



**Australian  
Competition &  
Consumer  
Commission**

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Our Ref: A91033 – A91035  
Contact Officer: Jaime Martin  
Contact Phone: (03) 9290 1477

28 February 2007

Dear Sir/Madam

**Re: Port Waratah Coal Services Ltd application for revocation of authorisations  
(A30236 – A30238) and substitution of authorisations (A91033 – A91035)  
- interested party consultation**

The Australian Competition and Consumer Commission (the ACCC) is currently conducting an interested party consultation process in relation to the above mentioned application from Port Waratah Coal Services Ltd (PWCS) for the revocation of authorisations A30326- A30238 and substitution of new authorisations A91033 – A91035.

In April 2005 the ACCC granted conditional authorisation (A30236 – A30238) to PWCS for the Medium Term Capacity Balancing System (CBS) until 31 December 2007. The Medium Term CBS was 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 September 2006, Hunter Valley coal producers voted to discontinue the Medium Term CBS in 2007. Since that time, a large queue of vessels has re-formed at the Port of Newcastle.

As such, PWCS has sought revocation of the current authorisations A30236 – A30238 so that they can be substituted with authorisations A91033 – A91035 to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle until 31 December 2007.

The purpose of this letter is to invite you, as a potentially interested party, to comment on the issues outlined in this letter and PWCS' application.

PWCS has also requested interim authorisation so that it can implement the proposed amended Medium Term CBS as soon as practicable, and if possible, prior to the commencement of the second quarter of 2007. The ACCC seeks your comments on the request for interim authorisation by **Friday, 9 March 2007** – comments can be provided by email or fax to the contacts shown at the end of this letter. The request for interim authorisation is discussed further on pages 3-4 of this letter.



## **Background**

The ACCC is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way businesses may obtain immunity is to apply for what is known as an 'authorisation' from the ACCC. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

In assessing the public benefits and detriments of an authorisation application, the ACCC undertakes a public consultation process seeking comments on the application from interested parties. Following an initial consultation process, the ACCC will issue a draft decision for comment. The ACCC will then reconsider the application in light of any further submissions, and release its final decision.

Parties to an authorisation may apply for what is known as 'revocation and substitution'. The ACCC treats an application for revocation and substitution as a fresh application and the processes above are followed.

### **Application for re-authorisation by PWCS**

On 27 February 2007 the ACCC received an application for revocation of authorisations A30236 – A30238 and substitution of authorisations A91033 – A91035 to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle until 31 December 2007 (that is, for the term of the PWCS' current authorisation).

In particular, PWCS seeks authorisation to reinstate a modified Medium Term CBS to take effect from 1 January 2007 until 31 December 2007. The terms of the amended Medium Term CBS are set out in Annexure 4F to the Coal Handling Services Agreement (attached to PWCS' supporting submission). In summary, the key proposed amendments to the Medium Term CBS are:

'large producers' will receive a monthly coal loading allocation, rather than a quarterly allocation, aimed at ensuring a more even allocation mechanism within quarters to address the current pattern of end of quarter vessel queue peaking

the 'flexibility amounts' will be increased to 180 000 tonnes, which aims to recognise legitimate fluctuations in demand and to allow greater flexibility to producers.

PWCS submits that the proposed amendments to the Medium Term CBS will not result in any decrease in coal exports at the Port of Newcastle. It also submits that the public benefits in the form of reduced demurrage costs as a result of re-instating the modified Medium Term CBS will outweigh any public detriments.

For details on the proposed amendments to the Medium Term CBS, and public benefits and detriments that PWCS claims are likely to result from the proposed arrangements, please see the attached submission.

A full copy of the application for authorisation is also available on the ACCC's website <[www.accc.gov.au](http://www.accc.gov.au)> (by following the Public registers and Authorisations links).

### **Request for submissions**

To assist the ACCC in its consideration of the application it would be helpful to obtain your comments on the likely public benefits and any likely anti-competitive effects, or any other public detriment, from the proposed arrangement.

The ACCC asks for submissions to be in writing so they can be made publicly available. They are placed on a public register for this purpose.

Persons lodging a submission with the ACCC may request that information included in the submission be excluded from the public register in certain circumstances. Submissions which are excluded from the public register may still be taken into account by the ACCC when conducting its assessment of an authorisation application. Guidelines for seeking exclusion from the public register are attached for your information.

If you wish to lodge a submission, please address your submission to:

The General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

Submissions can also be lodged by email to [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au) or by facsimile on (02) 6243 1211. Please also provide a preferred email address for any future correspondence from the ACCC.

If you intend to provide a submission in relation to PWCS' application for authorisation, please do so by **Monday, 19 March 2007**. The ACCC will progress its assessment of the application in a timely manner. An indicative timetable is set out below for your information.

### **Call for submissions on request for interim authorisation**

As previously mentioned, PWCS has also requested interim authorisation to allow it to reinstate the modified Medium Term CBS as soon as practicable, and if possible, prior to the commencement of the second quarter of 2007.

Interim authorisation would allow the modified Medium Term CBS to operate as if it had full authorisation while the substantive application is being considered by the ACCC.

The ACCC endeavours to deal with requests for interim authorisation quickly. In making an assessment as to whether it is appropriate to grant interim authorisation, the ACCC is not required to undertake a full assessment of the benefit and anti-competitive detriment likely to arise as a result of the proposed conduct.

The ACCC decides whether to grant interim authorisation on a case by case basis. Should an applicant request interim authorisation, the ACCC will usually consider a range of factors including harm to the applicant and other parties if interim is or is not granted, possible benefit and anti-competitive detriment to the public, the urgency of the matter and whether the market would be able to return to substantially to its pre-interim state if the ACCC should later deny authorisation.

PWCS considers that interim authorisation of the amended Medium Term CBS is necessary and urgent to allow it to begin addressing the substantial queue (currently around 60 vessels) that has re-formed at the Port of Newcastle since September 2006. PWCS submits that the industry is currently paying approximately A\$1 million per day in demurrage charges as a result of this queue.

Further details of PWCS' request for interim authorisation are in sections 3 and 4 of its supporting submission.

The ACCC would also appreciate your views in relation to the request for interim authorisation. To facilitate this, you may wish to provide your views in writing to the above email address; by faxing your comments to the General Manager, Adjudication, (02) 6243 1211; or by calling the officers responsible for this matter, Jaime Martin or David Hatfield (contact details provided below), by **Friday, 9 March 2007**.

### **Future correspondence from the ACCC**

Please inform us if you do not wish to make a submission at this time, but would like to be informed of the progress of these applications at the draft and final determination stages (including a preferred email address).

You can also forward this letter to any other party who may wish to make a submission to the ACCC regarding this application.

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 Jaime Martin on (03) 9290 1477 ([jaime.martin@accg.gov.au](mailto:jaime.martin@accg.gov.au)) or David Hatfield on (02) 6243 1266 ([david.hatfield@accg.gov.au](mailto:david.hatfield@accg.gov.au)).

Yours sincerely



Scott Gregson  
General Manager  
Adjudication Branch

**PWCS application for revocation of authorisations (A30236 – A30238) and substitution of authorisations (A91033 – A91035) – indicative timetable**

|                         |  |
|-------------------------|--|
| <b>27 February 2007</b> | Lodgement of application and supporting submission, including request for interim authorisation. |
| <b>28 February 2007</b> | Public consultation process begins.  |
| <b>9 March 2007</b>     | Closing date for submissions on interim authorisation.   |
| <b>March 2007</b>       | ACCC decision regarding interim authorisation.   |
| <b>19 March 2007</b>    | Closing date for submissions from interested parties on substantive application.                 |
| <b>April 2007</b>       | Draft determination issued by the ACCC.  |
| <b>May 2007</b>         | Public consultation on draft determination including any conference if called.                   |
| <b>May/June 2007</b>    | Final determination issued by the ACCC.  |

**PWCS – application for revocation of authorisations A30236 – A30238 and substitution of authorisations A91033 – A91035**

**Re: proposed re-instatement of the Medium Term Capacity Balancing System for 2007**

**Initial consultation - list of interested parties**

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**Producers**

1. Anglo Coal Australia Pty Limited
2. Austar Coal Mine Pty Limited
3. BHP Billiton - Energy Coal
4. Bloomfield Collieries Pty Limited
5. Centennial Coal Company Limited
6. Coal & Allied (Rio Tinto Coal Australia Pty Ltd)
7. Donaldson Coal Pty Ltd
8. Gloucester Coal Limited
9. Integra Coal Operations Pty Ltd
10. Resource Pacific Limited
11. Peabody Pacific Pty Limited
12. White Mining limited
13. Whitehaven Coal Mining Pty Ltd
14. Idemitsu Australia Resources Pty Limited
15. Xstrata Coal Australia Pty Ltd
16. Camberwell Coal Pty Ltd
17. Newcastle Coal Infrastructure Group
18. Muswellbrook Coal Company Ltd

**Government**

19. NSW Minerals Council
20. NSW Department of Mineral Resources
21. Ministry of Transport (NSW)
22. Department of Industry, Tourism and Resources
23. Department of Foreign Affairs and Trade – Trade Development Division

**Rail**

24. Australian Rail Track Corporation Ltd
25. QR
26. Pacific National

**Other**

27. Hunter Valley Coal Chain Logistics Team
  28. United Mine Workers Federation
  29. The Maritime Union of Australia
  30. Hunter Valley Coal Chain Logistics Team
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Australian  
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## Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes

### Public process

The Australian Competition and Consumer Commission (ACCC) is responsible for assessing non-merger authorisation and merger clearance applications and notifications. Successful applicants and notifying parties are protected from legal action under specific competition provisions of the *Trade Practices Act 1974* (the Act). The provision of such legal protection is not taken lightly. The ACCC's assessment of authorisation and merger clearance applications and notifications is therefore conducted openly and transparently with extensive consultation.

Under the Act the ACCC must maintain public registers of information provided in the authorisation, merger clearance and notification processes. The ACCC may place information from its public registers on the ACCC website.

### Can information be excluded from the public registers?

The Act allows for applicants, notifying parties and interested parties providing information about an authorisation or merger clearance applications or notifications to ask that the information, or parts of it, be excluded from the relevant public register.

Under the Act, when a request to exclude information from the public register is made, the ACCC must exclude the information from the public register if it contains the details of:

- a secret formula or process
- the cash consideration offered for the acquisition of shares or assets
- the current costs of manufacturing, producing or marketing goods or services.

The ACCC also has discretion under the Act to exclude material from the public registers if it is satisfied that it is desirable to do so, either because of the confidential nature of the material or for any other reason.

### How to request information be excluded from the public register

The Trade Practices Regulations outline what parties need to do if they want information provided to be excluded from the public register.

The regulations state that if such a request is made for a whole document or parts of a document, the words 'Restriction of Publication Claimed' should appear in red writing near the top of each page.

When a request is made for exclusion of part of a document, the regulations state that the words 'Restriction of Publication of Part Claimed' should appear in red near the top of the first page and the part of the document for which exclusion is requested should also be clearly marked in red. If the request concerns a document longer than five pages, a description of the whereabouts of the parts for which exclusion is requested should be provided.

The ACCC asks that you provide a full copy of the document, and a public register version with the information to be excluded from the public register omitted.

You should remove headers claiming 'Confidential communication' from documents (for example, emails and facsimiles) unless they contain information that you want excluded from the public register. If the information is not confidential and the header cannot be removed, you should clearly state at the beginning of correspondence to the ACCC that exclusion from the public register is not requested.

Applicants, notifying parties and parties requesting that information be excluded from the public register must do so when they submit the information to the ACCC. Reasons must be provided in support of the request.

## How does the ACCC assess requests to exclude information from the public register?

Information subject to a request for exclusion will not be placed on the public register while the ACCC assesses the request.

The ACCC will try to respond to requests to exclude information from the public register within one to two business days. The ACCC is generally able to respond much faster if requests are limited to information that is genuinely confidential, if confidential information is clearly marked and if requests are accompanied by a detailed explanation of why it should be excluded from the public register.

When the ACCC agrees to a request, the information will be excluded from the relevant public register. This information may still be used by the ACCC under its powers under the Act. Information withheld from the public register may still be accessed through other legal processes such as under the *Freedom of Information Act 1982*.

If the ACCC denies a request because the request is not accompanied by sufficient supporting information or because it considers that the information is not confidential in nature, the ACCC will inform the party making the request of its decision.

If the ACCC denies a request, the information for which exclusion was denied will be considered as withdrawn from the ACCC's consideration—unless the party advises that it wishes to withdraw or amend the request. As a general rule, the ACCC will allow the party one to two business days to respond.

If a party chooses to withdraw the information subject to an exclusion request, the ACCC will not use the information in its decision-making processes.

Generally speaking, the ACCC **will** decline a request to exclude information from the public register where that information is necessary to identify the conduct or arrangements for which protection is sought.

### *Checklist for requesting that information be excluded from the public register*

- Have you identified the specific sections of the document to which the request relates?
- Have you outlined reasons for requesting that information be excluded from the public register?
- Have you provided a copy of the full document and identified those parts you want excluded?
- Have you provided a public register version of the document and masked or removed those parts you want excluded?
- Are you aware that requests to exclude information from the public register must be submitted at the time the information is provided to the ACCC?

### Related publications

*Access to public registers*

*Merger guidelines 1999*

*Merger review process guidelines*

*Formal merger review process guidelines*

*Guide to authorisation*

*Guide to collective bargaining notifications*

*Guide to exclusive dealing notifications*

### ACCC contacts

Infocentre 1300 302 502

Website [www.accc.gov.au](http://www.accc.gov.au)

For other business information, go to [www.business.gov.au](http://www.business.gov.au)