

Partner Liza Carver
Contact Ara Margossian
T +61 2 9263 4223
amargossian@gtlaw.com.au
Our ref 1002604
Your ref A91072-A91074



LAWYERS

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By e-mail

Mr David Hatfield
Acting General Manager
Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Gilbert + Tobin

2 Park Street
Sydney NSW 2000
Australia

GPO Box 3810
Sydney NSW 2001

T +61 2 9263 4000
F +61 2 9263 4111

DX 10348 SSE

www.gtlaw.com.au

Dear Mr Hatfield

Newcastle Port Corporation – Submission in response to ACCC draft determination

We act for Newcastle Port Corporation (NPC).

NPC wishes to respond to the ACCC's comments on the 'common user provision' in its draft determination in respect of NPC's application for authorisation (A91072-A91074). NPC has also responded to some of the assertions made by Coal & Allied on the 'common user provision' in its submission in response to the ACCC's draft determination.

In its draft determination, the ACCC stated:¹

"the 'common user' provisions in the PWCS lease (or [PWCS] interpretation of them) have meant that PWCS has not been able to enter into long term contracts to underpin future investment with certainty. This has had flow-on ramifications for rail contracts. The ACCC notes that PWCS requested the NSW Government to remove the 'common user' provisions in 2007. The ACCC understands that the provisions remain in the lease".

Similarly, Coal & Allied, in its submission to the ACCC in response to the draft determination has stated:²

"[the] PWCS is subject to a common user obligation in its lease with NPC, which substantially restricts its ability to enter into long term contracts to underpin future expansions".

NPC strongly disagrees with the above interpretations of the 'common user provision' and does not consider that the 'common user provision' prevents PWCS from entering into long term contracts.

Clause 4.1 of the Kooragang Island lease between PWCS and the NSW Government (Lease) states:

¹ ACCC, Newcastle Port Corporation application for authorisation: Draft Determination, 29 February 2008, paragraph 6.50.

² Coal & Allied, Letter to the ACCC dated 17 March 2008 'Draft determination – Applications for authorisation A91075 – A91077 lodged by Donaldson Coal Pty Limited (Donaldson) and A91072 – A91074 lodged by Newcastle Port Corporation (NPC)

"...the Demised Premises shall not be used otherwise than for the construction of the Facility and for the operation of the Facility as a common user facility in such a way that the Services are made available to any and every shipper of coal through the Port of Newcastle ("user") under conditions and at a cost for like services that are not discriminatory as between users."
(our emphasis)

There is nothing in clause 4.1 of the Lease that prevents PWCS from entering into a long term contract with coal shippers. The 'common user provision' does not impose any temporal restrictions on PWCS in terms of its ability to enter into contracts with coal shippers. It neither requires nor prohibits long term contracts. Nor does it require the PWCS to accommodate ships on a 'turn of arrival' basis.

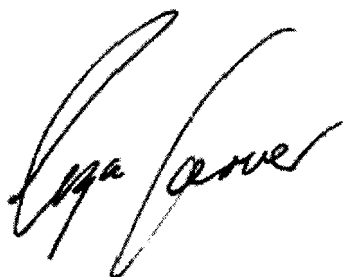
In line with the NSW Government's objective of operating the PWCS terminal on an 'open access' basis, the 'common user provision' requires PWCS to make the facility available to *"any and every shipper of coal"* and to do so in a manner that is *"not discriminatory between users"*. The operation of the PWCS terminal at the Port of Newcastle in accordance with these principles does not prevent long term contracts, provided that the terminal is operated in a manner that can accommodate *"any and every shipper of coal"*.

NPC also considers that the position expressed by Coal & Allied in its submission is based on a tenuous interpretation of what constitutes a long term contract. It appears to NPC that the Coal & Allied interpretation of a long term contract is one that allocates capacity to a selected few coal shippers only and which would prevent the operation of the PWCS terminal on an 'open access' basis. In other words, the Coal & Allied interpretation of a long term contract is one that is incompatible with an 'open access' framework.

NPC does not agree with such an interpretation. In NPC's view, the 'common user provision' permits PWCS to enter into any term of contract, provided it can do so in a manner that is consistent with the provision of capacity on a non-discriminatory basis to *"any and every shipper of coal"*.

Please do not hesitate to contact us if you have any questions.

Yours sincerely



Liza Carver
Partner
T +61 2 9263 4005
lcarver@gtlaw.com.au

Ara Margossian
Lawyer
T +61 2 9263 4224
amargossian@gtlaw.com.au