

# Submission to Australian Competition and Consumer Commission

**Application for Interim Authorisation of DBCT Coal Chain Coordinator**

**Anglo American Metallurgical Coal Pty Ltd**

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## 1 Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) welcomes the opportunity to provide this submission to the Australian Competition and Consumer Commission (**ACCC**) in response to the application for authorisation lodged by Rio Tinto Coal Australia Pty Limited (**RTCA**), Peabody Energy Australia Pty Ltd (**Peabody**) and Pacific National Pty Ltd (**Pacific National**) No. A91410 and A1941 (**Application**).

Anglo American does not support the application for authorisation.

Anglo American is supportive of the concept of an 'independent' centralised coal chain coordinator in the Dalrymple Bay Coal Terminal (**DBCT**) Coal Chain. However, without a truly independent central coordinator, centralised coordination of the DBCT Coal Chain is fundamentally flawed. The Application does not provide for an independent central coordinator and, therefore, Anglo American strongly opposes the proposed regime largely on that basis.

Further, the proposal in the Application is flawed in its practicability as it does not provide for a workable relationship with the key stakeholders within the DBCT Coal Chain. For example, it provides no transparency as to how the regime will work with Aurizon Network Limited's (**Aurizon Network**) below rail operations and DBCT Pty Ltd's port operations. Further, it does not bind non-members and, therefore, creates an extra step in the scheduling process.

In addition to this, the proposed regime does not specify clear and equitable scheduling principles and, given that the scheduling coordinator is not independent (ie Pacific National for the first 12 months or other members thereafter) there are no objective principles or other protections for members to ensure that train path allocations will be scheduled on a fair basis and in line with contracted capacity both above and below rail.

The proposed regime does not include adequate industry representation and, for the reasons identified above, there is likely to be concern within the industry as to the claimed benefits of the regime. This is likely to create a divide within the industry, further defeating the claimed purpose and effectiveness of the proposed regime. There is also the potential to create a competitive disadvantage to non-members. Accordingly, Anglo American is concerned that these aspects could potentially give rise to exclusionary behaviour by excluding non-members from gaining access to any advantages of central coordination or denying those non-members access to pathing they would ordinarily be able to obtain were it not for the existence of the proposed regime.

In summary, Anglo American supports an 'independent' centralised coordination regime similar to that employed in the Hunter Valley Coal Chain (**HVCC**). However, Anglo American does not consider that such a regime can be adequately achieved within the proposed framework of the Application and therefore submits that the ACCC should refuse to grant the interim authorisation.

## 2 Background

It is noted that RTCA, Peabody and Pacific National (**Applicants**) lodged the Application to the ACCC to permit the Applicants to establish the DBCT Coal Chain Coordinator (**DCCC**) to allow the Applicants to participate in discussions with a view to creating a more efficient coordination of operational arrangements in the DBCT Coal Chain (**Proposed Conduct**).

The Applicants have requested that ACCC grant interim authorisation to allow the Applicants to immediately begin taking the steps necessary to implement the proposed DCCC arrangements to 'prove up' the concept of the joint coordination under the DCCC in the trial phase.<sup>1</sup>

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<sup>1</sup> Rio Tinto Coal Australia Pty Ltd, Peabody Energy Australia Pty Ltd and Pacific National Pty Ltd, *Rio Tinto Coal Australia Pty Ltd & Ors – Authorisation – A91410 & A91411* (25 February 2014) 11 (**Application for Authorisation**).

Anglo American provides this submission to the ACCC in response to the Applicants' request for interim authorisation of the Proposed Conduct.

### **3 Scheduling coordinator not independent**

As indicated, Anglo American is supportive of the concept of 'independent' central coordination in the DBCT Coal Chain. In its submission to the Productivity Commission, Anglo American stated that it is supportive of '*independent export chain coordination bodies with the objective of ensuring coordinated, independent and impartial system performance assessment, reporting and recommendations in respect of investment.*'<sup>2</sup>

However, the regime proposed by the Applicants is fundamentally flawed as it does not require the scheduling coordinator to be an independent party.

As part of the proposed regime, the Applicants propose that the following two bodies be created:

- (a) a management committee 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; and
- (b) a joint scheduling group to coordinate scheduling from a 'pool' of shared 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.

The management committee shall appoint the scheduling coordinator to lead the development, in consultation with the joint scheduling group, of an optimised schedule of train paths for all of the members of the DCCC on a 'pooled' basis.

Therefore, further to the scheduling coordinator not being independent, there is significant oversight by these bodies in the scheduling process.

The proposed regime does not provide a comprehensive and transparent regime sufficient to ensure, and also satisfy industry participants of, the impartiality of the scheduling coordinator in conducting its duties. There is neither recognition of this inherent conflict nor any proposal to manage it in the Application. Clearly, this creates problems particularly where the members are unable to agree where competing for pooled paths.

It is proposed that the scheduling coordinator will 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.<sup>3</sup>

For the first 12 months, it is proposed that the scheduling coordinator will be Pacific National. Following this the management committee will appoint another scheduling coordinator which could be any of the members of DCCC.

The appointment of a single service provider, such as Pacific National, as scheduling coordinator raises serious questions regarding independence. Fundamentally, the entire regime cannot work where the scheduling coordinator is not truly independent due to conflicts between its interests as a member and role as scheduler. This is just as concerning (if not more so) where a coal producer such as RTCA or Peabody replaces Pacific National as scheduling coordinator. Clearly, any member or other coal chain stakeholder acting as the scheduling coordinator will always have a conflict of interest. The lack of any transparent and objective criteria or principles for scheduling, particularly where any pooled paths are contested, further exacerbates the risk of a

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<sup>2</sup> Anglo American, *Submission to Productivity Commission - Review of the National Access Regime* (18 April 2013) 9.

<sup>3</sup> Application for Authorisation, 25.

situation where the allocation is not made equitably. For example there is no detailed regime setting out the priority regime for pathing allocations.

Anglo American notes the following serious concerns in relation to the lack of independence of the proposed scheduling coordinator:

- (a) **Potential abuse of position:** The potential for the appointed party to use its role as scheduling coordinator to benefit its own commercial agenda or preferences is too great. For example, the independent Hunter Valley Coal Chain Coordinator (**HVCCC**), has now replaced processes which relied heavily in the past on non-independent parties such as rail and port service providers making decisions. . This potential for abuse of power is also evident in Aurizon Network's dealings with industry, and we note that Aurizon Network is a regulated entity with a much more stringent level of regulatory oversight.
- (b) **Misuse of information:** Under the proposed regime the members are required to provide sensitive information to the scheduling coordinator including required train paths and coal availability data. There is also no ringfencing arrangement or detailed confidentiality regime, other than a general requirement on all participants to keep information confidential. Therefore the information provided to the scheduling coordinator, for example, could be made known to any other part of its business benefiting its own commercial operations with very limited recourse for the infringed party (ie the parties simply have a right to lodge an injunction).
- (c) **Lack of detail around scheduling:** There is no comprehensive objective framework around 'how' the scheduling coordinator allocates train paths, and therefore, can do so in its own commercial interests with no recourse for members.
- (d) **General deterrence:** Given the lack of independence and confidentiality arrangements that apply to the proposed scheduling coordinator, parties are not incentivised to join the DCCC or alternatively to be transparent in their dealings or disclosure with the scheduler or other members of DCCC. This is likely to significantly affect the success of the proposed regime in achieving its objectives of increasing efficiency. This also creates the further issue of dividing the industry creating competitive issues for members of the DCCC that may be taken advantage of by the scheduling coordinator and those non-members (who have chosen not to join because of these issues) and may therefore lose competitiveness with those that have joined the DCCC.
- (e) **General competitive advantage for scheduling coordinator:** Even where an advantage is not deliberately attained, the scheduling coordinator will obtain a competitive advantage over its competitors through the nature of its role (and the absence of an adequate ringfencing regime). For example the joint scheduling group only meet weekly and a significant number of changes occur to the schedule intra-weekly. This creates a risk of discrimination, particularly where the scheduling coordinator is another coal producer.

Anglo American is strongly of the view that centralised coordination of the DCCC, which includes all DBCT users, would be beneficial but could only work effectively where the scheduling coordinator was truly independent of all members, including users and rail providers in the DCCC, as is the case with the HVCCC. Anglo American submits that the following alternative arrangement would be a preferable approach in these circumstances:

- (a) An independent scheduler is appointed to coordinate all steps in the DBCT Coal Chain. As the ACCC is aware, this is a well-recognised approach that has been successfully adopted in the HVCC for years. The Applicants submit that the Integrated Logistics Company (**ILC**) is not an appropriate body to act as a third party scheduling Coordinator as 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.<sup>4</sup> However Anglo American is of the view that extending the role of the ILC is far more appropriate than creating a new role for a party that is intrinsically linked within the system such as Pacific National, Peabody or RTCA.

- (b) Both Aurizon Network and DBCT Pty Ltd should be obliged to take into account recommendations of the central coordinator and provide reasons if they do not act in accordance with its recommendations. In turn, Aurizon Network and DBCT Pty Ltd should be provided with an opportunity to provide input into the coordination process and key constraints on each of them that need to be addressed.
- (c) The central coordinator would obtain access to sufficient information to allow it to act as coordinator and would agree to adopt a black box approach to keep the confidential information secure.
- (d) The role of central coordinator should include:
  - (i) dynamic modelling of capacity;
  - (ii) advice on capacity;
  - (iii) recommendations on System Operating Assumptions and scheduling; and
  - (iv) the objective of maximising capacity to achieve contracted capacity.

Accordingly, Anglo American opposes the authorisation of the Application as the proposed regime fails on a fundamental level to provide the DBCT Coal Chain with a system that it requires to increase efficiency, and that will be workable by all users of the DBCT Coal Chain without fear of discrimination or abuse of process.

#### **4 Information sharing between members of DCCC**

In addition to the information provided to the scheduling coordinator, under the members Agreement and Charter (**Charter**), members agree to 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.<sup>5</sup>

This may include making and giving effect to the coordinated management of:<sup>6</sup>

- (a) coal availability (reflecting mine production, stockpiling, load-out infrastructure availability, maintenance, and operations);
- (b) below rail arrangements; and
- (c) port loading and shipping arrangements.

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.<sup>7</sup>

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<sup>4</sup> Application for Authorisation, 6

<sup>5</sup> Application for Authorisation, 6.

<sup>6</sup> Application for Authorisation, 6.

<sup>7</sup> Application for Authorisation, 8.

This creates considerable concern given the lack of information and transparency dealing with how the confidential information is to be utilised generally within the DCCC, the absence of ringfencing arrangements and the treatment of confidential information. This creates a significant risk of coal availability and other commercially sensitive information immediately being leaked to the market and customers generally in an opportunistic way by competitors. A significant competitive and commercial disadvantage also arises for those that do not elect to join the DCCC (even where the election is based on reasonable concerns with the management of the objectives of the DCCC) as those parties may not be able to compete fairly with the members of the DCCC due to the 'critical mass' of pooled pathing.

Anglo American notes that there is already an information sharing process between users of the Goonyella rail line and DBCT. Anglo American understands that currently one of the problems with existing arrangements is that there is no incentive for parties to disclose that they may not be able to fully meet capacity. However, Anglo American considers that given the lack of visibility around decision making and the treatment of confidential information, it is highly unlikely that participants in the DCCC would be prepared to disclose all of this information on an open basis.

The only way in which participants would be encouraged to share this information and thus achieve the projected goal of reduced inefficiencies in throughput, would be to appoint a truly independent scheduling coordinator and implement a proper 'black box' process where access to this sensitive information, in particular coal availability data, was viewed only by the independent scheduling coordinator. It would also enable the scheduling coordinator to make better planning and 'day of operations' decisions by being fully informed, as members would not be as concerned about confidential information being misused.

## **5 Potential for exclusionary conduct**

Further the scheduling coordinator will be able to pool from within the DCCC members train paths which would otherwise be available to the other users (including non-members) on an ad hoc basis. This will be likely to result in members of the DCCC gaining a competitive advantage over non-members in relation to 'first rights' of access to train paths.

## **6 Current regime creates unnecessary extra step**

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. Further the Application states that 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.<sup>8</sup>

Further, under the proposed regime, Aurizon Network and DBCT Pty Ltd are prevented from being members of the DCCC.<sup>9</sup> This means that these parties will not be involved in the coordination process and information sharing processes. This creates an unnecessary extra step in the process. For example, DCCC will determine train path allocations and submit these to DBCT Pty Ltd with no ability to bind DBCT Pty Ltd, and DBCT Pty Ltd will be required to take this information with no transparency as to the process of how the train paths were determined. As the DBCT yard plan and Aurizon Network train schedule are developed iteratively, Anglo American questions whether the proposed regime will improve capacity utilisation or create barriers to improvement, through lack of involvement of key capacity stakeholders.

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<sup>8</sup> Application for Authorisation, 10.

<sup>9</sup> Application for Authorisation, 25.

Anglo American considers that any proposed central coordination regime will only be effective where all rail and DBCT port users join and are part of the regime's requirements. This is because the regime then has no exclusionary effect on any non-members thereby achieving the purpose of co-ordination of the coal chain and not just a part of it. Therefore any proposal that includes only a few users (such as this regime) would result in coordination of those users' capacity in the absence of other users' contracts and requirements. This will likely only create misalignment of train paths between members of DCCC and non-members.

Further, the DCCC intends to become a key party in liaising 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.<sup>10</sup> However, the Application provides very limited, if any, information as to how the DCCC will engage with other stakeholders in the DBCT Coal Chain, including:

- (a) how the scheduling coordinator intends to communicate with these parties;
- (b) how the role of the scheduling coordinator overlaps with the other stakeholders; and
- (c) whether these parties are intended to continue to have any direct involvement with the users or the scheduling coordinator will act as sole representative of the users for all matters.

## **7 Scheduling principles are inadequate**

The joint scheduling group and the scheduling coordinator are required to comply with a set of scheduling principles when undertaking scheduling activities. These scheduling principles are aimed at:<sup>11</sup>

- (a) seeking to maximise and optimise port capacity for all members (including taking into account its cargo assembly operations and seeking to minimise vessel turnaround time);
- (b) maximising the availability and utilisation of below and above rail infrastructure and assets; and
- (c) take into account other coal chain factors, such as coal availability, train load-out capacity, ship loading order, etc.

Anglo American submits there are some major issues with the proposed scheduling principles. First, the scheduling principles as set out in Schedule 5 of the Application are vague and overarching. In particular, they fail to provide a detailed framework under which such an important process will be determined. A few key omissions are as follows:

- (a) a detailed process to be applied when determining train paths. The current regime provides significant discretion available to the scheduling coordinator (a particular issue where the scheduling coordinator is not independent);
- (b) key factors that should be considered by the scheduling coordinator in determining train path allocations. Currently, it simply requires the scheduling coordinator to consider "other coal chain factors" of which five broad concepts are identified. Again, this creates too much ambiguity and gives the scheduling coordinator too much discretion;
- (c) a requirement for the scheduling coordinator to justify the train path allocations that have been determined including the criteria used in determining the train path allocations; and

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<sup>10</sup> Application for Authorisation, 10.

<sup>11</sup> Application for Authorisation, 26.



- (d) an avenue for users to challenge the improper allocation of scheduling principles in determining the train path allocations.

Anglo American notes that the allocation of train paths is essentially the sole reason for requesting the Proposed Conduct be Authorised by the ACCC and yet the process by which this will be objectively determined has been omitted in the Application.

Second, the scheduling principles may be modified from time to time, by direction given to the joint scheduling group and the scheduling coordinator by the management committee of which each member has an equal vote regardless of tonnages (discussed further below).

Third, these principles need to include proper restrictions on discrimination between parties, particularly as the authorisation would cut across existing commercial agreements for 'above' and 'below' rail services. As this is a commercial arrangement and not subject to the statutory restrictions placed on regulated entities, the general prohibitions on discrimination between users and restrictions on favouring a related party do not apply. Accordingly, it is essential that a proper regime is set out that prohibits the scheduling coordinator from discriminating between members or in favour of its own related body corporates.

Where a truly independent scheduling coordinator is appointed, these concerns are alleviated to the extent that the objectives would be more balanced. However, Anglo American considers that these provisions should still be implemented where an independent scheduling coordinator is appointed.

Finally, the Application focuses on increased throughput and greater cost competitiveness at DBCT resulting from reduced interface losses and more efficient, flexible and coordinated operations.<sup>12</sup> Anglo American submits that the focus should be on ensuring that existing contracted capacity is able to be maximised and utilised with a view to existing users obtaining the overall benefit of passing more coal through the system.

## **8 Voting rights are disproportionate to tonnages**

One of the fundamental flaws in the existing regime is that there is no correlation between the 'tonnage' of coal passed through the DBCT Coal Chain and the voting rights of members in DCCC.

In essence, this gives users a disproportionate right to vote on critical supply chain matters despite having minimal tonnages of coal passing through the DBCT Coal Chain. A user may become a member where they meet the eligibility criteria outlined in the Application. This requires that the users contribute at least 2mpta through the DCCC. However, that user will gain one vote on key matters that affect the coal chain as a whole.<sup>13</sup> For example, a group of smaller coal producers could effectively vote in favour of certain changes to the scheduling principles to align their commercial agendas despite those changes having significant adverse implications on a larger user and therefore significant implications on the ability to actually maximise throughput.

Further any Member may lodge a complaint to the management committee against another Member where it believes that it has not complied with the Charter or has acted in a manner that has an adverse impact on another Member. Where it does so, the management committee may (by a 75% vote) elect to suspend or terminate the defaulting party's membership where the management committee (of which each Member has one vote regardless of tonnages) considers the complaint is material and proven. This provides an avenue for smaller coal producers to

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<sup>12</sup> Application for Authorisation, 8.

<sup>13</sup> Application for Authorisation, 11.

strategically align to promote their own commercial agendas at the detriment of the efficiency of the coal chain as a whole.

Anglo American submits that in the event that an adequate independent coordination arrangement is able to be implemented, that it is reflective of the tonnages that coal producer has contracted to pass through the DBCT Coal Chain.

## **9 Interim authorisation**

The Application has requested that interim authorisation be granted to allow the parties to immediately begin taking the steps necessary to implement the proposed DCCC arrangements for the following reasons:<sup>14</sup>

- (a) to enable the Applicants to “prove up” the concept of the joint coordination under the DCCC in the trial phase (i.e. a ‘soft launch’);
- (b) to permit the early implementation of the DCCC and therefore the earlier achievement of significant public benefits; and
- (c) there is no material public detriment associated with the Proposed Conduct.

Anglo American has significant concerns with interim authorisation being granted on this basis. We have set out our reasons below.

First, and most importantly, without a proper independent scheduling coordinator the regime as a whole is flawed and should not be authorised. Accordingly, interim authorisation should not be granted where the authorisation itself should be rejected.

Second, under the proposed regime, a new member may only join the DCCC after 3 months from Authorisation<sup>15</sup> and cannot vote until they have been a member for at least 3 months.<sup>16</sup> Therefore granting interim authorisation allows RTCA, Peabody and Pacific National to exclusively exchange information and negotiate behind closed doors, even where the regime itself is fundamentally flawed.

Third, the Applicants submit that the early implementation of the DCCC on a trial basis, early in 2014, 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.<sup>17</sup> This statement is misleading and ignores two key issues, namely that all major submissions to UT4 have already been lodged and that a decision on UT4 is unlikely to be significantly modified by a regime:

- (a) that has only operated for a number of months;
- (b) that includes only two mining participants and the Aurizon Group’s key competitor, Pacific National; and
- (c) where any data as to optimisation will not be conclusive, given the exclusivity of membership during the trial period.

Fourth, the Applicants submit that substantial revenues and reduced costs will be realised by all users of the DBCT Coal Chain during this interim period. Anglo American submits that this is both highly unlikely and an insignificant amount of revenue compared to the risk in allowing RTCA,

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<sup>14</sup> Application for Authorisation, 11.

<sup>15</sup> Application for Authorisation, 11.

<sup>16</sup> Application for Authorisation, 26.

<sup>17</sup> Application for Authorisation, 12.

Peabody and Pacific National to exclusively share information and negotiate behind closed doors until 3 months after Authorisation (if granted).

Fifth, the Applicants submit that the benefits are shared with the entire coal chain and increase with membership. However, Anglo American submits that such benefits will only be realised where significant support is gained for a proposed coordinated approach. This is much more likely under an open industry wide negotiation process with an independent scheduling coordinator than under a gradual increase in membership in the current proposed regime, assuming that this result is achieved.

Finally the Applicants submit that granting interim authorisation will not have the potential to effect competition in the interim period or cause any harm to others. However Anglo American is of the view that the proposed regime is likely to split the industry into those that see strategic benefit in gaining access to information of other users (ie smaller coal producers and those entities such as RTCA, Peabody and Pacific National who have been able to negotiate exclusively for months) and those other coal producers that are cautious of the flawed arrangements in the proposed regime. The proposed conduct could also have an impact on international competition or anti-trust law requirements in other jurisdictions by potentially creating a single larger source of coordinated supply into the market. Anglo American notes that this has not been considered and it is not possible at this stage to properly assess the potential impact of such conduct without proper consultation with the Applicants.

For the reasons identified above, Anglo American is of the view that based on the Application, the interim authorisation should not be granted by the ACCC.