



**Australian
Competition &
Consumer
Commission**

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Dear Sir / Madam

Port Waratah Coal Services Limited (PWCS), Newcastle Coal Infrastructure Group (NCIG) and Newcastle Port Corporation (NPC) applications for authorisation A91147 – A91149 — interested party consultation

The Australian Competition and Consumer Commission (ACCC) received an application for authorisation from Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and Newcastle Port Corporation (the Applicants) on 29 June 2009. The Applicants subsequently provided a public version of the supporting submission to the applications and a letter further clarifying the request for interim authorisation on 30 June 2009.

A copy of the application, public supporting submission and letter clarifying the request for interim authorisation are attached.

A copy of the application is also available on the ACCC's website www.accc.gov.au/AuthorisationsRegister. The ACCC will update the public register as this matter progresses.

The Applicants are seeking authorisation of certain aspects of a long term solution to the capacity constraints at the Port of Newcastle.

In particular, the Applicants seek authorisation to make or give effect to a contract, arrangement or understanding which involves the proposed conduct set out in Attachment 1 to the supporting submission (referred to as the 'Capacity Framework Arrangements').

The Capacity Framework Arrangements include:

- (a) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure
- (b) 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
- (c) 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

- (d) 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)
- (e) 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
- (f) a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system, and
- (g) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

The Applicants propose that the Capacity Framework Arrangements will be phased-in in accordance with the following steps:

- *Phase 1* – involves PWCS offering capacity allocations to existing producers using the PWCS Terminals based on the ‘2009 Tonnage Offer’ for the period 1 July 2009 to 31 December 2009 under a modified PWCS Coal Handling Services Agreement (see Part A of the Capacity Framework Arrangements).
- *Phase 2* – involves PWCS implementing and giving effect to the PWCS Nomination and Allocation Procedure, under which PWCS will offer capacity allocations to existing users of the PWCS Terminals based on the ‘2010 Base Tonnage Offer’ for the period from 1 January 2010 onwards, and commence inviting nominations for additional capacity allocations under the terms of new long term ship or pay contracts to commence on 1 January 2010 (see Part B of the Capacity Framework Arrangements).

The Applicants submit that Phase 2 will only commence if both PWCS and NCIG have executed Capacity Framework Documents with NPC (as defined in Attachment 1 to the supporting submission) by 31 August 2009, or such other date as agreed by the Applicants. If the documents are not executed by the relevant date, the Applicants propose that any authorisation of Part A of the Capacity Framework Arrangements would continue until 31 December 2009, and some or all of the Applicants may commence steps to implement a variant of the conduct set out in Part B of the Capacity Framework Arrangements, and lodge a separate application for authorisation with the ACCC.

The Applicants seek authorisation for 15 years from 1 July 2009 until 30 June 2024.

The ACCC invites you to comment on the application. Given the complexity of the proposed conduct, please refer to Attachment 1 of the supporting submission for the Applicants’ complete description of the Capacity Framework Arrangements for which authorisation is sought.

Also attached for your information, please find a summary of the authorisation process and instructions about how to make a submission to the ACCC.

Interim authorisation

The Applicants have also requested urgent interim authorisation of the proposed Capacity Framework Arrangements. In particular, the Applicants seek interim authorisation:

- for Part A of the Capacity Framework Arrangements, as soon as reasonably practicable (with a retrospective ability to implement the conduct effective from 1 July 2009) and
- for Part B of the Capacity Framework Arrangements, as soon as reasonably practicable (even if this occurs after any interim authorisation is granted in relation to Part A of the Capacity Framework Arrangements).

The Applicants submit that interim authorisation is required in order to:

- start implementing the long term solution, and in particular, give effect to the '2009 Base Tonnage Offer' for the period 1 July 2009 until 31 December 2009, as well as the respective 'Nomination and Allocation Procedures' and contractual alignment principles, and
- enable PWCS and NCIG to enter into long term ship or pay contracts with users of the Terminals and therefore obtain sufficient certainty to undertake the necessary planning in relation to investment and expansion decisions, and in the case of producers, sales decisions and proposed arrangements with other Hunter Valley service providers.

In making an assessment as to whether it is appropriate to grant interim authorisation, the ACCC is not required to undertake a full assessment of the benefits and detriments likely to arise as a result of the proposed conduct.

The ACCC decides whether to grant interim authorisation on a case by case basis. When an application for interim authorisation is received, the ACCC will usually consider a range of factors, including:

- harm to the applicant and other parties if interim is, or is not granted
- possible benefit and detriment to the public
- the urgency of the matter and
- whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.

The ACCC notes the tight timeframe within which it has been asked to consider interim authorisation.

The ACCC endeavours to deal with requests for interim authorisation quickly. The ACCC therefore seeks your comments on the request for interim authorisation by **12 noon Wednesday, 8 July 2009**— comments can be provided by email to adjudication@acc.gov.au.

Alternatively, if you would like to provide comments orally, please contact Ms Jaime Martin on (03) 9290 1477 (or at jaime.martin@acc.gov.au) to organise a suitable time.

In view of the complexity of the proposed arrangements, should you require additional time to consider the request for interim authorisation, please contact Jaime Martin (details above).

Request for submissions on the substantive applications for authorisation

The ACCC invites you to make a submission on the likely public benefits and effect on competition, or any other public detriment, from the proposed arrangements.

For further details on the public benefits and detriments the Applicants claim are likely to result from the proposed Capacity Framework Arrangements, please refer to Section 3 of the supporting submission to the application.

If you intend to provide a submission in relation to the substantive application for authorisation, please do so by close of business **Friday, 24 July 2009**. As noted above, submissions in relation to the request for interim authorisation should be provided by **12 noon, 8 July 2009**.

Submissions, including a record of oral submissions, will be placed on the ACCC's public register subject to any request for exclusion (guidelines are attached).

Timetable

The ACCC will progress its assessment of the application in a timely manner. An indicative timetable is set out below for your information.

29 June 2009	Lodgement of application and supporting submission, includes request for interim authorisation.
30 June 2009	Public version of the supporting submission to the applications received from the Applicants.
1 July 2009	Public consultation process begins.
12 noon, 8 July 2009	Closing date for submissions on interim authorisation.
12 noon, 9 July 2009	Applicants respond to submissions from interested parties in relation to interim authorisation.
July 2009	ACCC decision regarding interim authorisation.
24 July 2009	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
10 August 2009	Applicants respond to issues raised in the public consultation process.
September 2009	Draft determination.

September/October 2009	Public consultation on draft determination, including any conference if called.
October/November 2009	Final determination.

The ACCC's list of interested parties

Please advise if you do not wish to make a submission at this time, but would like to be kept informed about the progress of this matter, including receiving a copy of the ACCC's draft and final determinations. In doing so, please provide an appropriate contact person and email address for future correspondence.

You can also forward this letter to any other party who may wish to make a submission to the ACCC regarding the application.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Mr David Hatfield on (02) 6243 1266 (david.hatfield@acc.gov.au) or Ms Jaime Martin on (03) 9290 1477 (jaime.martin@acc.gov.au).

Yours sincerely



**Dr Richard Chadwick
General Manager
Adjudication Branch**

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and
Newcastle Port Corporation – applications for authorisation A91147 – A91149**

Interested parties – initial consultation

1. Anglo Coal Australia Pty Ltd
2. Austar Coal Mine Pty Limited
3. BHP Billiton - Energy Coal
4. Bloomfield Collieries Pty Limited
5. Centennial Coal Company Limited
6. Coal & Allied (Rio Tinto Coal Australia Pty Ltd)
7. Donaldson Coal Pty Ltd
8. Gloucester Coal Limited
9. Idemitsu Australia Resources Pty Limited
10. Integra Coal Operations Pty Ltd
11. Peabody Pacific Pty Limited
12. White Mining Limited
13. Whitehaven Coal Ltd
14. Xstrata Coal Australia Pty Ltd
15. Werris Creek Coal Sales Pty Ltd
16. Peabody Coal Trade Australia
17. Ashton Coal Mines Limited
18. NSW Minerals Council
19. Australian Rail Track Corporation
20. Hunter Valley Coal Chain Logistics Team
21. SCT Logistics
22. Asciano Limited
23. QR National Coal
24. Genesee & Wyoming Australia Pty Ltd (on behalf of Fenwick Elliot Grace)
25. Mr Ian McNamara, Policy Advisor for The Office of the Hon. Joe Tripodi MP, Minister for Ports and Waterways
26. The Treasury (Energy, Transport and Communications Unit)
27. Australian Government Department of Resources, Energy and Tourism (Minerals Branch)
28. Australian Government Department of Infrastructure, Transport, Regional Development and Local Government (Infrastructure Investment)
29. Infrastructure Australia
30. National Transport Commission
31. NSW Department of Planning (Major Project Assessments Division)
32. NSW Department of Primary Industry (Mineral Resources Division)
33. NSW Maritime
34. Australian Transport Safety Bureau
35. Maritime Union of Australia
36. United Mine Workers Federation
37. The Hon Nick Greiner AC
38. Rail Corporation NSW
39. NSW Ministry of Transport
40. China Shenhua Energy Company Limited