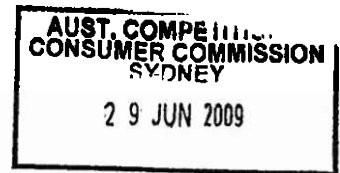


FILE No:
DOC:
MARS/PRISM:



Form A

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (1)

EXCLUSIONARY PROVISIONS:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicants

(a) Name of Applicants:

(Refer to direction 2)

A91147 Port Waratah Coal Services Limited ("PWCS");
Newcastle Coal Infrastructure Group Pty Limited ("NCIG"); and
Newcastle Port Corporation ("NPC").

(b) Description of business carried on by applicants:

(Refer to direction 3)

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and is also in negotiations with the NSW Government in relation to the leasing and operation of the proposed new "Terminal 4" at the Port of Newcastle (together, the "**PWCS Terminals**"). PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

NCIG is a consortium formed in 2004 in response to the NSW Government's invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle ("**NCIG Terminal**"). The first stage of the NCIG Terminal, with a capacity to load approximately 30 Mtpa, is expected to become operational in 2010.

NPC is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995 (NSW)* ("Act"). NPC's principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

(c) Address in Australia for service of documents on the applicants:

Port Waratah Coal Services Limited

c/- Mr Dave Poddar

Partner

Mallesons Stephen Jacques

Level 61

Governor Phillip Tower

1 Farrer Place

Sydney NSW 2000

Newcastle Coal Infrastructure Group Pty Ltd

c/- Mr Peter Armitage

Partner

Blake Dawson

225 George Street

Sydney NSW 2000

Newcastle Port Corporation

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37

2 Park Street

Sydney NSW 2000

2. Contract, arrangement or understanding

(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

(Refer to direction 4)

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 which involves the proposed conduct set out in Attachment 1 of the attached Supporting Submission (“Capacity Framework Arrangements”).

The conduct for which authorisation is sought will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

In particular, the Capacity Framework Arrangements (for which the Applicants seek authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
 - (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
 - (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
 - (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
 - (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;
 - (vi) a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
 - (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.
- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions:

(Refer to direction 4)

In accordance with the contracts, arrangements or understandings described in 2(a) above, the Applicants and the coal chain participants, producers or exporters with whom they may each enter into contracts may, from time to time, make and/or give effect to contracts, arrangements or understandings that are, or may be exclusionary provisions within the meaning of section 45 and section 4D of the *Trade Practices Act 1974 (Cth)* in connection with the supply and/or acquisition of coal handling services at the PWCS Terminals and/or NCIG Terminal, in particular arising from the Capacity

Framework Arrangements and associated arrangements as described in the attached Submission.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export pursuant to and in accordance with various commercial agreements to be entered into, including to give effect to the principles and framework set out in the Implementation Memorandum signed by PWCS, NCIG and NPC (and provided to the Commission) in April 2009 as described in the Supporting Submission.

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Port Waratah Coal Services Limited

PO Box 57

Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

Newcastle Coal Infrastructure Group Pty Limited

Level 7, 167 Macquarie Street

Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

Newcastle Port Corporation

PO Box 663

Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

Others Additionally:

- (i) any producer of coal for export through the Terminals or exporter of coal from the Terminals may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission as well as other

coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal (including those listed in Attachment 6 of the Supporting Submission); and

- (ii) any above or below rail service provider in the Hunter Valley referred to in Attachment 6 of the Supporting Submission may be a party to a contract, arrangement or understanding in 2(a); and
- (iii) the Hunter Valley Coal Chain Coordinator (or equivalent body) (yet to be constituted).

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

Not applicable.

4. Public benefit claims

- (a) Arguments in support of application for authorisation:

(Refer to direction 6)

Please refer to the Supporting Submission.

- (b) Facts and evidence relied upon in support of these claims:

Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2(c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please refer to the Supporting Submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission.

7. Contracts, arrangements or understandings in similar terms

(a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

(b) Is this application to be so expressed?

No. However, as set out above, the Capacity Framework Arrangements for which authorisation is sought (or aspects of the Capacity Framework Arrangements) are likely to be reflected in a range of formal agreements and other documents as set out in the Supporting Submission.

(c) If so, the following information is to be furnished:

(i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

N/A.

(ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

(Refer to direction 10)

N/A.

(iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

N/A.

8. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture vehicle between the companies listed in Attachment 5 of the Supporting Submission.

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form B and Form D with this Form A.

(c) If so, by whom or on whose behalf are those other applications being made?

Please refer to 8(b).

9. Further information

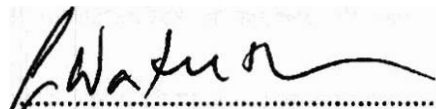
- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation

Mr Dave Poddar
Partner
Mallesons Stephen Jacques
Level 61
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Telephone: (02) 9296 2281
Facsimile: (02) 9296 3999

Dated..... 29/6/09

Signed by/on behalf of
Port Waratah Coal Services Limited,
Newcastle Coal Infrastructure Group Pty Limited and
Newcastle Port Corporation


.....
(Signature)

for

Dave Poddar
Partner
Mallesons Stephen Jacques

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions.

In providing these details —

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
 8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.
 9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
 10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

FILE No:

DOC:

MARS/PRISM:

AUST. COMPETITION &
CONSUMER COMMISSION
SYDNEY

29 JUN 2009

Form B

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (1)

AGREEMENTS AFFECTING COMPETITION: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contact or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicants

- (a) Name of Applicants:
(Refer to direction 2)

A91148 Port Waratah Coal Services Limited ("PWCS");
Newcastle Coal Infrastructure Group Pty Limited ("NCIG"); and
Newcastle Port Corporation ("NPC").

- (b) Short description of business carried on by applicants:
(Refer to direction 3)

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and is also in negotiations with the NSW Government in relation to the leasing and operation of the proposed new "Terminal 4" at the Port of Newcastle (together, the "PWCS Terminals"). PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

NCIG is a consortium formed in 2004 in response to the NSW Government's invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle ("NCIG Terminal"). The first stage

of the NCIG Terminal, with a capacity to load approximately 30 Mtpa is expected to become operational in the first quarter of 2010.

NPC is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995 (NSW)* ("Act"). NPC's principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

- (c) Address in Australia for service of documents on the applicants:

Port Waratah Coal Services Limited,

c/- Mr Dave Poddar

Partner

Mallesons Stephen Jaques

Level 61

Governor Phillip Tower

1 Farrer Place

Sydney NSW 2000

Newcastle Coal Infrastructure Group Pty Ltd

c/- Mr Peter Armitage

Partner

Blake Dawson

225 George Street

Sydney NSW 2000

Newcastle Port Corporation

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37

2 Park Street

Sydney NSW 2000

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

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 which involves the proposed conduct set out in Attachment 1 of the attached Supporting Submission (“Capacity Framework Arrangements”).

The conduct for which authorisation is sought will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

In particular, the Capacity Framework Arrangements (for which the Applicants seek authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
- (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
- (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
- (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;
- (vi) a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
- (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition:

(Refer to direction 4)

In accordance with the contracts, arrangements or understandings described in 2(a) above, the Applicants and the coal chain participants, producers or exporters with whom they may each enter into contracts may, from time to time, make and/or give effect to contracts, arrangements or understandings that have the purpose or effect or likely effect of substantially lessening competition in a market within the meaning of section 45 of the *Trade Practices Act 1974 (Cth)* in connection with the supply and/or acquisition of coal handling services at the PWCS Terminals and/or NCIG Terminal, in particular arising from the Capacity Framework Arrangements and associated arrangements as described in the attached Supporting Submission.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export pursuant to and in accordance with various commercial agreements to be entered into, including to give effect to the principles and framework set out in the Implementation Memorandum signed by PWCS, NPC and NCIG (and provided to the Commission) in April 2009 as described in the Supporting Submission.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Port Waratah Coal Services Limited

PO Box 57

Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

Newcastle Coal Infrastructure Group Pty Limited

Level 7, 167 Macquarie Street

Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

Newcastle Port Corporation

PO Box 663

Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

Others

Additionally:

- (i) any producer of coal for export through the Terminals or exporter of coal from the Terminals may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission as well as other coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal (including those listed in Attachment 6 of the Supporting Submission);
 - (ii) any above or below rail service provider in the Hunter Valley including those referred to in Attachment 6 of the Supporting Submission may be a party to a contract, arrangement or understanding referred to in 2(a); and
 - (iii) the Hunter Valley Coal Chain Coordinator (or equivalent body) (yet to be constituted).
- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)
- Not applicable.

4. Public benefit claims

- (a) Arguments in support of application for authorisation:
(Refer to direction 6)

Please refer to the Supporting Submission.

- (b) Facts and evidence relied upon in support of these claims:
Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:
(Refer to direction 8)

Please refer to the Supporting Submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No. However, as set out above, the Capacity Framework Arrangements for which authorisation is sought (or aspects of the Capacity Framework Arrangements) are likely to be reflected in a range of formal agreements and other documents, as set out in the Supporting Submission.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)

N/A

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

N/A.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

N/A.

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5 of the Supporting Submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form A and Form D with this Form B.

- (c) If so, by whom or on whose behalf are those other applications being made?

Please refer to 8(b).

9. Further information

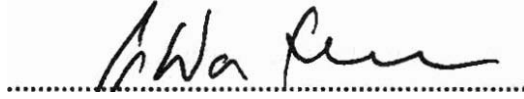
- (a) Name and address of person authorised by the applicants to provide additional information in relation to this application:

Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation

Mr Dave Poddar
Partner
Mallesons Stephen Jaques
Level 61
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Telephone: (02) 9296 2281
Facsimile: (02) 9296 3999

Dated.....29/6/09.....

Signed by/on behalf of
Port Waratah Coal Services Limited,
Newcastle Coal Infrastructure Group Pty Limited and
Newcastle Port Corporation



.....
(Signature)

for

Dave Poddar
Partner
Mallesons Stephen Jaques

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that of any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
 8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
 9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

FILE No:
DOC:
MARS/PRISM:

AUST. COMPETITION &
CONSUMER COMMISSION
SYDNEY
29 JUN 2009

Form D

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (7)

SECONDARY BOYCOTTS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (7) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to engage, in concert with other persons, in conduct that hinders or prevents, or may hinder or prevent, a third person supplying goods to services to, or acquiring goods or services from, a fourth person
- to engage, in concert with other persons, in conduct that prevents or substantially hinders, or may prevent or substantially hinder, a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicants

(a) Name of Applicants:

(Refer to direction 2)

A91149 Port Waratah Coal Services Limited ("PWCS");
Newcastle Coal Infrastructure Group Pty Limited ("NCIG"); and
Newcastle Port Corporation ("NPC").

(b) Description of business, activity or occupation carried on by applicants:

(Refer to direction 3)

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and is also in negotiations with the NSW Government in relation to the leasing and operation of the proposed new "Terminal 4" at the Port of Newcastle (together, the "PWCS Terminals"). PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

NCIG is a consortium formed in 2004 in response to the NSW Government's invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle ("NCIG Terminal"). The first stage

of the NCIG Terminal, with a capacity to load approximately 30 Mtpa is expected to become operational in the first quarter of 2010.

NPC is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995* (NSW) ("Act"). NPC's principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

- (c) Address in Australia for service of documents on the applicants:

Port Waratah Coal Services Limited,

c/- Mr Dave Poddar

Partner

Mallesons Stephen Jaques

Level 61

Governor Phillip Tower

1 Farrer Place

Sydney NSW 2000

Newcastle Coal Infrastructure Group Pty Ltd

c/- Mr Peter Armitage

Partner

Blake Dawson

225 George Street

Sydney NSW 2000

Newcastle Port Corporation

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37

2 Park Street

Sydney NSW 2000

2. Conduct

- (a) Description of the conduct proposed to be engaged in, for which authorisation is sought:

(Refer to direction 4)

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, which involves the proposed conduct set out in Attachment 1 of the attached Supporting Submission (“Capacity Framework Arrangements”).

The conduct for which authorisation is sought will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

In particular, the Capacity Framework Arrangements (for which the Applicants seek authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
- (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
- (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
- (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;

- (vi) a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
- (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

(b) Number of persons proposing to engage, in concert, in the conduct:

PWCS, NCIG, NPC as well as any coal chain participants, including all producers of coal for export through the Terminals, exporters of coal from the Terminals, the Hunter Valley Coal Chain Coordinator (or equivalent body) (yet to be constituted) and any above or below rail service provider in the Hunter Valley, may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission, as well as other coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal in Attachment 6 of the Supporting Submission).

- (i) Where number of persons stated in item 2 (b) is less than 50, their names and addresses:

Port Waratah Coal Services Limited

PO Box 57
Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

Newcastle Coal Infrastructure Group Pty Limited

Level 7, 167 Macquarie Street
Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

Newcastle Port Corporation

PO Box 663
Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

The Newcastle Coal Producers

For the names and addresses of the coal producers, please refer to Attachment 6 of the Supporting Submission to this Application.

Above and below rail service providers

Please refer to Attachment 6 of the Supporting Submission to this Application.

- (c) Description of the goods or services to which the conduct (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export pursuant to and in accordance with various commercial agreements to be entered into, including to give effect to the principles and framework set out in the Implementation Memorandum signed by PWCS, NCIG and NPC (and provided to the Commission) in April 2009 as described in the Supporting Submission.

- (d) The term for which authorisation of the provision of the conduct is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

3. Parties

- (a) Name and address of the third person whose supply or acquisition of goods or services, or whose trade or commerce involving the movement of goods overseas, is to be, or may be, hindered or prevented by the conduct:

In accordance with the contracts, arrangements or understandings described in 2(a) above, the parties referred to above in 2(b) may, from time to time, be hindered or prevented in relation to the export of coal through the PWCS Terminals and/or NCIG Terminal.

- (b) Name and address of person to or from whom, or the place to or from which, supply or acquisition of goods or services is to be, or may be, hindered or prevented by the conduct:

Please refer to 3(a).

- (c) Names and addresses of persons on whose behalf application is made:

Not applicable.

4. Public benefit claims

- (a) Arguments in support of application for authorisation:

(Refer to direction 5)

Please refer to the Supporting Submission.

- (b) Facts and evidence relied upon in support of these claims

Please refer to the Supporting Submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 6)

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the conduct for which authorisation is sought, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (c) above and the prices of goods or services in other affected markets:

(Refer to direction 7)

Please refer to the Supporting Submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission.

7. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*):

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5 of the Supporting Submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form A and Form B with this Form D.

- (c) If so, by whom or on whose behalf are those other applications being made?
Please refer to 7(b).

8. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the applicants seeking authorisation to provide additional information in relation to this application:

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure
Group Pty Limited and Newcastle Port Corporation**


Mr Dave Poddar
Partner
Mallesons Stephen Jaques
Level 61
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Telephone: (02) 9296 2281
Facsimile: (02) 9296 3999

Dated.....29/6/09.....

Signed by/on behalf of
Port Waratah Coal Services Limited,
Newcastle Coal Infrastructure Group Pty Limited and
Newcastle Port Corporation



(Signature)

 Dave Poddar
Partner
Mallesons Stephen Jaques

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the conduct in respect of which authorisation is sought.
4. Provide details of the conduct in respect of which this authorisation is sought.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
 6. Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
 7. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed conduct. Provide quantification of those detriments where possible.