



Rio Tinto, Peabody Energy & Pacific National– applications for authorisation A91410 & A91411 Interim authorisation decision 27 March 2014

Decision

The Australian Competition and Consumer Commission (the ACCC) has granted interim authorisation in respect of the application for authorisation lodged by Rio Tinto Coal Australia Pty Ltd, Peabody Energy Australia Pty Ltd & Pacific National Pty Ltd (the Applicants) on 25 February 2014.

Interim authorisation is granted to enable the three Applicants to give effect¹ to the Dalrymple Bay Coal Terminal (DBCT) Coal Chain Coordinator Members' Agreement and Charter (the Charter), and to make and give effect to the agreements and arrangements described in the Charter; that is to:

- coordinate order requests to be made in relation to the scheduling of below rail train path entitlements between Applicants' mines and DBCT
- each appoint a common "Scheduling coordinator" to act on behalf of the Applicants in submitting orders to DBCT Pty Ltd and Aurizon Network on behalf of the Applicants
- 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 the Applicants to cooperate and agree coordination of other parts of the DBCT coal chain, where the Applicants 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
 - port loading and shipping arrangements, and

¹ The ACCC does not have the power to grant an authorisation to corporations to make a contract or arrangement or to arrive at an understanding if the contract or arrangement has been made or the understanding has been arrived at before the ACCC makes a determination in respect of the application. Consequently, whilst the applicants have applied for authorisation to both make and give effect to a contract, arrangement or understanding, the ACCC cannot authorise the making of the Charter.

- reject applications for membership where a party fails to comply with eligibility criteria.

Interim authorisation does not extend to joint marketing or collective bargaining activities in respect of any customers of the Applicants or pricing arrangements in respect of any product they supply.

Under the Charter, participation in the coordination arrangements is limited to the three Applicants for an initial three month period. The ACCC will reconsider interim authorisation at the time of making its Draft Determination in three months' time.

Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The applications for authorisation

Rio Tinto Coal Australia Pty Limited and Peabody Energy Australia Pty Ltd are coal producers that own and operate coal mines in Central Queensland, and export coal through the Dalrymple Bay Coal Terminal via the Goonyella Coal Chain rail system. Pacific National is an above rail operator that provides coal haulage services to Rio Tinto and Peabody, and other coal producers using the coal terminal.

The Applicants seek authorisation for themselves and any future parties to make and give effect to the Dalrymple Bay Coal Terminal Coal Chain Coordinator (DCCC) Members' Agreement and Charter, and to the agreements and arrangements contemplated by the Charter. This includes the appointment of a Scheduling Coordinator on behalf of all members to submit order requests in relation to the scheduling of below rail train path entitlements between the members' mines and the coal terminal.

The authorisation process

Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (the Act). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

Section 91 of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

The Applicants requested interim authorisation on the basis that:

- it would allow experience gained from the arrangements to inform a rail access undertaking approval process currently being undertaken by the Queensland Competition Authority
- earlier implementation would allow the earlier achievement of benefits in the form of additional revenues and cost savings
- the arrangements will not have any direct or adverse effect on any other coal producers or rail operators
- the arrangements are not likely to have any adverse effect on competition
- implementation is unlikely to have any material enduring and non-reversible effect on any relevant market.

Consultation

The ACCC sought submissions from 17 interested parties potentially affected by these applications, including coal producers, above rail operators, the below rail infrastructure operator, the port operator, regulators and government departments. Of these, five provided submissions to the ACCC, three of which were broadly supportive of the application and the request for interim authorisation. The remaining two submissions raised concerns that:

- the arrangements may competitively disadvantage, or otherwise negatively impact, those coal chain users outside the arrangements
- the proposed Scheduling Coordinator position is not independent of the coal chain users
- the proposed Scheduling Principles are not sufficiently clear and specific, and
- the claimed benefits are unlikely to arise.

Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

Reasons for decision

In granting interim authorisation, the ACCC considers that:

- interim authorisation may enable the earlier achievement of efficiency and revenue benefits by reducing interface losses in the coal chain
- the information proposed to flow between the parties is largely already available to coal chain users
- the DCCC will have no visibility of any commercial terms associated with above rail haulage activities, and the Scheduling Coordinator is required to sign a Confidentiality Deed restricting the use of any confidential information to DCCC purposes
- in any case, detriment is unlikely to result from the arrangements given they are limited to the coordination of train ordering by the Applicants. The proposed arrangements should not negatively impact other coal chain users because they have been developed within existing contractual and regulatory arrangements, and the final decision about rail scheduling will continue to be made by Aurizon Network and DBCT Pty Ltd.
- further, many of the concerns raised by interested parties are not relevant to the initial three month period of the DCCC, as they could only arise when other parties are permitted to join the arrangements. The ACCC proposes to consider these issues again as part of its Draft Determination.

Reconsideration of interim authorisation

The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.