COAL & ALLIED

Managed by Rio Tinto Coal Australia

17 December 2007

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Attention: Mr Scott Gregson

Dear Mr Gregson

Application for Authorisation A91072 – A91074 lodged by Newcastle Port Corporation (NPC)

Thank you for the opportunity to provide comment on the requested Application for Authorisation A91072 – A91074.

Coal and Allied Industries Limited (C&A) has previously made a submission to the ACCC in support of the Authorisation Application lodged by Pacific National (PN), Port Waratah Coal Services (PWCS), and Queensland Rail (QR) proposing the Vessel Queue Management System (VQMS). C&A notes the ACCC's decision of 13 December 2007 to not grant interim authorisation for that Application. C&A is concerned that in the absence of an interim authorisation for the VQMS, there is significant potential for the vessel queue to increase dramatically in early 2008.

Consequently, C&A agrees, in principle, with the concept put forward in the NPC application. That is, to roll over the CBS based on the port nominations which were used in the 2007 CBS, for the period 1 January 2008 to 31 December 2008, or until the ACCC approves the application for authorisation of the VQMS, whichever is earlier. Basing an interim allocation system on the 2007 port nominations ensures that no producer would go backwards from their 2007 position.

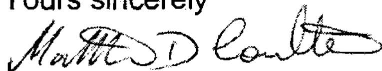
However, while C&A agrees with the concept of the NPC application, C&A queries the validity of the application, and submits that PWCS is the appropriate party to put forward an application for authorisation of a capacity balancing system such as that proposed by NPC. Please find enclosed a letter from Allens Arthur Robinson outlining C&A's position that each of the applications made by NPC is invalid.

C&A is not in a position to comment on the practicalities of implementing the application. However, as PWCS has not made the application, it is difficult for C&A to give its full support to a proposal for which the party that will need to implement it has not stated that it can or intends to implement it.

In light of the new application for authorisation from another coal producer, C&A are in the process of considering their position regarding Application for Authorisation A91075 – A91077.

Please contact me on 07 3361 4228 if you have any queries.

Yours sincerely



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14 December 2007

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Dear Mr Gregson

Authorisation applications by Newcastle Ports Corporation

We act for Coal & Allied Industries Limited (***C&A***).

We refer to the three applications for authorisation lodged with the Australian Competition and Consumer Commission (***ACCC***) on 3 November 2007 by Newcastle Ports Corporation (***NPC***) in relation to exclusionary provisions, secondary boycotts and agreements affecting competition. C&A has asked us to comment on the validity of the applications on its behalf, but without expressing any views at this point in relation to the proposed capacity distribution system to which the applications relate.

For the reasons set out below, each of these applications is invalid as the applications do not relate to conduct that is occurring or which is proposed to occur. Further, even if the conduct was to occur, NPC is not a party to any such conduct, and therefore lacks the standing required to make an application.

1. No conduct to be authorised

The applications lodged by NPC specify that the conduct to be authorised is:

> *the making of, or giving effect to, any contract, arrangement or understanding involving NPC, PWCS and any producer of coal for export through the Port of Newcastle, or exporter or exporters of coal through the Port of Newcastle (whether they are shareholders in PWCS or not) which relates to, or is in any way associated with, the proposed capacity distribution system to apply from 1 January 2008, which is described in the attached submission.*

Attachment 1 to the submission which accompanied the applications sets out the "proposed capacity distribution system" in the form of a draft Annexure 4F to the standard Coal Handling Services Agreement which applies between PWCS and each of its customers (ie, producers/exporters). The proposed system largely replicates, but is not identical to, the current Capacity Balancing System that is the subject of an authorisation (lodged by PWCS) which expires on 31 December 2007.

As is evident from the above, the NPC applications relate to a proposed arrangement between PWCS and both NPC and coal exporters (ie, PWCS' customers). The wording

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Beijing
Brisbane
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
Melbourne
Perth
Phnom Penh
Port Moresby
Shanghai
Singapore
Sydney

of the applications makes it clear that PWCS is a critical party to any such arrangement. For this reason, it is quite apparent that at the current time there is no conduct of the type specified in the applications either occurring or, as far as C&A is aware, likely to occur.

While section 88 of the Trade Practices Act (***TPA***) expressly permits the ACCC to authorised *proposed* conduct, it does not empower the ACCC to authorise purely *hypothetical* conduct. In order to constitute proposed conduct, C&A submits that there must be a reasonable likelihood that the conduct will occur in the foreseeable future. C&A is not aware of such a prospect existing in the case at hand. While it may not be necessary for all parties identified in an authorisation application to have consented to take part in the conduct at the time of making the application, C&A submits that, at a minimum, the key participants in any arrangement, without whom the conduct could not occur, must have consented or at least be likely to enter into the arrangement if it is authorised.

That is not the case here. As far as C&A is aware, PWCS, as a key party to the arrangement sought to be authorised, has not consented or indicated any current likelihood of entering into the "proposed" arrangement. To the contrary, PWCS has previously lodged separate applications for authorisation with the ACCC which relate to a quite different capacity balancing system for 2008. Further, PWCS does not specify NPC as being a party to those arrangements.

In these circumstances, C&A submits that it is clear the NPC applications are invalid, as there is no proposed conduct of the type specified therein.

2. No standing to seek authorisation

Even if PWCS did indicate a willingness to enter into arrangements of the type specified in the NPC applications for 2008, the NPC applications are still invalid as NPC lacks the necessary standing to make an application.

Section 88(1) of the TPA provides that the ACCC may grant authorisation to a corporation which enables the corporation to make or give effect to an arrangement which would substantially lessen competition or which constitutes an exclusionary provision. Section 88(7) allows the ACCC to grant authorisation to a person to engage in conduct which would constitute a secondary boycott.

In both cases, section 88 requires that the corporation/person must be engaging in the conduct which constitutes, or may constitute, a contravention of the TPA. NPC's application fails to meet this requirement.

The capacity balancing system the subject of the NPC application is a revised draft Annexure 4F to the standard PWCS Coal Handling Services Agreement. NPC is not a party to that agreement. It is, in each case, an agreement between PWCS and its relevant customer (ie, coal producers/exporters). The fact that NPC is not a party to the arrangement is highlighted by the fact that NPC has never been listed as a party to the previous authorisation applications granted by the ACCC in relation to capacity balancing arrangements at the Port of Newcastle.

NPC attempts to categorise itself as a party to an arrangement between PWCS and coal producers/exporters solely on the basis of a completely separate lease between NPC and PWCS in relation to land on which PWCS' facilities are located, and the existence of 'common user' provisions in that lease. Those provisions are set out in section 3.1 of the submission accompanying the NPC applications.

C&A submits that NPC's arguments do not withstand scrutiny, and there is no legal basis to conclude that NPC is a party to any arrangement that might exist between PWCS and coal producers/ exporters:

- The lease imposes an obligation on PWCS to operate the coal loading facility as a common user facility, but there is no obligation on PWCS to submit any operational rules or procedures that it implements to NPC for approval before their implementation. The lease therefore does not impose any positive obligation on NPC to approve a capacity balancing system introduced by PWCS. If there was such an obligation, there may be more merit to NPC's claim that it would impliedly be a party to any capacity balancing system.
- The lack of any pre-approval right is evidenced by the fact that, so far as C&A is aware, PWCS has never sought NPC's approval or consulted with NPC in relation to the previous capacity balancing systems that have been authorised by the ACCC. The submission accompanying the NPC applications refers to clause 4.3(a) of the lease, which allows the NPC to waive the operation of the 'common user' provisions, and asserts that the NPC has granted waivers under that clause in relation those previous capacity balancing systems. However, clause 4.3(a) requires PWCS to make submissions to the NPC as a precursor to the grant of any such waiver. C&A is not aware that PWCS has made any submissions to NPC under clause 4.3(a) in relation to the previously authorised capacity balancing systems.
- Any rights that NPC has in relation to the operation of the facility as a common user facility must be enforced by NPC establishing, in legal proceedings for a breach of the lease, that the operation of the facility by PWCS is inconsistent with the common user requirements. It cannot be concluded that any failure by NPC to institute legal proceedings in relation to a future capacity balancing system introduced by PWCS would constitute 'actual or implied approval" of any such arrangement as claimed by NPC.
- Even if non-objection by NPC did constitute implied approval, for the purposes of the lease, of any arrangement implemented by PWCS, that does not make NPC a party to the arrangement *for the purposes of the TPA*. Any approval granted, expressly or impliedly, by NPC would relate solely to whether NPC considers that the system complies with the common user requirements. Such approval says nothing about whether the arrangement may give rise to liability under the TPA, nor does it condone such an agreement if it happens to give rise to TPA issues since there may be TPA issues unrelated to common user considerations. To be a party to an arrangement under the TPA, a party must assume some obligation with the other parties in relation to the conduct which is illegal. That critical element is clearly absent here.
- Accordingly, even on the basis put forward by NPC, it cannot be the case that NPC can properly be described as a party to a separate arrangement between PWCS and each of its customers for the purposes of the TPA. The lease, and NPC's actions under the lease, are separate to, and do not involve or require NPC to be involved in, the making or giving effect to any arrangement between PWCS and coal producers/exporters for the purposes of the TPA.
- As NPC is not a party to the conduct the subject of the authorisation application, NPC has no standing to apply for authorisation. It has sought to establish a claim to standing via

provisions in a completely separate agreement to the agreement for which authorisation is sought.

C&A submits that PWCS is the appropriate party to put forward any application for authorisation of a capacity balancing system such as that proposed by NPC (or at least a party to the proposed arrangement who has the support of PWCS). PWCS has not sought authorisation of such a system. Authorising an application by a third party such as NPC will provide that applicant with commercial leverage to force PWCS to enter into contractual arrangements for 2008 that, to date, it has not indicated a willingness to enter. Even if there was a legal basis to grant authorisation to NPC, the ACCC should not be prepared to grant authorisations in these circumstances and, C&A submits, must consider carefully the implications of handing a third party this power.

Yours sincerely

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