



**Australian
Competition &
Consumer
Commission**

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Professor Stephen Corones
Consultant
DLA Phillips Fox
Waterfront Place
1 Eagle Street
Brisbane QLD 4000

Dear Professor Corones

**Applications for authorisation regarding Dalrymple Bay Coal Terminal –
- request for interim authorisation**

The Australian Competition and Consumer Commission (the ACCC) has decided to deny interim authorisation in respect of the application for authorisation lodged by eight coal producers using the Dalrymple Bay Coal Terminal on 14 November 2008. A copy of the ACCC's decision, including a statement of its reasons, is attached.

Next steps

For your information, the next step in the process is for the ACCC to release a draft determination which will take account of any submissions from the applicants and interested parties and will indicate the ACCC's preliminary views on the merits of the application. The ACCC will give both the applicants and interested parties the opportunity to provide a further submission on the draft determination before the ACCC issues its final decision.

As noted in the attached decision, the ACCC may review its decision on interim authorisation at any time. In this regard the ACCC will reconsider this decision at the time of issuing its draft determination. The ACCC's decision in relation to interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted by the ACCC.

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 Shane Chisholm on (02) 6243 1252.

Yours sincerely

Dr Richard Chadwick
General Manager
Adjudication Branch



Anglo Coal Australia Pty Ltd and Others (re Dalrymple Bay Coal Terminal) - Applications for authorisation [A91107-A91109] – request for interim authorisation

REASONS

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided not to grant interim authorisation at this time in respect of the applications for authorisation (A91107-A91109) lodged by Dalrymple Bay Coal Terminal (DBCT)¹ on 14 November 2008.

THE APPLICATION

On 14 November 2008, eight users of the Dalrymple Bay Coal Terminal applied for authorisation for the continuation of the QMS beyond the expiry of the current authorisations on 31 December 2008. The applicants have also requested urgent interim authorisation of their proposed arrangements due to the pending expiration of the current QMS.

The applicants propose authorisation being conditional upon them submitting an implementation plan for a long term solution by 31 March 2009. It is envisaged by the applicants that this long term solution will involve a transition phase (transitional allocation mechanism), which will be subject to a separate application for authorisation. This transition phase is expected to run for approximately 18-24 months, by which time system capacity is expected to be able to meet existing contracted demand.

Further information regarding the application is available on the ACCC's public register at www.accc.gov.au.

¹ Application made on behalf of the following coal producers using DBCT (the applicants): Anglo Coal Australia Pty Ltd; BHP Billiton; Mitsubishi Alliance; Isaac Plains Coal Management Pty Ltd; Macarthur Coal (C & M Management) Pty Ltd; Peabody Pacific Pty Ltd; Rio Tinto Coal Australia Pty Ltd; Vale Australia Pty Ltd; Xstrata Coal Queensland Pty Ltd.

THE AUTHORISATION PROCESS

The ACCC can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

INTERIM AUTHORISATION

Section 91 of the Act allows the ACCC to grant interim authorisation without making a decision on the merits of the application.

The ACCC will only grant interim authorisation in appropriate circumstances. In many circumstances it is not appropriate to do so because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

CONSULTATION

Upon receipt of the authorisation application on Friday 14 November 2008, the ACCC undertook interested party consultation on an urgent basis in order to consider the request for interim authorisation. Copies of public submissions are available on the ACCC's website (www.accc.gov.au) by following the 'Public Registers' link.

BACKGROUND

The QMS is designed to address the imbalance between the demand for coal loading services at Dalrymple Bay and the capacity of the Goonyella coal chain. It was first authorised by the ACCC on 15 December 2005.

In 2007, Dalrymple Bay Coal Terminal Pty Ltd requested the ACCC grant authorisation for the QMS until the end of 2010. On 29 February 2008, the ACCC issued a determination authorising DBCT to continue using the QMS only until the end of 2008. The ACCC has always considered the QMS to be appropriate as a short-term transitional measure only.

Under the currently authorised QMS, which the applicants request to continue for a further six months, a demand adjustment mechanism will apply if, following the System Capacity declaration process, demand for Terminal services (producers aggregate annual contract tonnages) exceeds the capacity of the system. If this is the case for a particular period, a pro rata reduction based on annual contract tonnages for each producer will be calculated to balance demand with available System Capacity. Producers are provided with a monthly pro rata coal loading entitlement, which they are free to trade with other producers.

REASONS FOR DECISION

In assessing the request for interim authorisation the ACCC considered that

- urgency alone is not a sufficient reason for the granting of interim authorisation, given that the applicants have known of the expiry of the authorisation and the ACCC's views regarding the long term operation of the QMS since at least February 2008.
- the continued operation of the QMS has the potential to reduce the incentive to develop a long term solution to address the capacity constraints in the coal chain. This has significant flow on effects in terms of lost export revenue. Given the period of sustained high demand, it is likely that had the underlying issues been resolved, the capacity of the Goonyella Coal Chain would be significantly higher than it currently is.
- given recent falls in vessel hire rates and a significant drop in demand for coal, the ACCC considers vessel queues and associated demurrage savings are likely to be lower than at previous times it has considered the QMS. The ACCC acknowledges that if an extensive vessel queue were to form in the first six months of next year, the QMS would lead to a reduction in demurrage costs for the industry, particularly as falls in spot rates for demurrage may not have an immediate impact due to fixed contracted rates. However, the evidence of a drop in demand for coal makes it less certain that an excessive queue will arise in the absence of a QMS.
- the ACCC acknowledges that the QMS could act to reduce the environmental impact of a long vessel queue in the short term and lead to increased short term efficiency and throughput at DBCT.

Having regard to all of these matters, the ACCC considers that the proposed extension of the queue management system for a period of six months is not, in the absence of a long term solution having been developed, in the public interest. Accordingly the ACCC does not consider it appropriate to use its discretion to grant interim authorisation at this stage.

The ACCC notes that this decision in no way prevents the parties from developing a long term solution to address the capacity constraints in the Goonyella Coal Chain.

Reconsideration of interim authorisation

The ACCC recognises that some progress is being made and strongly encourages all relevant parties to work together to finalise details of a long term solution as soon as possible. It is open to the parties to apply for interim authorisation again when a long term solution has been developed.

In this regard the ACCC is likely to reconsider any request for interim at the time of issuing its draft determination. The ACCC's decision in relation to interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted by the ACCC.