



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Rio Tinto Coal Australia Pty Limited, Peabody Energy
Australia Pty Ltd, and Pacific National Pty Ltd

in respect of

coordination of operational arrangements
relating to the transportation of coal
for export through the
Dalrymple Bay Coal Terminal.

Date: 19 June 2014

Authorisation numbers: A91410-91411

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC proposes to grant authorisation to Rio Tinto Coal Australia, Peabody Energy, and Pacific National to coordinate operational arrangements relating to the transportation of coal for export through the Dalrymple Bay Coal Terminal. The ACCC proposes granting authorisation for five years.

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

Rio Tinto Coal Australia Pty Ltd (Rio Tinto) and Peabody Energy Australia Pty Ltd (Peabody) operate coal mines south of Mackay in Queensland. Coal from these mines is transported to the Dalrymple Bay Coal Terminal (DBCT) for export via the Goonyella Coal Chain railway system. Rio Tinto and Peabody, together with the above rail service provider Pacific National Pty Ltd (together, the Applicants) have applied for authorisation to coordinate operational arrangements relating to the transportation of coal for export through DBCT, to seek to capture greater throughput efficiency.

The Applicants submit that actual throughput of the Goonyella Coal Chain is reduced by 'interface losses', caused by the interaction between the components of the rail system – rail, trains, port and producers. The proposed conduct is intended to allow producers and rail operators to coordinate their end-to-end use of system infrastructure to reduce these losses and increase total system throughput.

The Applicants propose to implement the DBCT Coal Chain Coordinator Charter, which involves appointing a coordinator to act on behalf of all members in submitting orders to the port and the below rail operator on behalf of members. Membership is open to all producer and above-rail users of the DBCT. The members intend to coordinate order requests to be made in relation to the scheduling of below rail train paths between their mines and the DBCT. The coordination does not extend to joint marketing or collective bargaining activities, pricing arrangements, or commercial terms of agreements.

The ACCC granted interim authorisation to the arrangements on 27 March 2014, allowing the Applicants to commence a trial period of implementation of the coordination arrangements. The Applicants have provided examples of efficiency savings achieved during the trial period.

In consulting with interested parties, a number of concerns were raised regarding whether the proposed arrangements would achieve the claimed benefits and the possible impacts on other users of the Goonyella Coal Chain (both members and non-members). The ACCC has taken these concerns into consideration and the claims made by the Applicants, and has reached a preliminary view that the proposed arrangements will result in a public benefit in the form of an overall increase in throughput of the DBCT, while working within existing regulatory and contractual frameworks. The ACCC considers the arrangements are likely to allow members to make use of train paths which would otherwise be lost, resulting in a benefit to all users of the Goonyella Coal Chain by reducing congestion, improving cycle times as a result of a reduction in dwell times at DBCT, a reduction in below rail tariffs due to increased throughput, and potentially reductions in demurrage costs and reduced need for infrastructure expansion.

The ACCC notes that the likely public benefits from the proposed arrangements may demonstrate broader benefits which may be achieved by greater coordination of the Goonyella coal chain.

The ACCC considers the potential for any detriments arising from the arrangements is mitigated by a number of factors including:

- the arrangements operate within existing contractual and regulatory frameworks
- the proposed coordination relates only to operational matters
- the arrangements include a confidentiality regime, and the information to be shared is generally already available to DBCT users in different forms
- the arrangements are voluntary, but open to all producers and rail operators using the DBCT, with no restrictions on exit.

For these reasons, the ACCC proposes to grant authorisation to the proposed arrangements for the term of the Charter (being 24 months with the possibility of extensions) up to a maximum of five years.

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Abbreviations

BMA	BHP Billiton Mitsubishi Alliance
DBCT	Dalrymple Bay Coal Terminal
DCCC	DBCT Coal Chain Coordinator
ILC	Integrated Logistics Company
Mtpa	million tonnes per annum
QCA	Queensland Competition Authorisation
QMS	Queue Management System

The applications for authorisation

1. On 25 February 2014 Rio Tinto Coal Australia, Peabody Energy and Pacific National (the **Applicants**) lodged applications A91410 and A91411 with the ACCC seeking authorisation to coordinate coal transportation arrangements through the Dalrymple Bay Coal Terminal (**DBCT**) as the arrangements may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act. The arrangements may also contain an exclusionary provision (within the meaning of section 45 of the Act) that may also be a cartel provision. The Applicants requested interim authorisation to enable them to engage in the proposed conduct while the ACCC is considering the substantive application.
2. The ACCC granted interim authorisation on 27 March 2014 for an initial three month period. Under the DCCC Charter, during this initial period participation in the arrangements is limited to the three 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. Rio Tinto and Peabody, together with their above rail service provider Pacific National Pty Ltd have applied for authorisation to coordinate operational arrangements relating to the transportation of coal for export through DBCT, to capture greater throughput efficiency. The proposed arrangements are set out within the DBCT Coal Chain Coordinator (**DCCC**) Members' Agreement and Charter (the **Charter**) and involve the appointment of a Scheduling Coordinator to act on behalf of all members in submitting orders to the port operator (DBCT Pty Ltd) and below-rail operator (Aurizon Network).
5. It is proposed the Scheduling Coordinator will submit orders to the port operator and below-rail operator based on an optimised plan developed using information obtained from members, including: forecasts of production, stocks, railings and sales; shipping and co-shipper information; system and site outages; rail fleet availability; track access availability; and recent and forecast system performance. The plan will be developed to ensure maximum throughput of members' coal through the DBCT Coal Chain, and to facilitate the efficient and coordinated use and operation of DBCT Coal Chain infrastructure and associated equipment and infrastructure.
6. The Applicants advise that the DCCC arrangements have been developed within existing contractual and regulatory arrangements, and do not involve the scheduling

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

of train paths but only optimised ordering of members' trains, and that the final decision about rail scheduling will continue to be made by Aurizon Network and DBCT Pty Ltd.

7. Under the proposed arrangements, membership of the DCCC will be open to all coal producers and rail operators utilising the DBCT Coal Chain, following a three month period (conducted under interim authorisation and concluding on 27 June 2014) to allow time for the operational and staffing arrangements to be finalised. A Management Committee is to be established comprising one representative from each Member organisation, subject to minimum tonnage requirements of 2 million tonnes per annum (**Mtpa**). The Management Committee's role includes oversight of the DCCC Objectives and Charter, including periodically reviewing the Objectives and Charter, and to consider and resolve disputes between members when these are referred to it.
8. It is proposed that, for the first 12 months, the Scheduling Coordinator will be Pacific National. After this period the Scheduling Coordinator will be appointed by the Management Committee..
9. The Charter is to operate for a term of 24 months unless extended by decision of the Management Committee. Authorisation is sought for the length of the Charter (including possible extensions) up to a maximum period of five years.

The applicants

10. Rio Tinto and Peabody operate coal mines in the Bowen Basin, Queensland. Coal from these mines is transported to the Dalrymple Bay Coal Terminal for export via the Goonyella Coal Chain rail network. Pacific National is an above rail operator that provides coal haulage services to Rio Tinto and Peabody, as well as other coal producers using the Goonyella coal chain.
11. Rio Tinto is a wholly owned member of the Rio Tinto Group, a global mining and metal organisation. Rio Tinto operates a number of coal mines in Queensland and New South Wales, including the Clermont, Kestrel and Hail Creek Mines which ship coal via the DBCT.
12. Peabody Energy Australia is a wholly-owned subsidiary of Peabody Energy Corporation, a US-based company. Peabody Energy Australia operates coal mines in Queensland and New South Wales, including the North Goonyella, Eaglefield, Millenium, Burton, Moorvale and Coppabella mines which ship coal via the DBCT.
13. Pacific National is Australia's largest private rail freight business, and the second-largest coal haulage operator. Pacific National operates throughout Australia and is wholly owned by Asciano.

Background

DBCT and the Goonyella coal chain

14. The Goonyella coal chain rail network services 30 mines in the Bowen Basin coal region in Central Queensland. It carries coal primarily to two separate coal terminals: the DBCT and the Hay Point Coal Terminal, which are near Mackay. The

Hay Point Coal Terminal is a single-user terminal owned and operated by BHP Billiton Mitsubishi Alliance (**BMA**). The Goonyella coal chain is linked to other rail systems, such that users also have capacity to transport coal to the Port of Gladstone (400kms south of DBCT) and the Port of Abbot Point (200kms north of DBCT).

15. DBCT is a multi-user coal export facility located 38 kilometres south of Mackay at the Port of Hay Point in Queensland. DBCT is owned by the Queensland State Government and is leased to DBCT Management through a long-term lease. DBCT has a current nameplate capacity of 85 Mtpa, all of which is currently contracted to coal producers located in the Bowen Basin coalfields. Eight parent companies (including Rio Tinto and Peabody) with about 16 coal mines export coal through the DBCT.
16. DBCT is declared for third party access under the Queensland Competition Authority Act with terms and conditions of access regulated by a Queensland Competition Authority (**QCA**) approved access undertaking.
17. The rail network is owned and operated by Aurizon Network (formerly QR National Network) and is also subject to an access regime approved by the QCA. At the time of issuing this draft determination, new System Rules, proposed by Aurizon Network, are undergoing consideration by the QCA. Coal haulage services are provided to coal producers by two competing above rail operators: Aurizon Rail (formerly QR National Coal) and Pacific National.
18. Generally, orders for train paths are submitted to Aurizon Network by above rail operators on behalf of coal producers. Aurizon Network is responsible for scheduling of train paths.
19. Following the recommendations made by the independent O'Donnell Review² in 2007, an Integrated Logistics Company (**ILC**) was established to identify improvement initiatives to increase throughput in the Goonyella Coal Chain. Membership of the ILC consists of the terminal owner, terminal operator, port authority, network operator, both above-rail operators, and all coal producers railing to DBCT. Under its current Constitution the ILC does not play any role in operational matters such as rail or terminal scheduling, or 'day of operations' coordination.

Previous authorisation applications

20. The ACCC has previously granted authorisation to eight users of the DBCT to operate a queue management system (**QMS**) in December 2005 and February 2008, under A30239-30241 & A91060-91062 respectively.
21. The QMS sought to address the imbalance between the demand for coal loading services at the Dalrymple Bay Coal Terminal and the capacity of the Goonyella coal chain.
22. The ACCC granted A91060-91062 for 11 months as a transition period to enable a long-term solution to excessive vessel queues to be developed and implemented.
23. DBCT users applied a third time for authorisation of similar arrangements in November 2008. The ACCC issued a draft determination proposing to deny authorisation because the continued operation of the QMS was likely to reduce incentives to develop a long-term solution. The applicants subsequently withdrew their application.

² Commissioned by the Queensland Government and Queensland Resources Council with a view to increasing the throughput capacity of the Goonyella coal chain.

ACCC evaluation

24. 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.
25. Broadly, the Applicants submit the arrangements are intended to respond to ongoing 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.
26. The Applicants advise 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.
27. Seven parties provided submissions in response to the application for authorisation. In broad summary:
 - port operator DBCT Management and coal producer Glencore support the arrangements
 - coal producers BHP Billiton Mitsui Coal (**BHP**) and Vale, above rail operator Aurizon Rail and below rail operator Aurizon Network do not object to the arrangements, but raise various concerns
 - coal producer Anglo American opposes the arrangements.
28. The views of the Applicants and interested parties are considered in the evaluation below. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
29. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests³ contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. Essentially, the ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.
30. In order to assess the effect of the proposed arrangements and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future without the conduct.

The relevant areas of competition

31. The Applicants submit the relevant areas of competition are
 - the global market for the supply and acquisition of thermal and metallurgical coal
 - the market for the supply and acquisition of below rail services on the Goonyella rail system
 - the supply and acquisition of coal rail haulage services in North Queensland, and

³ Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8).

- the supply and acquisition of coal loading services for bulk coal carrying ships in North Queensland.
32. No submissions were received by interested parties on the relevant areas of competition.
 33. The ACCC agrees that each of the areas of competition identified by the Applicants may be relevant to its assessment of the arrangements.

The future with and without

34. 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 application to the likely future without the conduct. 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.
35. The Applicants submit, in the absence of authorisation, the most likely counterfactual is a continuation of the status quo, in which decisions relating to the scheduling and coordination of infrastructure requirements will be made by DBCT Pty Ltd and Aurizon Network, with operational information and coordination of scheduling between producers and rail operators continuing to be shared on an ad hoc and limited basis. Existing bodies, including the ILC, are not well suited to facilitating 'day of operations' scheduling and coordination between coal producers as their roles are focussed either on higher level activities or at particular nodes within the system (i.e. port or rail). The Applicant notes that any extension of the role of the ILC would require unanimous approval of all its members, which to date has not been achieved.
36. Anglo-American submits that extending the role of the ILC would be an alternative to the arrangements proposed by the Applicants, which would be preferable as it would provide an independent central coordinator.
37. In response, the Applicants note that, despite a considerable amount of time being spent over years endeavouring to develop such a model, no consensus has as yet been achieved, but that the DCCC is intended as a starting point for improved operational coordination.
38. Glencore submits that an independent entity providing whole of coal chain coordination and scheduling services is unlikely to be adopted in an environment where the rail track provider and some coal producers are not supportive of such a model.
39. The ACCC has not been made aware of any plans to extend the role of the ILC or to establish a more comprehensive independent coal chain coordinator and therefore does not consider this to be a likely alternative to the DCCC. Due to externalities arising from investment in additional capacity and the current approach of contracting based on the stand alone capacity of each element of the coal chain (rather than system capacity), there does not appear to be sufficient commercial incentives for all parties to agree to move away from the current basis of contracting for capacity along the coal chain, or for parties to agree to having centralised determination of system capacity and greater coordination of coal transportation. This is supported by a number of largely unsuccessful attempts to achieve greater coordination in the Goonyella Coal Chain over the last 10 years or so. As a result, the ACCC considers that, in the absence of the proposed arrangements, it is likely that the status quo would continue – whereby producers would individually submit

orders for trains to their rail providers and there would be little if any operational coordination between producers .

Public benefit

40. 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.⁴

Applicants' submission

41. The Applicants submit the proposed arrangements will deliver public benefits, including:

- reduction in interface losses resulting in improved utilisation of system capacity and increased throughput
- reduced need for capital investment in 'excess' capacity and lower port and below rail tariffs, and rail fleet costs
- reduced demurrage costs
- improvement of DBCT's international reputation and cost competitiveness
- providing a 'local solution' that is low cost, can be implemented quickly and that offers a springboard for greater coordination and efficiency, and
- wider economic benefit as a result of increased throughput at DBCT.

42. The Applicants submit the DCCC will 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. Interface losses consist of the reduction in throughput caused by interaction between nodes (or components) of the coal chain – i.e. between mine, train path, rail haulage, coal terminal, and shipping.

43. In the case of the DBCT, the Applicants submit interface losses are exacerbated by the multi-user and multi-service provider nature of the system, where different operating modes, system governance and contracted capacity in relation to each node can become misaligned. The Applicants submit interface losses can be reduced by implementing arrangements that improve the degree of agility and contractual and operational alignment between nodes.

44. The Applicants estimate, based on their initial contribution of tonnes to the DCCC, a 3-5% increase in throughput when the arrangements have been fully established, equating to roughly \$22-38 million per month in increased coal revenues across all users of the DBCT Coal Chain.

45. The Applicants submit the benefits identified will be shared by all users of the DBCT Coal Chain, including non-members, as a result of fewer cancelled train services (thus freeing up train paths for use by other users, including non-members), reduction in dwell times, increased flexibility in the vessel queue or operation of the terminal (reducing vessel queues), reducing the below rail tariffs paid by all users

⁴ *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.

(which are calculated on a system-wide basis), and reducing the need for further capital investment in port or rail infrastructure.

46. The Applicants provided a number of scenarios to illustrate how the arrangements would work in practice to increase throughputs, including examples of how the interim authorisation has been utilised to achieve benefits through coordination. For example, a member has planned a maintenance shut down for 10 days at one of its mines. The other member therefore plans to rail strongly during the shutdown period. In other words, by being aware in advance of a producer members' planned shutdown, another producer member can plan to increase production during this period to utilise rail paths and trains which would otherwise have been lost. The result is an increase in total throughput when compared to throughput without the proposed arrangements.

Interested parties' views

47. Submissions commenting on the claimed reduction in interface losses were received from Anglo American, Aurizon Network, Aurizon Rail, BHP and Glencore.
48. Glencore submits the proposed arrangements are likely to contribute to more efficient utilisation of the existing rail infrastructure with significant resulting public benefits.
49. Anglo American submits the proposed arrangements fail on a fundamental level to provide the DBCT Coal Chain with a system that it requires to increase efficiency, and 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.
50. BHP submits the coordination of rail orders by users may provide some marginal benefits, but that these are overstated as they do not address the core problem.
51. Aurizon Network submits the Applicants have materially overstated the public benefits claimed and achievable, because:
- there may be difficulty in securing the participation of all producers and rail operators
 - industry participants already have the opportunity to have direct input into the way train services are scheduled, through the proposed System Rules and the Integrated Planning Regime
 - many of the causes of throughput losses (previously identified for example in the ILC's 2013 Master Plan), cannot be influenced by the proposed arrangements.
52. Aurizon Rail submits the arrangements will not result in any increase in the throughput of coal from DBCT because
- reduced throughput at the DBCT is due to a number of factors, not just interface losses
 - the proposed arrangements will not necessarily address some of the major causes of interface losses which do occur
 - it does not consider there is any misalignment between itself and its customers that would impact on throughput, because Aurizon Rail has worked proactively with its customers to use flexibility under Aurizon Network's 2010 Access Undertaking to borrow and lend its customers' entitlements in order to optimise scheduling arrangements, minimise resourcing requirements and to reduce variation to the agreed plan.

Applicants' response

53. In response to these concerns, the Applicants submit that:

- greater benefit would be achieved if all users of DBCT participated in the DCCC; however even if the DCCC membership remains limited to the current Applicants, the public benefits remain substantial and outweigh any detriments
- while rail scheduling inflexibility and inefficiency is not the sole form of interface loss in the system, the DCCC will result in improvements beyond merely the efficiency of rail ordering, and should improve a number of factors identified by the ILC as holding back maximum capacity – for example, day of operations involvement, short to medium term prioritisation of vessels, and optimised order requests
- each of the existing initiatives (including System Rules, the Integrated Planning Regime and capacity 'swapping') is focussed on only one part of the supply chain and each is "owned" by an infrastructure owner. They do not create an alternative to the DCCC, which provides a collaborative structure involving producers and rail operators and allows coordination beyond rail to all components of the coal chain
- further, capacity 'swapping' allows for flexibility between customers of the same rail operator but does not permit the borrowing or lending of entitlements between customers of different rail operators, and is controlled by the rail operator not the coal producer. In other words, multiple producers cannot coordinate their coal production and transportation under capacity swapping.

ACCC's view

54. The ACCC notes that, of the benefits claimed by the Applicants, a reduction in interface losses is the primary benefit with the others flowing from this. For this reason the ACCC's analysis has focussed primarily on the claimed benefit of reduced interface losses.
55. The ACCC understands that interactions between the components of the coal supply chain can result in inefficiencies which reduce throughput. Cooperation between parties and transparency of information can provide a means to reduce these inefficiencies and increase throughput.
56. The ACCC considers that the proposed arrangements are likely to result in a degree of increased throughput, by facilitating the swapping of rail paths which would otherwise be lost. The ACCC considers this represents a more efficient use of the infrastructure of the DBCT coal chain which constitutes a public benefit, leading to increased throughput and increased export revenues. The ACCC recognises that this proposal is not a whole-of-coal chain coordination solution – particularly with limited participation at this time – but considers the proposed arrangements have the potential to demonstrate real benefits from greater coordination which may encourage other participants to join over time, and that more participants would increase the potential for greater savings.

Public detriment

57. 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.⁵

58. The Applicants submit that the arrangements will not result in any material adverse effect on competition in any market in Australia, because

- the DCCC relates to operational, not commercial, coordination
- most of the information shared through the arrangements is already generally available to coal producers in a different form
- the arrangements do not involve or facilitate any sharing of commercial information related to customers, product decisions, marketing or pricing
- to the extent it provides for the alignment of production or stockpiling, this is limited to short-medium term planning (i.e. 3-4 month forecasts)
- the below rail market is a declared monopoly under the *Queensland Competition Act* and so is not subject to competition
- the arrangements may provide members with greater countervailing bargaining power in relation to below-rail negotiations
- the arrangements are open to all coal producers and rail operators using the DBCT, and there are no restrictions on exit
- there are clear incentives for the DCCC to encourage further membership to increase the benefits of the arrangements
- all scheduling decisions are still ultimately made by Aurizon Network and DBCT Pty Ltd
- the DCCC does not schedule or allocate entitlements in any contestable market, such as haulage
- no information of other coal producers or rail operators is required or disclosed
- the DCCC will not engage in collective negotiations over commercial terms of access
- the DCCC structure does not involve the transfer of any contractual rights from or between members.

59. Glencore submits the arrangements will not result in any adverse competitive impacts or other detriments.

60. The ACCC's assessment of the public detriments from the proposed conduct follows, including issues raised by interested parties.

Independence of the Scheduling Coordinator

61. Under the Charter, Pacific National is to perform the role of Scheduling Coordinator for the first 12 months, after which time the Management Committee may appoint a different member, or an independent person, firm or company, to this role. In addition, the Scheduling Coordinator may be replaced at any time through super-majority decision of the Management Committee if it concludes that the Scheduling Coordinator has not complied with its functions, objectives or obligations.

62. Vale raises concerns that this creates the potential for conflict between DCCC members and Pacific National's other customers due to the discriminatory flow of

⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

information, and Pacific National's obligation under the Charter to maximise throughput of the members. Anglo American submits that having a non-independent entity raises concerns that scheduling decisions may be made in such a way as to discriminate between members, or in favour of bodies corporate related to the Scheduling Coordinator's business. Aurizon Network submits that a rail operator acting as Scheduling Coordinator raises potentially serious issues from both a competition and a conflicts perspective, given potential conflicts with producers contracted to haulage providers who are not members of DCCC.

63. In response, the Applicants submit the Scheduling Coordinator's decision making will be fully exposed to all members on a weekly basis, and scheduling decisions or approaches can be escalated to the Management Committee at any time. All activities of the Scheduling Coordinator are overseen by the Management Committee which retains the ultimate power to direct it as to how scheduling decisions are to be made. The Scheduling Coordinator is under an explicit obligation to act in a fair and impartial manner and in the interests of members as a whole.
64. The ACCC notes the potential for conflict, or perceived conflict, with Pacific National's role as Scheduling Coordinator, but considers the potential for any detriment in this regard is substantially mitigated by the factors identified by the Applicant and recounted at paragraphs 58 and 63 above. While the ACCC expects some coal chain participants will be less likely to join the arrangement without an independent coordinator, it notes that there are good reasons for Pacific National to fulfil this role for the first 12 months (including the resource commitment involved for Pacific National in the appointment of a dedicated position for the role, and in recognition of the operational knowledge Pacific National can bring to the role particularly given it is the rail provider for the two initial producer members). After this time Pacific National can be replaced as Scheduling Coordinator by vote of the Management Committee, either with a different member or with an independent coordinator. The ACCC considers producer members of the Management Committee have commercial incentive to encourage new members to join, and as such are likely to appoint an independent Scheduling Coordinator should having Pacific National in this role prove a barrier to some parties' participation. Nonetheless the ACCC encourages the Management Committee to seriously consider this issue towards the end of the first 12 months.

Impact on non-member producers

65. Anglo American submits that the arrangements permit DCCC members to pool their train paths which would otherwise be available to other users (including non-members) on an ad hoc basis, which 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. Aurizon Network also expressed concern that improvements in the train scheduling outcomes for members of the DCCC may come at the detriment of other users.
66. The Applicants respond that the benefits arising from the DCCC do not occur by imposing losses on other users of the coal chain or other systems or coal chains, and that the DCCC arrangements will not detrimentally affect non-member users' current arrangements or throughput in any way, but may in fact benefit these users through more efficient use of the coal chain as a whole. The arrangements enable the pool of DCCC paths to be used to respond to anticipated demands on the system and to respond to changes that would otherwise result in lost capacity and waste (eg. through cancelled paths that cannot be used). Further, the Applicants submit that final decisions regarding rail scheduling will continue to be made by

Aurizon Network and DBCT Pty Ltd, applying the relevant principles in the regulatory frameworks.

67. The ACCC considers there is potential for greater coordination in the Goonyella Coal Chain to provide benefits to participants without impacting on other coal chain users, through the more efficient utilisation of the infrastructure in such a way as to increase the capacity of the coal chain as a whole. The DCCC arrangements may be able to achieve this in part by allowing train paths to be used which would otherwise be lost. The ACCC notes that no interested party has provided examples of how the proposed arrangements might result, or has during the trial period resulted, in lost train paths or other negative impacts for non-members.

Impact on rail haulage markets

68. Aurizon Rail submits the arrangements (if expanded beyond the Applicants, as intended) could impact on competition in the haulage market through:

- the sharing of information leading to the standardisation of terms of quality of service in the rail haulage market
- directly or indirectly influencing the way in which members negotiate haulage services
- facilitating tacit or overt collusion between buyers of rail haulage services
- Clause 6.3 of the Charter requires members not to enter into any new arrangements with third parties affecting the DBCT Coal Chain infrastructure which would put that member in conflict with their obligations under the Charter. Aurizon Rail submits this clause may limit producer members from holding competitive tenders for their rail haulage requirements
- providing a competitive advantage to operator members over non-member operators, as member operators could potentially offer a more flexible shipping stem relative to non-members.

69. In response the Applicants submit the DCCC arrangements will not, in practice, detrimentally impact competition for rail haulage and may in fact help to improve contestability for rail haulage services because:

- there is little, if any, haulage capacity associated with DBCT that is likely to become contestable during the proposed 5-year maximum term of the DCCC authorisation
- the DCCC increases transparency for coal producers
- they reduce barriers to entry into the haulage market by providing direct transparency and flexibility around scheduling for haulage customers (including for customers of smaller operators)
- Clause 6.3 does not, and is not intended to, restrict member producers from acquiring haulage services from non-member rail operators, noting that Clause 6.1(c) provides that members must at all times act in good faith in dealings with other members and other parties
- the arrangements do not involve sharing of pricing or terms of haulage contracts
- any attempt by members to use the DCCC to discuss and agree standardised commercial terms for haulage services would risk a contravention of the Act.

70. The ACCC considers the arrangements are unlikely to lessen competition between providers of haulage services, given that the scope of the conduct does not include commercial terms or pricing, and the nature of information to be shared. The ACCC notes that any attempts to establish a buying cartel would not fall within the scope of authorisation and would constitute a serious breach of the Act.

Additional issues

71. Anglo American considers the scheduling principles set out in the arrangements are inadequate. The Applicants respond that the principles are set out in detail in Clause 9.3 of the Charter, and that in addition the Scheduling Coordinator has overarching obligations under the Charter to act fairly, equitably and in the best interests of all members. The Applicants submit the principles identify key outcomes rather than rigid protocols because rigidity is part of the current problem preventing flexible operations, and that the principles will allow the scheduling arrangements and principles to evolve over time.

72. Anglo American and Aurizon Network raise concerns that sensitive or confidential information to be shared within the DCCC is not adequately protected by the confidentiality regime set out in the arrangements. The Applicants respond that all confidential information is protected by confidentiality protocols within the Charter, and the only information shared within the DCCC which is not otherwise available to industry participants relates to production and mine stockpile levels over a 3-4 month planning horizon.

73. Coal producers Anglo American and Vale are concerned at the voting arrangements within the Management Committee. Vale submits it is concerned that smaller producers are excluded from voting in the Management Committee, while Anglo American is concerned that smaller producers are over-represented in the Management Committee as voting is not based on tonnage. In response, the Applicants submit that the voting arrangements for the Management Committee are necessary to ensure the DCCC is not able to be dictated to by a small number of large producers, and conversely to prevent producers from 'gaming' the system by only contributing a small amount of tonnage in order to be able to gain the right to a vote. The ACCC notes that the Applicants have applied the voting thresholds flexibly when appropriate, and have agreed to the inclusion of smaller producer, Vale, as a voting member of the Management Committee.

74. Aurizon Rail is concerned the Charter can be amended by vote of members, without reconsideration by the ACCC. The Applicants note any variation to the Charter that sought to permit members to engage in conduct that is outside the scope of the authorisation and not contemplated by the Charter and the agreements and arrangements contemplated by the Charter would require at least a minor variation, or potentially a revocation and substitution, be lodged with the ACCC for consideration. Further, the Charter itself limits the nature of variations, including not having a retrospective effect or impact on a member's ability to exit the DCCC.

75. Anglo American submits the arrangements create an extra step in the scheduling process and the arrangements may create barriers to improvement. The Applicants submit that having an extra preliminary step should not impact upon non-members, and the arrangements do not involve changes to any existing supply or haulage contracts, and do not involve the sharing of customer, price, marketing, or product information.

76. . Having considered the issues above, the ACCC considers the clarifying information provided by the Applicants appears to adequately address the concerns raised. In addition, in general terms the ACCC notes that:

- nothing (in the arrangements or otherwise) prevents any other party from establishing similar arrangements, either amongst other non-DCCC member users or through an independent coordinating body
- participation in the DCCC is voluntary and members can leave at any time at no cost, and
- the Charter, including scheduling principles, confidentiality requirements, and Management Committee protocols can be altered by a super-majority decision of the Management Committee (so long as these are within the scope of the authorisation), allowing for a flexible approach should members have concerns with aspects of these. More substantial alterations may require a variation to the authorisation.

77. The ACCC therefore considers on the basis of the information before it that the arrangements are unlikely to result in significant detriment.

Balance of public benefit and detriment

78. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

79. The ACCC considers the proposed arrangements are likely to result in a public benefit in the form of increased throughput for the DBCT through a more efficient utilisation of existing infrastructure, and is unlikely to result in significant public detriment given the scope of the conduct and the nature of the information to be shared between the parties within the arrangements.

80. 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.

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

Length of authorisation

82. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ 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.

83. In this instance, the Applicants seek authorisation for the length of the Charter (including possible extensions) up to a maximum period of five years.

84. No submissions were received from interested parties regarding the length for which authorisation should be granted.

85. Given the time needed to establish develop the arrangements, the ACCC considers authorisation for the length of the Charter up to a maximum period of five years is an appropriate period for it to grant authorisation.

⁶ Subsection 91(1).

Draft determination

The applications

86. On 25 February 2014 Rio Tinto Coal Australia Pty Ltd, Peabody Energy Australia Pty Ltd and Pacific National Pty Ltd (the Applicants) lodged applications for authorisation A91410 and A91411 with the ACCC. Applications A91410 and A91411 were made using Forms A and B, Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsections 88 (1) and 88(1A) of the Act for the Applicants 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.
87. The Applicants seek authorisation of these arrangements 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. The arrangements may also contain an exclusionary provision (within the meaning of section 45 of the Act) that may also be a cartel provision.
88. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

89. The relevant tests for consideration of this application for revocation and substitution are set out in subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).
90. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed arrangements are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
91. The ACCC is also satisfied that the proposed arrangements are likely to result in such a benefit to the public that the conduct should be allowed to take place.
92. The ACCC therefore **proposes to grant** authorisation to applications A91410 and A91411.

Conduct for which the ACCC proposes to grant authorisation

93. The ACCC proposes to grant authorisation to Rio Tinto Coal Australia Pty Ltd, Peabody Energy Australia Pty Ltd and Pacific National Pty Ltd, and any future members, to give effect to⁷ the DBCT Coal Chain Coordinator (DCCC) Members'

⁷ 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.

Agreement and Charter (the Charter) and to make and give effect to the agreements and arrangements contemplated by the Charter, that is 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
- 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 arrangements) for the length of the Charter (including possible extensions) up to a maximum period of five years.

94. This draft determination is made on 19 June 2014.

Interim authorisation

95. At the time of lodging the applications the Applicants requested interim authorisation to commence a trial period of implementation of the coordination arrangements. The ACCC granted interim authorisation under subsection 91(2) of the Act on 27 March 2014 to enable the three Applicants to give effect to the arrangements.

96. The ACCC considers that there is a benefit in expanding the interim authorisation to allow the inclusion of possible new DCCC members. The ACCC considers an expansion of the arrangements is unlikely to result in significant detriment.

97. The ACCC therefore extends the existing interim authorisation to include any future members to make and give effect to the arrangements set out in paragraph 93.

98. 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

The ACCC will now seek further submissions. 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.