

MALLESONS STEPHEN JAQUES

For Public Register

Dr Richard Chadwick
General Manager, Adjudication
Australian Competition and
Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

17 September 2009

Copy to

Mr Peter Armitage
Blake Dawson
225 George Street
Sydney NSW 2000

Ms Liza Carver
Gilbert + Tobin
Level 37, 2 Park Street
Sydney NSW 2000

Attention: Mr David Hatfield / Ms Jaime Martin

Dear Dr Chadwick

Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation - Applications for authorisation A91147 - A91149 and A91168 - A91169

1 Purpose of letter - execution of Capacity Framework Documents

- 1.1 We refer to the applications for authorisation A91147 - A91149 lodged by Port Waratah Coal Services Limited (“PWCS”), Newcastle Coal Infrastructure Group Pty Limited (“NCIG”) and Newcastle Port Corporation (“NPC”) (together, the “Applicants”) on 29 June 2009, applications for authorisation A91168 - A91169 lodged by the Applicants on 24 July 2009 (together, the “Existing Applications”) and the variations to those applications lodged on 14 September 2009.
- 1.2 The purpose of this letter is to advise the Commission that the Capacity Framework Documents were executed by NCIG on 17 September 2009. Accordingly, the conditions for interim authorisation set out in the Commission’s Interim Authorisation Decisions dated 22 July 2009 and 29 July 2009 have now been satisfied.
- 1.3 The Commission indicated in its media release dated 1 September 2009, it was open to the parties to lodge a fresh application for interim authorisation “if and when all the respective Capacity Framework Documents are executed.” The Applicants therefore now request the Commission to grant a fresh interim authorisation, as all of the Applicants have signed their respective Capacity Framework Documents.
- 1.4 Attachment 1 to this letter provides details of the executed Capacity Framework Documents.

2 Request for fresh interim authorisation

- 2.1 As the Capacity Framework Documents have now been signed, the Applicants respectfully request the Commission to:
- (a) re-grant interim authorisation in respect of the conduct described in the initial version of Attachment 1 provided to the Commission on 29 June 2009 and which remains unchanged in the marked-up version of Attachment 1 provided to the Commission on 14 September 2009; and
 - (b) grant interim authorisation in respect of the revised application for authorisation (that is, the parts of Attachment 1 which have been varied in the marked-up version of Attachment 1 lodged with the Commission on 14 September 2009).
- 2.2 The Applicants submit that, in respect of the unchanged aspects of Attachment 1, there has not been any material change of circumstances since the Commission's previous decision to grant interim authorisation on 29 July 2009 and the execution of the definitive agreements now satisfies the Commission's request of executing the relevant Capacity Framework Documents.
- 2.3 The changes to Attachment 1 (as marked up in the version provided to the Commission on 14 September 2009) largely involve clarifications and practical changes necessary to give effect to the long term solution for capacity expansions for the export of coal from the Port of Newcastle. They do not involve any material change of circumstances.
- 2.4 Re-granting of interim authorisation will enable the Applicants to move forward and commence the nomination and other processes necessary to implement "phase 2" of the long term solution from 1 January 2010 which is an important positive step in the long term solution for capacity constraints in the Hunter Valley. Without the re-granting of interim authorisation, it is likely to be difficult to meet this proposed timing.

3 Part B of Attachment 1

- 3.1 As the Commission is aware, Part B of Attachment 1 provides that:

"The Applicants seek authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, if by no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS):

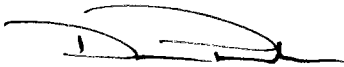
- (a) *the PWCS Capacity Framework Documents are executed in full by PWCS and NPC; and*
- (b) *the NCIG Capacity Framework Documents are executed in full by NCIG and NPC".*

3.2 The Applicants have agreed to amend in Part B of Attachment 1 the date for signing from 31 August 2009 to 17 September 2009. Accordingly, if authorised by the Commission, the conduct referred to in Part B of Attachment 1 may be implemented.

4 Further information

If the Commission has any questions in relation to the matters raised in this letter, we would be pleased to assist.

Yours sincerely



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ATTACHMENT 1: CAPACITY FRAMEWORK DOCUMENTS

	Document	Parties	Execution date
PWCS Capacity Framework Documents			
1	Capacity Framework Agreement	PWCS, NCIG and NPC	Signed by PWCS and NPC on 31 August 2009
2	Deed of Variation for the Kooragang Lease No. 8334878K	PWCS and NPC	31 August 2009
3	Deed of Variation for the Kooragang Sub-Lease No. 7080854M	PWCS and NPC	31 August 2009
4	Deed of Variation for the Carrington Lease No. AC652598R	PWCS and NPC	31 August 2009
5	Kooragang Island Terminal 4 Agreement for Lease	PWCS, State Property Authority and NPC	31 August 2009
NCIG Capacity Framework Documents			
6	Capacity Framework Agreement	PWCS, NCIG and NPC	Signed by NCIG on 17 September 2009 ¹
7	Amendment Deed - Kooragang Agreement for Lease and accompanying side documents ² .	NCIG and State Property Authority	17 September 2009
8	Deed of Undertaking	NCIG, NPC, each NCIG Shareholder and each NCIG Producer	17 September 2009

¹ Each of the documents executed on 17 September 2009 is dated and is intended to take effect from 31 August 2009.

² As part of the amendments to the Kooragang Agreement for Lease, NPC has provided two side documents: (1) A letter to NCIG stating the circumstances in which NCIG will approve the final form of the NCIG Long Term Ship or Pay Contracts, such approval being required under the terms of the Amendment Deed; and (2) A side deed which clarifies: (a) the basis on which NPC (as authorised delegate of the State Property Authority) may withhold its approval of the plans and specifications for the expansion of the NCIG terminal under the Agreement for Lease; (b) what NPC will consider to be the 'Full Expansion' of the NCIG terminal; and (c) the basis on which notice may be given to PWCS for the purpose of permitting NCIG Producers to nominate for capacity at the PWCS terminals.

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17 September 2009

9	Deed Poll in relation to NCIG Stage 2 shortfall or delay (in favour of each Non-NCIG Producer) ³ .	NCIG, NPC and each NCIG Producer	17 September 2009
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On 31 August 2009, PWCS and the relevant counterparties also executed various financiers' and lessor consents in relation to the variation of the PWCS Leases. PWCS also initialled the final form of its Long Term Ship or Pay Contracts to be offered to customers and the PWCS Terminal Access Protocols.

PWCS, NCIG and NPC have also initialled the Levy Protocol and the NCIG Nomination and Allocation Procedure.

³ The Deed Poll was not originally contemplated as a separate NCIG Capacity Framework Document. However, it includes a number of obligations which were previously set out in the Deed of Undertaking and Amendment Deed.