at the time of application.

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## Schedule 4 Confidentiality Covenants

**Confidentiality Deed Poll** made on the                      day of                      [month / year]

**By:**                      [Insert name of Scheduling Coordinator] (ACN [#]) of [insert address] (**Scheduling Coordinator**)

**In favour of:**                      The Members of the DCCC (Members)

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### Background

- A. Under the terms of the Dalrymple Bay Coal Chain Coordinator Members' Agreement and Charter (**Charter**), the Members have agreed to establish the DCCC and work together to achieve the Objectives.
- B. The Scheduling Coordinator has been appointed to assist the Members in achieving the Objectives. Details of the role and function of the Scheduling Coordinator are set out in clause [10] of the Charter.
- C. In order to properly carry out its role and functions, the Scheduling Coordinator required access to certain Confidential Information of the Members, and for that purpose:
  - a. each Member has agreed to provide the Scheduling Coordinator with certain Confidential Information in accordance with the terms of the Charter; and
  - b. the Scheduling Coordinator has agreed to protect the use and disclosure of that Confidential Information on the terms of this Deed Poll.

### NOW IT IS AGREED AS FOLLOWS

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## 1 Definitions and Interpretation

### 1.1 Definitions

In this Deed Poll capitalised words have the same meaning as in the Charter. In addition, the following terms have the following meanings:

**Confidential Information** means any information of a Member which:

- (a) is confidential or can reasonably be inferred to be confidential from the circumstances in which it is disclosed; and
- (b) is disclosed to or observed by the Scheduling Coordinator in connection with the activities of the DCCC,

and all notes, compilations, analyses, extracts, summaries and other records prepared by or for the Scheduling Coordinator based on or incorporating that information, but does not include information which:

- (c) is in or comes into the public domain, other than through breach of this Deed Poll or the Charter;

- (d) at the time of first disclosure to or observation by the Scheduling Coordinator, was already in its lawful possession (except where the Scheduling Coordinator has knowledge that it received that information from a third person in breach of a duty of confidence owed (directly or indirectly) by that third person to the disclosing Member); or
- (e) is disclosed to or observed by the Scheduling Coordinator from a third party (other than an Associate of a relevant Member) entitled to disclose it.

**Purpose** means the purpose of properly carrying out the role and functions of the Scheduling Coordinator, as set out in clauses [10.1 and 10.2] of the Charter.

## 1.2 Interpretation

In this Deed Poll, unless the context requires otherwise:

- (a) headings are for convenience only and do not affect the interpretation of this Deed Poll;
- (b) the singular includes the plural and vice versa;
- (c) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (d) the words 'such as', 'including', 'particularly' and similar expressions are not used as, nor are intended to be, interpreted as words of limitation; and
- (e) a reference to:
  - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a document includes all amendments or supplements to that document.

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## 2 Scheduling Coordinator's obligations

### 2.1 Undertakings

The Scheduling Coordinator undertakes and covenants to at all times, and will procure that its directors, employees, consultants and contractors also:

- (a) use the Confidential Information only for the Purpose;
- (b) keep confidential and not permit or allow any act or omission whereby any Confidential Information may be ascertained or used by, or disclosed or communicated to, any other person except in accordance with the relevant terms of the Charter and this Deed Poll;
- (c) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access, use, copying or disclosure;
- (d) immediately notify each relevant Member of any potential, suspected, or actual unauthorised use, copying or disclosure of their Confidential Information; and

- (e) be prepared to deliver up to each relevant Member, or delete, all of that Member's Confidential Information and copies in the Scheduling Coordinator's possession, custody or control, on request by that Member at the conclusion of the Scheduling Coordinator appointment excluding the Scheduling Coordinator's internal working papers, files and internal documents created or brought into existence for the Purpose or those in existence prior to the date of this Deed Poll.

## **2.2 Security**

The Scheduling Coordinator must, at its own cost, establish and maintain effective security measures to safeguard Confidential Information from unauthorised access or use.

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## **3 Term**

The Scheduling Coordinator acknowledges and agrees that it is bound by these obligations in relation to the Members' Confidential Information from the date on which the Scheduling Coordinator has been appointed under clause 10.1 of the Charter until five (5) years after the Confidential Information is returned or deleted under clause 2.1(e).

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## **4 Disclosures**

### **4.1 Representations**

The Scheduling Coordinator acknowledges:

- (a) that the Members have made no implied representation or warranties:
  - (i) as to the accuracy, content, legality or completeness of their Confidential Information; or
  - (ii) that their Confidential Information does not infringe the Intellectual Property Rights or any other rights of any third party; and
- (b) that the Scheduling Coordinator has no claim against the Members or any of them in relation to the accuracy or completeness of any information disclosed by them to the Scheduling Coordinator.

### **4.2 Scheduling Coordinator's disclaimer**

The Scheduling Coordinator acknowledges:

- (a) that it must make its own assessment of the information disclosed by the Members or all or any of them and must satisfy itself as to the accuracy, content, legality and completeness of their Confidential Information; and
- (b) that subject to any Law to the contrary, and to the maximum extent permitted by Law, the Members have disclaimed all liability for any loss or damage (whether foreseeable or not) suffered by the Scheduling Coordinator using, disclosing or acting on information disclosed to the Scheduling Coordinator whether the loss or damage arises in connection with any negligence, default, or lack of care on the part of the Members or any or all of them.

### 4.3 Right to injunctive relief

The Scheduling Coordinator acknowledges that if it breaches its obligations under this Deed Poll:

- (a) monetary damages may not be a sufficient remedy; and
- (b) the Members or any of them will be entitled, without limiting any of its other rights or remedies, to injunctive or equitable relief to deal with the breach.

### 4.4 Indemnity

- (a) Subject to clauses 4.4(b), the Scheduling Coordinator indemnifies the Members against all liability or loss arising directly from, and any costs, charges and expenses incurred in connection with:
  - (i) any breach of this Deed Poll by the Scheduling Coordinator; and
  - (ii) the Scheduling Coordinator's acts or omissions which, if done or omitted to be done by the Scheduling Coordinator would be a breach of its obligations under this Deed Poll.
- (b) To the extent permitted by Law, the Scheduling Coordinator's liability under or arising from or in connection with this Deed Poll including the indemnity given in clause 4.4(a) will be limited for any liability of any kind arising, to the greater of:
  - (i) 1 times the value of the fees charged by the Scheduling Coordinator to the relevant Member in connection with the Purpose; and
  - (ii) the amount of \$[#],

per event or series of related events, provided that the provisions of this clause 4.4(b) will not apply to any liability caused by the fraud or reckless or wilful misconduct of the Scheduling Coordinator.

### 4.5 Release

The Scheduling Coordinator will not bring or institute any claim in contract, in tort, for breach of statutory duty or otherwise against the Members or any of them in respect of the Confidential Information.

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## 5 General

### 5.1 Deed Poll

This document is a Deed Poll. Each of the Members can enforce it even though it is not a party to this Deed Poll but only in respect of their own Confidential Information.

### 5.2 Waiver

- (a) No waiver of a right or remedy under this Deed Poll is effective unless it is in writing and signed by a relevant Member. It is only effective in the specific instance and for the specific purpose for which it is granted.
- (b) A single or partial exercise of a right or remedy under this Deed Poll does not prevent a further exercise of that or of any other right or remedy.

- (c) Failure to exercise or delay in exercising a right or remedy under this Deed Poll does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

**5.3 Assignment**

The Members are prohibited from transferring or otherwise assigning their respective rights or obligations under this Deed Poll.

**5.4 Severability**

Any term of this Deed Poll which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this Deed Poll is not affected.

**5.5 Governing law**

This Deed Poll is governed by the laws of Queensland and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Queensland.

**EXECUTED as a Deed Poll:**

Signed and delivered by [*Scheduling* )  
*Coordinator*] in accordance with )  
section 127 of the *Corporations Act 2001* (Cth) )  
by: )

\_\_\_\_\_  
Print name of Director

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Print name of Director or Secretary

\_\_\_\_\_  
Signature of Director or Secretary

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## Schedule 5 Management Committee Governance Principles

Activities and meetings of the Management Committee will be carried out in accordance with the principles below.

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### 1 Composition of the Management Committee

- (a) Subject to clause 1(b), the Management Committee will consist of 1 executive level representative appointed on behalf of each Member (**Management Committee Representative**), as notified in writing by that Member to all other Members.
- (b) A Member will only be entitled to appoint a Management Committee Representative, and to otherwise participate in Management Committee meetings under this Schedule 5, if that Member's Annualised Nominated Coal Throughput is not less than 2 Million tonnes per annum (Mtpa) on a rolling two-year basis.
- (c) For the purposes of clause 1(a) above, and in relation to any Management Committee Representative within the Management Committee:
  - (i) if any two or more Members are Associates, then those Members may only appoint a single Management Committee Representative between them;
  - (ii) any new Member may, for the first three months after becoming a Member, attend Management Committee meetings but shall not have a vote in those meetings.
- (d) For the purposes of clause 1(c)(i) above, two Members are **Associates** if:
  - (i) they are Related Bodies Corporate, as defined in the *Corporations Act 2001 (Cth)*;
  - (ii) one Member Controls the other Member, or both Members are under the Control of the same third party entity;
  - (iii) one Member has, or an Associate of the Member has, an equity holding of 20% or more in the other Member;
  - (iv) the Member is a joint venture or partnership in which the other Member or an Associate of the other Member has a majority holding, or is the operator or manager or managing partner;
  - (v) the Member is a trust of which the other Member, or an Associate of the other Member, is the trustee, responsible entity or manager, or of which the other Member is the beneficiary;
  - (vi) the Member is acting as the agent or representative of the other Member or its Associate in relation to the subject matter of this Charter (excluding any such arrangement created in accordance with this Charter); or
  - (vii) the Member would be the Associate of the other Member in accordance with this definition, if this definition is applied to the other Member.

In clauses 5.5(ii) to 5.5(vi) inclusive of this definition, Associate and Control has the meaning given to those terms in the *Corporations Act 2001 (Cth)*.

- (e) At the Effective Date, the Management Committee Representatives are as set out in Schedule 2 (Members Details and Nominated Coal Throughput).
- (f) Each Member may at any time, by written notice to all other Members, replace its Management Committee Representative or appoint an alternate representative to attend any meeting of the Management Committee.
- (g) At the first meeting of the Management Committee and at the first meeting following each anniversary of this Charter (calculated from the Effective Date), the Management Committee must appoint:
  - (i) a chair (from among the Management Committee Representatives) who will preside over each meeting of the Management Committee (**Chair**); and
  - (ii) a secretary (who need not be a Management Committee Representative) who will prepare the agenda for meetings, keep proper minutes of meetings and coordinate communication among Management Committee Representatives.

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## 2 Meetings of the Management Committee

- (a) The first meeting of the Management Committee will be held at 123 Albert Street, Brisbane at a date to be agreed, during which meeting, among other things, the Management Committee will set a timetable for future meetings, including the time, date and location of those meetings.
- (b) The Management Committee will meet at least once each calendar month. In addition:
  - (i) a Management Committee Representative may, by not less than 5 Business Days' notice in writing to the other Management Committee Representatives, summon a meeting of the Management Committee; and
  - (ii) the Management Committee must convene in accordance with the terms of the Charter to consider any Dispute Notice.
- (c) The Management Committee must meet either in person (at a location agreed by the Management Committee or, failing agreement, at a location set by the Chair) or by telephone or by such other means of electronic communication by which all persons participating in the meeting are able to hear the entire meeting and be heard by all other persons attending the meeting, in each case as the Management Committee determines (and, for the purposes of clauses 5(e) and 5(d) of this Schedule 5 only, this shall constitute being "present" at a meeting of the Management Committee).
- (d) All notices of meeting must be accompanied by an agenda for the meeting.
- (e) Each Member may, acting reasonably and at its own cost, have advisers or observers present at each meeting of the Management Committee in addition to its Management Committee Representative.
- (f) The Management Committee will procure that the secretary:
  - (i) prepares and keeps minutes of each meeting of the Management Committee; and



- (ii) gives a copy of the minutes to each Management Committee Representative as soon as practicable after the conclusion of each meeting.
  - (g) The minutes of each meeting must be submitted for approval at the next meeting of the Management Committee and, if approved by the Management Committee Representatives, must be signed by the Chair of that meeting and when signed, are sufficient evidence, unless the contrary is proved, of the proceedings and decisions of the meeting to which they relate.
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### 3 Quorum

- (a) The quorum for any meeting of the Management Committee will be 50% of the Members.
  - (b) If a quorum is not present within 45 minutes after the time appointed for the commencement of a meeting of the Management Committee, that meeting must be adjourned (unless otherwise agreed in writing by all Management Committee Representatives).
  - (c) If a quorum is not present at a reconvened meeting then, provided that:
    - (i) the reconvened meeting is conducted as a personal meeting (not by video or telephone meeting);
    - (ii) the Chair is present; and
    - (iii) all Management Committee Representatives were given at least 7 days' notice of the reconvened meeting,the Management Committee Representatives present at the reconvened meeting are deemed to constitute a quorum for the purposes of the business before that meeting.
  - (d) If, despite the above, a quorum is not present within 45 minutes after the time appointed for the meeting, the meeting is dissolved.
- 

### 4 Conduct of meetings

- (a) The Chair, acting reasonably and in the interests of all Members, is responsible for the general conduct of the meeting and for the procedures to be adopted at the meeting.
- (b) If the Chair is not present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act, the Management Committee Representatives present at the meeting may elect another Management Committee Representative to chair the meeting.
- (c) The Chair may at any time he or she considers it necessary or desirable for the proper and orderly conduct of the meeting:
  - (i) terminate debate or discussion on any business, question, motion or resolution being considered by the meeting and require the business, question, motion or resolution to be put to a vote of the Management Committee Representatives present; or

- (ii) allow debate or discussion on any business, question, motion or resolution being considered by the meeting to continue.
- (d) A decision by the Chair under clauses 4(a) or 4(c) of this Schedule 5 is final.
- (e) The Management Committee may determine during the course of a meeting to adjourn the meeting or any business, motion, question or resolution being considered or remaining to be considered by the meeting either to a later time at the same meeting or to an adjourned meeting.
- (f) Notice of an adjournment and the business to be transacted at an adjourned meeting must be given to all persons who were entitled to receive notice of the meeting the subject of the adjournment.

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## 5 Voting and decision making

- (a) Management Committee Representatives (and alternate representatives) have full power and authority to represent and bind their appointors in all matters decided by the Management Committee within the scope of its functions.
- (b) On any resolution or decision at any meeting of the Management Committee, subject at all times to the “stand down” period for new Members set out in clause 1(b)(ii) above, a Management Committee Representative may cast 1 (one) vote.
- (c) Subject to clause 5(f) below, all decisions of the Management Committee will be determined in accordance with clauses 5(d) and 5(e), as applicable.
- (d) Unless a decision or determination is expressed to be a Super-Majority Decision or to require unanimous agreement, all decisions or determinations made by Members under this Charter will be taken to be agreed where more than 50% of the votes of Management Committee Representatives present and entitled to vote on the matter support the decision or determination.
- (e) Super-Majority Decisions require the support of 75% or more of the votes of all Management Committee Representatives present and entitled to vote on the matter.
- (f) A resolution in writing (which may consist of one or several documents in the same terms executed in counterpart) signed by the requisite number of Management Committee Representatives required for the decision as contemplated by clause (d) or (e), as applicable, will be as valid as if it had been passed at a duly convened meeting of the Management Committee (and the requirement to be “present” under (d) and (e) above for a vote of the Management Committee shall be construed accordingly).
- (g) All duly passed resolutions of the Management Committee within the scope of its functions are contractually binding on each Member, and all Members must do all things to ensure the resolutions of the Management Committee are implemented.

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## Schedule 6 Joint Scheduling Group

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### 1 Composition of the Joint Scheduling Group

- (a) The Joint Scheduling Group will consist of 1 representative appointed on behalf of each Member (**Scheduling Representative**), as notified in writing by that Member to all other Members.
- (b) For the purposes of clause 1(a) above, and in relation to any Member participation within the Joint Scheduling Group, if any two or more Members are Associates, then those Members may only appoint a single Scheduling Representative between them.
- (c) Each Member may at any time, by written notice to all other Members, replace its Scheduling Representative or appoint an alternate representative to attend any meeting of the Joint Scheduling Group.

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### 2 Governance arrangements

#### 2.1 Meetings of the Joint Scheduling Group

- (a) The Joint Scheduling Group will meet daily, or as otherwise convened by the Scheduling Coordinator.
- (b) The Joint Scheduling Group will meet either in person or by telephone or by such other means of electronic communication by which all persons participating in the meeting are able to hear the entire meeting and be heard by all other persons attending the meeting, in each case as the Scheduling Coordinator determines.
- (c) The Scheduling Coordinator will have the role of planning and managing all meetings of the Joint Scheduling Group.

#### 2.2 Decision making

- (a) The Scheduling Coordinator has the power to make decisions in respect of the scheduling of each Member's Requested Coal Throughput, in relation to:
  - (i) the preparation of the Weekly Indicative Plan; and
  - (ii) managing to the Optimised Weekly Plan,in accordance with clauses 9.3 and 10 of the Charter.
- (a) In preparing any plans or undertaking any other activities under this Schedule 6, the Scheduling Coordinator and Joint Scheduling Group must follow any directions given from time to time by the Management Committee.

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### 3 Information inputs to Weekly Indicative Plan

- (a) The Joint Scheduling Group will meet at least weekly to provide information to the Scheduling Coordinator required for the preparation of the Weekly Indicative Plan.

- (b) The information supplied by the Scheduling Representatives for the purposes of clause (a) above may include:
  - (i) 3-4 month production forecasts;
  - (ii) historical performance against the Weekly Indicative Plan;
  - (iii) the most current “21 day plan” produced by the DBCT Operator;
  - (iv) site issues around projected production, stocks and off-take;
  - (v) shipping and co-shipper issues;
  - (vi) system and site outages;
  - (vii) rail fleet availability;
  - (viii) track access availability; and
  - (ix) details of below rail and port access agreements.
- (c) As part of the development of the Weekly Indicative Plan, or as otherwise identified by Members from time to time (including as part of the Medium term review under clause 5), Members will cooperate to seek to identify and give effect to any operational or other arrangements that are likely to promote the Objectives, including (without limitation):
  - (i) coordinating coal availability, including the timing of actual or anticipated production, over the short to medium term, where this is intended to reduce scheduling conflicts, congestion or otherwise maximise throughput;
  - (ii) identifying any joint or coordinated shipping arrangements that may (if accepted by the DBCT Operator) assist the efficient operation of other DBCT Coal Chain Infrastructure; and
  - (iii) coordinating management of stock piles, load-out equipment or other infrastructure or equipment.

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## 4 Process for determining Weekly Indicative Plan

### 4.1 Meetings convened by the Scheduling Coordinator

The Scheduling Coordinator will convene meetings of the Joint Scheduling Group as required in order for it to adequately prepare the Weekly Indicative Plan, comply with planning requirements in relation to that plan and to respond to scheduling or other issues associated with the DBCT Coal Chain Infrastructure (including the Optimised Weekly Plan), as they arise.

### 4.2 Development Weekly Indicative Plan - Friday

- (a) On the first day (Friday) of each planning week, the Joint Scheduling Group will meet to identify the Requested Coal Throughput of Members.
- (b) The Scheduling Coordinator, having duly considered the Requested Coal Throughput of each Member, must set a Weekly Indicative Plan.

*Example: A Weekly Indicative Plan developed by the Scheduling Coordinator following the meeting of the Joint Scheduling Group on Friday 4 October, then further developed and refined during the period Friday 4 October – Friday 11 October, will apply in respect of the week commencing Monday 14 October.*

#### **4.3 Conflict escalation and resolution by the Management Committee**

- (a) The Scheduling Coordinator will determine any issues, conflicts or disputes between Scheduling Representatives regarding the Weekly Indicative Plan and managing to the Optimised Weekly Plan, applying the DCCC Scheduling Principles.
- (b) A Scheduling Representative may escalate any issue, conflict or dispute in respect of the Weekly Indicative Plan and/or the Optimised Weekly Plan to the Management Committee for consideration and resolution, however (unless the Management Committee directs otherwise) such resolution will apply only to future Weekly Indicative Plans and not the Weekly Indicative Plan which is then being developed (it being acknowledged that there is unlikely to be sufficient time to resolve disputes in time for the next Optimised Weekly Plan).

#### **4.4 Submitting the Weekly Indicative Plan – Tuesday**

On Tuesday of each planning week, the Scheduling Coordinator will consult with the DBCT Operator in relation to the Weekly Indicative Plan.

#### **4.5 Consultation and finalisation of the Port Request and Optimised Weekly Plan – Wednesday to Friday**

- (a) In the period from Wednesday to Friday during each planning week, the Scheduling Coordinator will, for and on behalf of the Members, liaise with the DBCT Operator and Aurizon Network as required in order to finalise and settle the Port Request, taking into account the information and objectives provided by the Joint Scheduling Group (including the Requested Coal Throughput).
- (b) The Members agree that, and the Scheduling Coordinator must notify Aurizon Network that, the Scheduling Coordinator has the authority to manage and resolve any contested scheduling matters between Members.
- (c) It is acknowledged that:
  - (i) the DBCT Operator will use the finalised Port Request as the basis for a rail order placed with Aurizon Network;
  - (ii) Aurizon Network will finalise the applicable Optimised Weekly Plan; and
  - (iii) notwithstanding any Weekly Indicative Plan or submitted Port Request, Aurizon Network has the final say regarding the DBCT Coal Chain Infrastructure rail schedule.

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## **5 Medium term review**

- (a) The Joint Scheduling Group will meet at least monthly to collate monthly information in order to review the ability of the DCCC to fulfil the Objectives.
- (b) Information supplied to this meeting for the purposes of clause (a) may include:

- (i) forecast monthly production, stocks, raiing and sales;
  - (ii) shipping/co-shipper information;
  - (iii) shipping and co-shipper issues where possible;
  - (iv) system & site outages;
  - (v) rail fleet availability;
  - (vi) track access availability; and
  - (vii) recent and forecast system performance.
- 

## **6 Metrics and reporting**

The Joint Scheduling Group will develop and agree, in consultation with the Management Committee, the key metrics, format and timing of performance reports and strategic review reporting to be produced by the Scheduling Coordinator (or individual Members) under this Charter. In developing these reports the Management Committee will consider the time and materials impost on the Scheduling Coordinator (or individual Member) and the cost to deliver them.



- (c) Capitalised terms, unless otherwise defined, have the meaning given in the Members' Charter.
- (d) This Deed shall be governed and construed in accordance with the laws of the State of Queensland.

***EXECUTED as a Deed Poll***



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## Execution page

Executed as an agreement

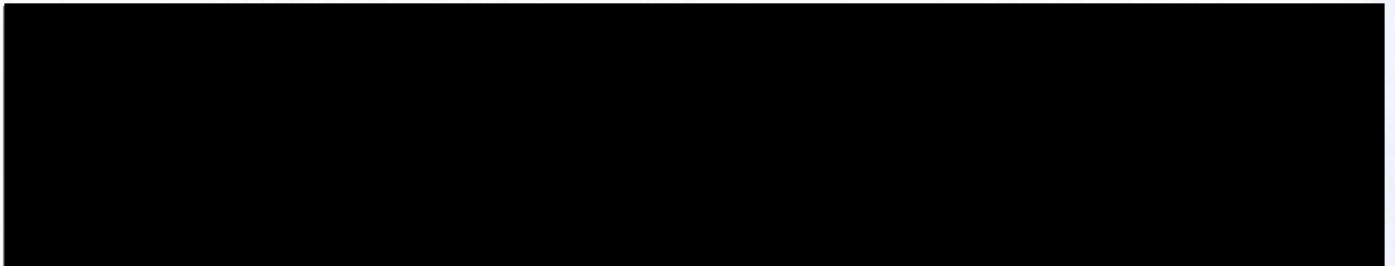
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Executed by **Rio Tinto Coal Australia Pty Ltd** by its duly authorised representative:



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Executed by **Peabody Energy Australia Pty Ltd** by its duly authorised representative:



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Executed for and on behalf of **Pacific National Pty Ltd** ACN 098 060 550 by its attorney under the power of attorney dated in the presence of:

