

Port Waratah Coal Services
Limited and
Newcastle Port Corporation

Submission responding to the
Draft Determination issued on 28
October 2009

Dated 24 November 2009

Port Waratah Coal Services Limited and Newcastle Port Corporation

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1 Introduction

1.1 Introduction

Port Waratah Coal Services Limited (“PWCS”) and Newcastle Port Corporation (“NPC”) make this submission in response to the draft determination issued by the Australian Competition & Consumer Commission (“ACCC”) on 28 October 2009.

PWCS and NPC understand that the ACCC has received only one further submission from ARTC since the draft determination. Accordingly, the sole purpose of this submission is to address the ACCC’s proposal, as set out in its draft determination, to grant authorisation for a period of 10.5 years, rather than the period of 15 years requested by the Applicants in their applications for authorisation.

As recognised by Minister Emerson in his recent address to the “In the Zone Conference” in Perth, investment certainty is critical in facilitating efficient investment in large scale infrastructure projects which promote Australia’s economic interests. In that address, Minister Emerson stated that *“the national infrastructure challenge confronting Australia is colossal... The policy challenge is to improve private sector incentives for investing in infrastructure, especially export infrastructure”*. For this reason, the Government has recently introduced a Bill to amend Part IIIA of the *Trade Practices Act 1974 (Cth)* (“TPA”) which is primarily intended to streamline the infrastructure access regime and provide greater certainty for both infrastructure owners and users. In particular, the amendments will enable infrastructure owners to obtain certainty through upfront Ministerial determinations that the access regime will not apply to that infrastructure project for a period of at least 20 years.

The Minister has also foreshadowed a potential review of Part IIIA of the TPA, amongst other things, to ensure an appropriate balance between the rights of potential users with the need to ensure strong private incentives to invest in new infrastructure.

Against this background, the arrangements which are the subject of PWCS, NPC and Newcastle Coal Infrastructure Group Pty Limited’s (“NCIG”) (together, the “Applicants”) applications for authorisation involve very substantial investment in the development and expansion of critical export infrastructure. The arrangements, which have been led and, to a very large degree, facilitated and made possible by the New South Wales Government, require substantial commitments by both PWCS and NCIG, and by producers who will underwrite this investment through long term ship or pay contracts.

To facilitate this level of efficient and ongoing investment, the Applicants and producers each require a high degree of regulatory certainty. PWCS and NPC therefore request that the ACCC re-consider the proposed duration of the authorisation and instead grant the requested authorisations for a period of at least 15 years (or longer if practicable). PWCS and NPC consider that this would be consistent with the statutory criteria under the TPA and is appropriate given the substantial investment required by various parties and the substantial involvement of the NSW Government in facilitating the arrangements.

1.2 Executive summary

PWCS and NPC request that the ACCC reconsider its proposal to authorise the Capacity Framework Arrangements until only 30 June 2020. PWCS and NPC request that the ACCC grant authorisation for a term of at least 15 years, if not 20 years, from 1 July 2009.

Authorisation of the Capacity Framework Arrangements for a period of at least 15 years will:

- reflect that Producers' may nominate for commencement of 10 year load point allocations under Long Term Ship or Pay contracts ("**LTSOP Contracts**") with PWCS up to 4 years from the date of nomination, or 5 years with NPC's consent, and provide authorisation for at least the length of the initial LTSOP Contracts, including those with a delayed commencement date;
- recognise that it takes time (and substantial investment) to bring new or expansion projects on stream. Additional certainty through a longer period of authorisation will enable producers to plan for, and put contracts in place, with certainty before mines start to produce coal for shipping, which will in turn facilitate alignment and efficient investment signals across the coal chain;
- reflect the evergreen nature of load point allocations under the proposed LTSOP Contracts and provide authorisation for at least the first four years that the initial 10 year LTSOP Contracts will roll over;
- provide greater certainty to producers and service providers against a background of very substantial expenditure and investment in the Hunter Valley Coal Chain; and
- result in a greater net public benefit than would be achieved by a shorter duration authorisation.

Further information supporting PWCS' and NPC's views is set out below.

2 A duration of at least 15 years would provide greater net public benefits

2.1 A duration of at least 15 years reflects that long term contracts may commence up to 5 years from the date of nomination

In its draft determination the ACCC noted that:

...the Capacity Framework Arrangements provide that producers are entitled to contract for any tonnage up to their PWCS base Tonnage offer and any length of contracts up to ten years. Every year, producers may then submit a one year renewal of their existing 10 year load point allocation.

Given that producers' ship or pay contracts at the port are initially for 10 years, the ACCC considers it appropriate that the proposed authorisation at least cover the giving effect to these contracts for the full initial term of the contracts. The ACCC notes this is a significant period, in which the circumstances in the Hunter Valley may change.

However, this does not take into account the fact that under the Capacity Framework Arrangements Producers can nominate for LTSOP Contracts with 10 year load point

allocations commencing up to four years from the date of nomination, or five years with approval from NPC.

The Capacity Framework Arrangements provide that Producers may submit nominations for load point allocations with a commencement date which is:

- 1 January in either the first, second, third or fourth year after the nomination is submitted; or
- with the approval of NPC, 1 January in the fifth year after the nomination is submitted.

If the authorisation expires on 30 June 2020, these producers will not have certainty that the Capacity Framework Arrangements, of which their LTSOP Contracts are a component, will be authorised for the full initial term of their LTSOP Contracts.

Further, as PWCS' LTSOP Contracts are based on a calendar year a 31 December expiry date would be preferable.

PWCS and NPC submit that a duration for the authorisations of at least 15 years would provide substantially greater certainty for producers who elect to submit nominations to commence in 2011 or later and whose *initial* 10 year term would otherwise extend beyond the duration of the authorisation. In light of the very significant investment by producers and service providers in the Hunter Valley, this additional certainty will give rise to greater public benefits which outweigh any public detriment associated with the proposed conduct.

2.2 A duration of at least 15 years reflects the evergreen nature of the long term ship or pay contracts

A duration of at least 15 years would also appropriately reflect the rolling or 'evergreen' nature of load point allocations under the proposed LTSOP Contracts.

A term of at least 15 years would give rise to an increased public benefit by creating certainty that the Capacity Framework Arrangements will continue to be authorised for at least the first five years after the initial 10 year term of a LTSOP Contract which commences on 1 January 2010.

2.3 A duration of at least 15 years strikes an appropriate balance between creating certainty and giving the ACCC the ability to review the authorisation

PWCS and NPC appreciate that the ACCC will wish to retain the ability to review the authorisation at the end of its term.

PWCS and NPC consider a duration of at least 15 years strikes an appropriate balance between providing sufficient certainty for Producers and recognising that the ACCC will wish to review the authorisation in light of any changed circumstances. In this regard, PWCS and NPC note that, in any event, under the TPA the ACCC has an express ability to revisit an authorisation in the event that there is a material change in circumstances. In these circumstances, PWCS and NPC submit that there is a compelling case for a longer duration for the authorisations sought.

2.4 The public benefits arising from granting authorisation for at least 15 years outweigh any detriments

In its Draft Determination, the ACCC identified that the contractual certainty created by the Capacity Framework Arrangements will give rise to the following public benefits:

- facilitating more accurate and timely investment by participants in the Hunter Valley coal industry;
- creating a starting point from which to align commercial incentives across the entire Hunter Valley coal chain;
- allowing coal producers to more accurately forecast production levels and maintain optimal stockpiling; and
- facilitating new entry by coal producers in the Hunter Valley;

Given the very substantial level of investment in infrastructure expansion that is proposed in the Hunter Valley Coal Chain under the Capacity Framework Arrangements (potentially in excess of \$5 billion), and the large expenditure by Producers, PWCS and NPC consider the additional certainty created by authorisation of the Capacity Framework Arrangements preferably until 31 December 2024 will result in greater net public benefits that would be achieved by a shorter authorisation.

3 Further issues

If the Commission requires any further information, PWCS and NPC would be pleased to assist.

The duration of the authorisations sought is a critical issue for PWCS and NPC, particularly in view of the substantial investment anticipated and the need to implement large scale expansion projects. Accordingly, if the ACCC has any concerns in relation to granting authorisation for a period of at least 15 years, PWCS and NPC would be pleased to meet with the ACCC to provide further information and seek to address those concerns.

**Port Waratah Coal Services Limited
Newcastle Port Corporation**

24 November 2009