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# COMPETITION ISSUES IN RESOURCES PROJECTS

## EXCLUSIVITY IN SUPPLY CHAINS

### INTRODUCTION

Mining projects require rail and port access to get the resource from the mine to the export market. Owners and users alike are constantly looking for ways to improve the efficiency of the supply chain and to increase supply chain throughput. Often, these outcomes require the operator to maintain or increase its level of control over the supply chain.

In devising ways to improve the efficiency of supply chains or to increase control, owners, operators and users must be careful not to breach the anti-competitive provisions of the *Competition and Consumer Act 2010* (Cth) (Act), particularly the prohibitions against misuse of market power, exclusive dealing and third line forcing.

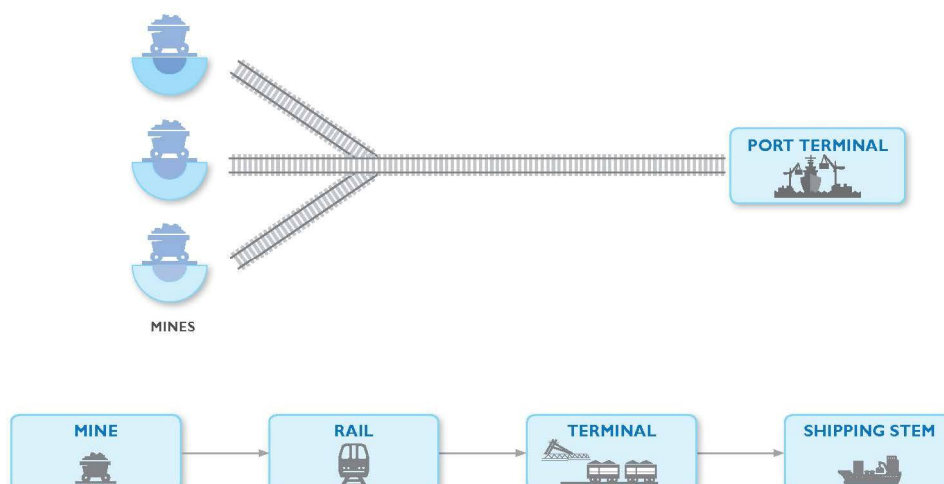
Parties may seek immunity to engage in exclusive dealing and third line forcing by lodging a notification with the Australian Competition and Consumer Commission (ACCC).

### KEY COMPETITION ISSUES

We briefly outline two key competition issues that have arisen in relation to the control of certain aspects of the supply chain in resources projects:

#### Single supplier of supply chain services

Making the use of a supply chain or part of a supply chain contingent on a requirement that customers also use the services of a third party provider is in breach of the Act, as it constitutes third line forcing.



Examples of third line forcing are:

- The provider of below rail or port handling services providing access on condition that the customer use a nominated above rail haulage provider.
- A Port Authority only permitting commodity owners to use a port on condition that a nominated towage operator is used.
- A bulk export port terminal operator agreeing to handle the commodity on condition that the customer use a nominated shipping line.

In June 2012, Port of Townsville Ltd notified the ACCC that it intended to only permit use of its port if users of the port acquire towage services from the holder of an exclusive licence granted by the port authority. Other port authorities in Australia have lodged similar notifications with the ACCC.

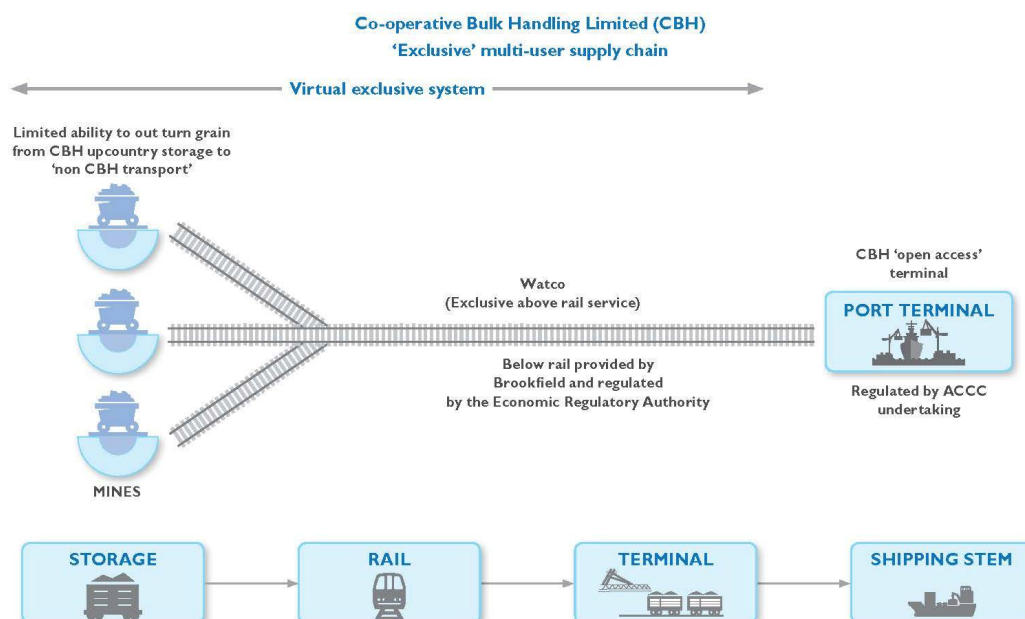
The notifications lodged by port authorities have received greater scrutiny over the last 12 months by interested parties and the ACCC, including in relation to whether ports have now increased in size sufficiently to be able to support a second towage operator, whether the competition to win exclusive rights to supply towage services is sufficient to compensate for the absence of competition during the contract period, whether the exclusive licences have led to higher rather than lower prices for towage services and whether the licences have caused over-capitalisation in tugs.

In September 2012, Port Hedland Port Authority notified the ACCC that it intended to only permit use of its port if users of the port acquire towage services from BHP Billiton Minerals. The ACCC is currently re-assessing whether it should allow the notification to stand.

### Gaining control over the supply chain

Owners and operators of bulk supply chains, even if not vertically integrated, often want to control the supply chain from storage to port to better coordinate the supply chain and drive efficiencies. Where the operator of a supply chain faces competition in only some components of a bulk export supply chain, it may introduce arrangements that seek to coordinate all components of the supply chain (for example, requiring customers to use the same supplier for all components). Such arrangements can raise competition law issues.

On 11 June 2008, Co-operative Bulk Handling Limited (CBH) notified the ACCC that it would require growers who store grain in its up-country storage facilities to also use its rail transport services to move grain to port for export (Notification). Given that CBH is virtually the only provider of up-country storage and there are high barriers to entry to storage for bulk export grain, the Notification effectively meant that no above-rail competition would be possible in the supply chain. This, in effect, created a virtual exclusive system from up-country storage to port controlled by CBH.



On 29 June 2011, after having investigated industry complaints, the ACCC gave notice to CBH revoking the statutory protection afforded by the Notification effective 1 May 2012. CBH appealed this decision to the Australian Competition Tribunal, who on 19 April 2013 upheld the ACCC's decision to revoke the Notification. Accordingly, CBH can no longer require customers to use its nominated rail service.

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