



**Australian  
Competition &  
Consumer  
Commission**

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Our Ref: A91072-A91074; A91075-A91077  
Contact Officer: Sarah Chubb  
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20 December 2007

Ms Liza Carver  
Partner  
Gilbert + Tobin  
GPO Box 3810  
SYDNEY NSW 2001

Dear Ms Carver

**Application for authorisation A91072-A91074 lodged by Newcastle Port Corporation and application for authorisation A91075-A91077 lodged by Donaldson Coal Pty Limited – interim authorisation decision**

The Australian Competition and Consumer Commission (the ACCC) has decided to grant interim authorisation in respect of:

the possible arrangements between Newcastle Port Corporation (NPC), Port Waratah Coal Services Limited (PWCS) and any producer or exporter of coal through the Port of Newcastle, as set out in application for authorisation A91072-A91074 lodged by NPC on 4 December 2007 and amended on 17 December 2007; and

the possible arrangements between Donaldson Coal Pty Limited (Donaldson), NPC, PWCS and any producer or exporter of coal through the Port of Newcastle, as set out in application for authorisation A91075-A91077 lodged by Donaldson on 7 December 2007 and amended on 10 December 2007.

The grant of interim authorisation extends to any revisions of the proposed arrangements which are consistent with Gilbert and Tobin's letter to the ACCC dated 19 December 2007 (sent on behalf of NPC) providing for transitional provisions relating to the implementation of the proposed arrangements.

Interim authorisation protects the arrangements for which authorisation is sought from legal action under the relevant provisions of the *Trade Practices Act 1974* (the Act) while the ACCC considers and evaluates the merits of the applications for authorisation.

## **Background**

NPC and Donaldson are both seeking authorisation for a proposed system designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.

NPC and Donaldson have indicated that their proposals are, in all material respects, consistent with the capacity balancing system (CBS) currently in operation at the Port of Newcastle but due to expire on 31 December 2007.

NPC and Donaldson have requested urgent interim authorisation due to the pending expiration of the authorisation of the current CBS.

## **Reasons for decision**

The ACCC considers that the grant of interim authorisation may facilitate the continuation of the existing CBS in the short term – in essence, maintaining the status quo – while the ACCC fully considers the applications for authorisation currently before it. The ACCC considers that, if implemented, the proposed CBS may help to limit the size of the vessel queue at the Port of Newcastle, thereby limiting the demurrage costs payable by producers.

The ACCC notes that the grant of interim authorisation removes any barriers posed by the Act in relation to the implementation of the proposed CBS. However, the question of whether the proposed CBS is implemented from 1 January 2008 remains an issue for industry to determine.

In granting interim authorisation, the ACCC notes that the current CBS has been in operation for several years. The ACCC has previously expressed the view that capacity allocation systems are transitional measures only, and that continued operation of the CBS on an extended basis may hinder the development of a long term solution to address the underlying issues behind constrained coal chain capacity in the Hunter Valley. The ACCC urges industry to continue to work towards a long term solution to address these underlying issues.

The ACCC notes that its decision to grant interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted by the ACCC.

## **Reconsideration of interim authorisation**

The ACCC may review the interim authorisation at any time.

The ACCC expects to issue a draft determination in relation to these applications in February 2008, and would expect to consider whether it is appropriate to continue interim authorisation at that time.

## **Next steps**

As noted above, the next step in the process for each application is for the ACCC to release a draft determination which will take account of any submissions from NPC, Donaldson and interested parties and will indicate the ACCC's preliminary views on the

merits of the applications. The ACCC will provide NPC, Donaldson and interested parties with the opportunity to provide further submissions on the draft determination before the ACCC issues its final decision.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Sarah Chubb on (02) 6243 1088.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Gregson', written over a light grey rectangular background.

Scott Gregson  
General Manager  
Adjudication Branch