



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

the RG Tanna Coal Export Terminal Producers

in respect of

collective negotiations with
Gladstone Ports Corporation Limited in relation to
coal handling and port services agreements

Date: 6 March 2014

Authorisation number: A91405

Commissioners:
Sims
Rickard
Schaper
Court
Walker

Summary

The ACCC proposes to grant authorisation for 15 years to the RG Tanna Coal Export Terminal Producers to enable collective negotiations with Gladstone Ports Corporation Limited in relation to the terms and conditions of coal handling agreements and port services agreements.

The ACCC has varied the existing interim authorisation to allow the Applicants to collectively negotiate with GPC and enter into agreements, provided however that the Applicants do not give effect to any such agreement.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

On 10 January 2014 Anglo American Australia Limited, BHP Billiton Mitsubishi Alliance, Cockatoo Coal Limited, Glencore Coal Investments Australia Pty Limited, Idemitsu Australia Resources Pty Ltd, Jellinbah Resources Pty Ltd, Rio Tinto Coal Australia Pty Ltd, Sojitz Coal Mining Pty Ltd, Wesfarmers Resources Ltd and Yancoal Australia Ltd (**the Applicants**) lodged an application for authorisation (A91405) with the ACCC. The Applicants are seeking authorisation to collectively negotiate with Gladstone Ports Corporation Limited (**GPC**) in respect of coal handling and port services agreements.

The Applicants are coal producers that hold mining leases and/or exploration licences for the Bowen Basin. The Applicants use the RG Tanna and Barney Point coal export terminals and channel infrastructure at the Port of Gladstone, Queensland, to export their coal to overseas customers. The application to collectively bargain is in response to GPC renegotiating agreements with the Applicants regarding the Port of Gladstone. GPC has already commenced the negotiation process and supports the collective bargaining arrangement proposed by the Applicants.

The ACCC considers that the proposed collective negotiations are likely to result in public benefits, including through reduced transactions costs and increased input into contracts. The ACCC considers that detriment is unlikely to result from collective negotiations due to the voluntary nature of collective negotiations and the absence of boycott activity.

The ACCC is satisfied that the likely public benefits will outweigh the likely detriments from the proposed arrangement, and therefore proposes to grant authorisation for 15 years, as requested by the Applicants.

The application for authorisation

1. On 10 January 2014 the RG Tanna Coal Export Terminal Producers lodged an application (A91405) with the ACCC seeking authorisation for the proposed collective bargaining conduct described below. The RG Tanna Coal Export Terminal Producers also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC is considering the substantive application.
2. The RG Tanna Coal Export Terminal Producers are Anglo American Australia Limited, BHP Billiton Mitsubishi Alliance, Cockatoo Coal Limited, Glencore Coal Investments Australia Pty Limited, Idemitsu Australia Resources Pty Ltd, Jellinbah Resources Pty Ltd, Rio Tinto Coal Australia Pty Ltd, Sojitz Coal Mining Pty Ltd, Wesfarmers Resources Ltd and Yancoal Australia Ltd (**the Applicants**).
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (**the Act**). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.¹

The conduct

4. The Applicants have applied for authorisation to:
 - collectively discuss and negotiate with Gladstone Ports Corporation Limited (**GPC**) the terms and conditions, including price, of coal handling agreements and port services agreements (**the Agreements**) which relate to the RG Tanna and Barney Point coal export terminals (**the Terminals**), the shipping channels and associated infrastructure at the Port of Gladstone and any facilities owned by GPC which are necessary for GPC to operate and manage the Port of Gladstone (including the construction of additional channels and facilities) (**Channel Infrastructure**) and associated matters concerning the efficient operation and maintenance of the Channel Infrastructure, including how financial commitments and related contributions to the provision of those activities by GPC are costed and will be funded by the Applicants
 - enter into and give effect to contracts, arrangements or understandings regarding the Agreements with GPC (or any future owner or operator of the Channel Infrastructure) containing common terms and conditions, including price, which relate to the Terminals, the Channel Infrastructure and associated matters concerning the efficient operation and maintenance of the Channel Infrastructure
 - discuss matters relating to the above discussions and negotiations amongst themselves.

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

5. The Applicants submit that GPC is proposing to restructure the contractual arrangements and terms covering coal handling at the Terminals and access to the Channel Infrastructure (including how these services will be costed and provided). The Applicants submit that GPC hopes to establish uniformity between each of the Applicants and therefore greater certainty with respect to port users' contributions to maintenance activities and any future capital works.
6. The Agreements will be entered into by the Applicants individually and each Applicant remains free to pursue independent negotiations with GPC on any matter.
7. The Applicants are seeking authorisation for a 15 year period.

Interim authorisation

8. At the time of lodging the application, the Applicants requested interim authorisation in order to commence meaningful negotiations as soon as possible.
9. The ACCC granted interim authorisation under subsection 91(2) of the Act on 6 February 2014 to enable the Applicants to commence collective negotiations with GPC in relation to the terms and conditions of the Agreements. Interim authorisation did not extend to the making of, or giving effect to, any agreements.
10. The Applicants have requested that the interim authorisation be extended to enable them to also enter into agreements, subject to a condition precedent such that the agreements will not come into force unless and until final authorisation is granted by the ACCC.

Background²

Port of Gladstone

11. The Port of Gladstone, located 525km north of Brisbane, is the largest multi-commodity port in Queensland. It is well positioned for exporting coal from the Central Queensland and Bowen Basin with coal representing around 67% of the Port's total export. The Port is Australia's third largest coal export port (handling 20% of coal exports) and Queensland's second largest coal export port (accounting for 33% of coal exports).
12. The RG Tanna Coal Terminal is located to the northwest of Gladstone. It is the world's fourth largest coal export terminal by throughput with a throughput capacity of approximately 75Mtpa, and handles coal from at least ten mines in Central Queensland.
13. The Barney Point Coal Terminal is located to the east of Gladstone and ships coal from at least ten mines in Central Queensland. It has a throughput capacity of 8Mtpa.
14. Current developments at the Port of Gladstone relating to the Wiggins Island Coal Export Terminal (**WICET**) and LNG export terminals (discussed below) are expected to significantly increase port traffic. To accommodate this increased

² Information in this section has been taken from the Applicants' submission in support of the application for authorisation A91405.

traffic, GPC has proposed new contractual arrangements and terms covering coal handling at the Terminals and access to the Port's Channel Infrastructure.

15. WICET is a project located at Golding Point to the west of the existing Terminals with a future capacity of 84Mtpa. WICET has been designed to meet Gladstone's need for additional capacity to accommodate for the expansion of coal mining operations in the Surat Basin, Bowen Basin and Central Queensland. The project also requires shipping channels and wharves to accommodate a range of vessel sizes.
16. The WICET development and the construction of multiple LNG export terminals on Curtis Island are expected to significantly increase Port of Gladstone traffic beginning 2014-15.
17. GPC commenced increased dredging activities in May 2011. The dredging project increases port access by deepening, widening and creating new shipping channels and swing basins, required for vessels seeking access to load and export coal at WICET and the LNG export terminals.

Gladstone Ports Corporation Limited

18. GPC is the appointed port authority for the Port of Gladstone, the Port of Bundaberg and the Port of Rockhampton. GPC owns and controls the Port of Gladstone, including around 4,321ha of land around the port. GPC is a government owned corporation, wholly owned by the State of Queensland. On 20 December 2013 the Queensland Government announced the appointment of JP Morgan to undertake a scoping study of the sale of Gladstone Port.³
19. The functions of GPC at the Port of Gladstone include:
 - establishing, managing and operating effective and efficient port facilities and port services
 - providing other services incidental to the performance of its other functions or likely to enhance the usage of the port, and
 - providing port services (including services relating to the establishment, operation or administration of ports and dredging services), whether inside or outside the port.

The Applicants

20. The Applicants are ten coal producers that hold mining leases and/or exploration licences for the Bowen Basin. The Applicants use the Terminals at the Port of Gladstone to export their coal to overseas customers.
21. Information about the Applicants is at Attachment A.
22. The Applicants have requested that any authorisation granted be expressed to apply to the Applicants' related parties and successors and any additional coal producers who wish to use the Terminals in the future.

³ Queensland Government, the Queensland Cabinet and Ministerial Directory website: <http://statements.qld.gov.au/Statement/2013/12/20/advisors-named-for-scoping-studies>, visited 5 March 2014.

Submissions received by the ACCC

23. The ACCC tests the claims made by the Applicant in support of an application for authorisation through an open and transparent public consultation process.
24. The ACCC sought submissions from 20 interested parties potentially affected by this application, including competitors, the target and government departments.
25. The Applicants submit that the proposed arrangement is likely to result in the following benefits for all participants, including GPC: significantly lower transaction costs; a shorter negotiation period; and certainty and reduced volatility for GPC and the Applicants regarding the operation and maintenance of the Terminals and the Channel Infrastructure. The Applicants claim that there is minimal anticompetitive detriment from the collective negotiation.
26. The ACCC received a public submission from GPC supporting the application and the request for interim authorisation.
27. No other submissions were received from interested parties.
28. The views of the Applicants and interested parties are considered in the evaluation chapter of this draft determination. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

29. The ACCC's evaluation of the proposed collective negotiations is in accordance with the relevant net public benefit tests⁴ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
30. In order to assess the effect of the proposed arrangement and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

31. The Applicants submit that the most relevant area of competition for assessing the proposed arrangement is that for the acquisition of services in respect of Channel Infrastructure and Terminal services. The Applicants submit that the geographic dimension could be broad, comprising the entire Bowen Basin area. The Applicants suggest that a possible secondary market is that for the global supply (or Asian supply) of thermal and metallurgical coal.
32. The ACCC considers that the primary area of competition likely to be affected by the proposed collective negotiations is that for the acquisition of services in respect of the Channel Infrastructure and Terminal services at the Port of Gladstone.
33. The ACCC recognises that the other relevant area of competition could include the Asian or global markets for the supply of thermal and metallurgical coal.

⁴ Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment B.

34. The ACCC is of the view, however, that it is not necessary to precisely define the relevant geographic areas of competition in this instance.

The future with and without

35. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
36. The Applicants suggest, and the ACCC agrees, that the most likely future without the proposed arrangement is that some or all of the Applicants will negotiate with GPC on an individual basis.

Public benefit

37. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵
38. The Applicants submit that the proposed conduct is likely to result in benefits for all participants, including GPC, including significantly lower transaction costs from negotiating collectively. The claimed savings include a decrease in the total number of hours spent engaging with GPC, a decrease in the costs involved in briefing external lawyers/experts, and efficiencies in pooling the limited resources of a number of smaller Applicants.
39. Further, the Applicants submit that collective negotiations will significantly shorten the negotiation period and provide certainty and reduced volatility for GPC and the Applicants regarding the operation and maintenance of the Terminals and the Channel Infrastructure, including how those services are to be costed and charged in the future. The Applicants consider that this will promote sustainable investment in growth of coal exports from the region through the Port of Gladstone (including additional volume through WICET and LNG export terminals), royalties, taxation, employment and related economic benefits to the local community.
40. GPC submits that the likely benefits from the proposed conduct will outweigh any detriments. GPC considers that there can be efficiencies from collective negotiations between buyers who share legitimate interests and their suppliers.
41. The ACCC accepts that collective negotiations will reduce transaction costs as a result of reduced time spent negotiating, reduced costs of experts' fees and efficiencies in the Applicants pooling their resources. This is particularly the case given that the aim of the renegotiation of the Agreements is to establish uniformity between each of the Applicants. The ACCC also accepts that the collective negotiations and uniform Agreements will shorten the negotiation

⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

period and provide some degree of certainty and reduced volatility for the parties, as well as enabling the Applicants to have increased input into contracts.

Public detriment

42. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶
43. The Applicants claim that there is minimal anticompetitive detriment from collective negotiation with GPC, noting:
- the voluntary nature of the proposed conduct and the absence of any collective boycott activity
 - the authorisation will extend to any future prospective users of the Terminals
 - there are restrictions on information sharing. The Applicants will not discuss commercially sensitive information (such as customer identities, customer pricing and production costs) as between themselves or collectively. The Applicants will continue to compete vigorously with each other in relation to the production and supply of export coal
 - the limited scope of the infrastructure to be covered. The authorisation is intended to apply to negotiations regarding the Terminals, the Channel Infrastructure and related services.
44. GPC agrees that the proposed conduct would result in minimal, if any, anticompetitive detriment. In particular, GPC notes that:
- the proposed collective negotiations will be voluntary and GPC will not be bound to participate in collective negotiations with the Applicants
 - the Applicants do not propose to engage in collective boycott activity
 - there will be information sharing restrictions put in place between the Applicants.
45. The ACCC accepts that it is unlikely that the proposed conduct would result in significant anti-competitive detriment, particularly given the voluntary nature of collective negotiations, the absence of boycott activity and the fact that GPC is supportive of the proposed arrangement.

Balance of public benefit and detriment

46. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
47. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

48. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

49. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
50. In this instance, the Applicants are seeking authorisation for a 15 year period. The Applicants submit that this is appropriate given the term of the Agreements will be at least 15 years. Further, there are long lead times associated with the extensive dredging and maintenance of shipping channels at the Port of Gladstone and a need to deliver long term commercial certainty to the Applicants and GPC.
51. The ACCC proposes to grant authorisation for 15 years, as requested. This is consistent with the proposed term of the Agreements and will provide sufficient certainty to the Applicants and GPC.

Draft determination

The application

52. On 10 January 2014 the RG Tanna Coal Export Terminal Producers lodged application for authorisation A91405 with the ACCC. Application A91405 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1) and 88(1A) of the Act in respect of collective negotiations with Gladstone Ports Corporation Limited (GPC) in relation to the terms and conditions, including price, of the coal handling agreements and the port services agreements.
53. The Applicants seek authorisation of this arrangement as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
54. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

55. For the reasons outlined in this draft determination and in accordance with the tests found in subsections 90(6), 90(7), 90(5A) and 90(5B), the ACCC considers that in all the circumstances the proposed arrangement for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
56. The ACCC therefore **proposes to grant** authorisation to application A91405.

⁷ Subsection 91(1).

Conduct for which the ACCC proposes to grant authorisation

57. The ACCC proposes to grant authorisation to the RG Tanna Coal Export Terminal Producers in respect of collective negotiations with GPC in relation to the terms and conditions, including price, of the coal handling agreements and the port services agreements for 15 years (see paragraph 4).
58. The Applicants have requested that any authorisation granted be expressed to apply to the Applicants' related parties and successors and any additional coal producers who wish to use the Terminals in the future
59. This draft determination is made on 6 March 2014.

Variation to interim authorisation

60. The ACCC has decided to vary the existing interim authorisation, which was granted on 6 February 2014, to allow the Applicants to collectively negotiate with GPC and enter into agreements which the ACCC understands will be subject to a condition precedent of ACCC authorisation (that is, the agreements will not come into force unless and until final authorisation is granted by the ACCC). Interim authorisation does not extend to giving effect to any such agreement.
61. The variation to the interim authorisation commences immediately and interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

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

Attachment A – the RG Tanna Coal Export Terminal Producers

The current Applicants are:

- **Anglo American Australia Limited (Anglo)** - Anglo is a foreign-owned public company based in Brisbane involved in the exploration, mining and sale of export and domestic coal in Australia. Anglo is a wholly owned subsidiary of Anglo American plc, one of the world's largest mining companies, and the third largest global and second largest Australian producer of metallurgic coal for export. Anglo operates five mines in Queensland and one in NSW.
- **BHP Billiton Mitsubishi Alliance (BHP)** - BHP is Australia's largest coal producer, accounting for over 25% of Australia's annual coal output and 28% of the world's seaborne metallurgical coal trade. BHP owns and operates seven Bowen Basin mines and the Hay Point Terminal near Mackay.
- **Cockatoo Coal Limited (Cockatoo Coal)** - Cockatoo Coal is listed on the ASX and has mining operations and expansion projects in the Bowen Basin as well as development projects in the Surat Basin and the Sydney Basin in NSW.
- **Glencore Coal Investments Australia Pty Limited (Glencore Coal)** - Glencore Coal is a foreign owned proprietary company involved in coal mining and exploration in Australia. Glencore Coal is a wholly owned subsidiary of UK-based international mining company, Glencore Xstrata plc. Glencore Coal Queensland Pty Limited also forms part of the Glencore Xstrata group and has interests in a number of open-cut and underground coal mines in Queensland.
- **Idemitsu Australia Resources Pty Ltd (Idemitsu)** - Idemitsu is a foreign-owned proprietary company based in Brisbane involved in coal mining operations in Australia. Idemitsu is an Australian subsidiary of the Japanese company Idemitsu Kosan Co. Ltd. Idemitsu has interests in mines in Queensland and NSW.
- **Jellinbah Resources Pty Ltd (Jellinbah)** - Jellinbah is a privately owned independent coal company with two operating mines in the Bowen Basin, Central Queensland.
- **Rio Tinto Coal Australia Pty Ltd (Rio Tinto Coal)** - Rio Tinto Coal, formally known as Pacific Coal, is involved in open-cut and underground coal operations in Australia. Rio Tinto Coal is part of the Rio Tinto Group, a combination of London-based Rio Tinto plc and Melbourne-based ASX-listed Rio Tinto Limited. Rio Tinto Coal's Queensland operations are located in the Bowen Basin. In NSW, Rio Tinto Coal manages Coal & Allied's open-cut operations.
- **Sojitz Coal Mining Pty Ltd (Sojitz)** - Sojitz is a Japanese company which manages and operates the Minerva Mine in the Bowen Basin in Central Queensland for coal exclusively for international export. Sojitz is also involved in joint ventures in seven operating mines and three projects in Australia.
- **Wesfarmers Resources Ltd (Wesfarmers)** - Wesfarmers is an Australian company involved in open-cut mining, metallurgical coal production, and supply of thermal coal for domestic power generation. Wesfarmers operates the Curragh mine in Queensland and has a 40% interest in the Bengalla mine in the Hunter Valley in NSW.
- **Yancoal Australia Ltd (Yancoal)** - Yancoal is an ASX listed company and one of the largest coal producers in Australia. Yancoal manages or has a share of

mines in Queensland, NSW and WA and investments in two coal terminals (Wiggins Island in Gladstone and NCIG in Newcastle).

Attachment B - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

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

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.