



**Port Waratah Coal Services Limited (PWCS), Newcastle Coal Infrastructure Group (NCIG) and Newcastle Port Corporation (NPC) applications for authorisation A91147 – A91149 and A91168 – A91169**

**INTERIM AUTHORITY DECISION  
23 September 2009**

**Decision**

The Australian Competition and Consumer Commission (the ACCC) has decided to grant interim authorisation with respect to applications for authorisation (A91147-A91149 and A91168-A91169), as amended on 14 September 2009.

In particular, the ACCC grants interim authorisation in relation to the amended Capacity Framework Arrangements.

Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect, unless revoked.

**The application**

PWCS, NCIG and NPC (the 'Applicants') seek authorisation to make and give effect to a provision of a contract, arrangement or understanding which involves proposed conduct set out in the amended Capacity Framework Arrangements.

On 14 September 2009 the Applicants sought to amend the applications for authorisation. A copy of the amended Capacity Framework Arrangements is available from the ACCC's website [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).

On 17 September 2009 the Applicants advised that all of their respective Capacity Framework Documents have now been executed. At that time, the Applicants also requested interim authorisation of the amended Capacity Framework Arrangements.

Following the execution of the Capacity Framework Documents, the Applicants submit that interim authorisation will enable the Applicants to move forward and commence the nomination and other processes necessary to implement the long term solution from 1 January 2010.

## **Background**

In July 2009 the ACCC granted interim authorisation to allow the Applicants to commence the phased-in implementation of the Capacity Framework Arrangements. The previous interim authorisation was subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009.

On 31 August 2009 the Applicants advised the ACCC that one party failed to execute the relevant Capacity Framework Documents.

Accordingly, on 1 September the ACCC revoked interim authorisation of the Capacity Framework Arrangements.

## **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 amended applications for authorisation, the ACCC invited interested parties to comment on the revised Capacity Framework Arrangements.

The ACCC received public submissions from Bloomfield Collieries, Integra Coal Operations Pty Limited and Coal and Allied Industries Limited.

Copies of public submissions received will be available from the ACCC's website [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).

A number of interested parties expressed similar concerns in relation to two specific amendments to the Capacity Framework Arrangements. In particular:

- the introduction of a reduced threshold for when small producers will receive quarterly allocations for exporting coal through PWCS terminals (from the current 5 million tonnes per annum threshold to 3 million tonnes per annum from 1 January 2012) and

- if an excessive queue arises or is forecast to arise, PWCS proposes to make downward adjustments on a pro rata basis to those producers using the ‘turn of arrival’ system, as opposed to a proposed new vessel sequencing system.

In response, PWCS submits that the transition from quarterly to monthly allocation periods for producers who export more than 3 million tonnes of coal per annum through PWCS terminals and the consideration of a new vessel sequencing system are intended to facilitate the efficient operation of its terminals and to promote greater certainty for PWCS and its customers.

In response to feedback from producers in relation to the introductions of a new vessel sequencing system, PWCS submits that it will be conducting further modelling work and consultation with the industry in the first half of 2010, and intends to trial a new system in the second half of 2010.

In relation to lowering the threshold for small producers from 1 January 2012, PWCS submits this will ensure that a greater number of medium-sized producers will be required to work on the basis of monthly, rather than quarterly, allocation periods. In turn, PWCS argues this will reduce the risk of spikes in the vessel queue, and ultimately, the risk of lost capacity.

The ACCC notes that PWCS has provided transition periods for producers in relation to the above mentioned operational changes. Therefore, the proposed amendments will not take immediate effect under any interim authorisation. The merits of the proposed amendments can be considered by the ACCC as part of the substantive applications for authorisation.

Having said this, the ACCC considers that any operational changes that increase the efficiency of PWCS’ terminals are likely to be in the public interest.

### **Reasons for decision**

In granting interim authorisation, the ACCC has had regard to the following issues:

- all of the Applicants have now executed their respective Capacity Framework Documents, which provides sufficient evidence of ongoing progress towards implementing the long term solution
- there is sufficient urgency for the Applicants to need to be able to re-commence implementing key aspects of the amended Capacity Framework Arrangements at the Port of Newcastle for the remainder of 2009, to enable commencement of the long term solution across the Hunter Valley coal chain by 1 January 2010
- the operation of the 2009 Base Tonnage Offer is unlikely to delay the implementation of the long term solution in the Hunter Valley
- the significant public benefit arising from the implementation of a long term commercial framework, namely, sufficient certainty for industry participants regarding coal volumes to underpin efficient investment across the entire coal chain.

**Reconsideration of decision**

The ACCC may review its decision on interim authorisation at any time. 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.