



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of Authorisations A91141, A91142, A91181 & A91182

Lodged by

Australian Amalgamated Terminals Pty Limited

in respect of

amendment to clause 2.2.1(a) of the conditions of authorisation

Date: 9 February 2010

Authorisation nos. A91141
A91142
A91181
A91182

Public Register no. C2010/140

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker

Summary

The Australian Competition and Consumer Commission (ACCC) has decided to vary authorisations A91141, A91142, A91181 and A91182.

The authorisations were granted on 3 December 2009, subject to conditions, to Australian Amalgamated Terminals Pty Limited, P&O Wharf Management Pty Limited and Plzen Pty Limited to give effect to section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT, being provisions that establish and constitute the AAT joint venture, but only to the extent that those provisions allow the parties to engage in certain conduct at AAT's terminals.

The variation to the authorisation amends clause 2.2.1(a) of the conditions of authorisation by extending the time period within which AAT must identify and notify the ACCC of a proposed independent price expert until 17 February 2010, or such later date as required by the ACCC.

1 Introduction

1.1 Authorisation is a transparent process where the ACCC may grant statutory protection from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.

Minor variation

1.2 A person to whom an authorisation has been granted may subsequently seek to vary the authorised arrangements. Depending on the nature of the proposed variation, the person may apply to the ACCC for a minor variation to the authorisation. A minor variation is defined in the Act as a single variation that does not involve a material change in the effect of the authorisation.

1.3 The ACCC must, if it is satisfied that the proposed variation is minor, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.

1.4 The ACCC may vary the authorisation where, if it were a new authorisation, subsections 90(5A), (5B), (6) or (7) would apply, the ACCC is satisfied that the variation will not result in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

2 The application for minor variation

- 2.1 On 27 January 2010, Australian Amalgamated Terminals Pty Ltd (AAT) lodged an application for minor variation to authorisations A91141-2 and A91181-2. The application for minor variation was amended on 28 January 2010 (to correct some dates referred to in the application).
- 2.2 Authorisations A91141-2 and A91181-2 were granted on 3 December 2009. Conditional authorisation was granted to AAT, P&O Wharf Management Pty Limited and Plzen Pty Limited to give effect to section 2 of the Shareholders Agreement, together with the other provisions of the Shareholders Agreement and the Constitution of AAT, being provisions that establish and constitute the AAT joint venture, but only to the extent that those provisions allow the parties to engage in certain conduct at AAT's terminals. Authorisation was granted until 31 December 2019.
- 2.3 Broadly the conditions:
- provide a mechanism for stevedores to seek access to AAT's terminals
 - impose a process for independent review of AAT's price increases to end-users
 - require AAT to provide end-users with a dispute resolution process for non-price disputes.
- 2.4 The application for minor variation relates to clause 2.2.1(a) of the conditions, whereby AAT must, within 20 business days of the authorisation coming into effect (i.e. before 28 January 2010), advise the ACCC in writing of the identity of a proposed independent price expert and provide the information necessary for the ACCC to assess whether to object to the appointment.
- 2.5 In its application for minor variation, AAT seeks an extension of time of three weeks (until 17 February 2010) to identify and notify the ACCC of a proposed independent price expert.

3 Submissions received by the ACCC

- 3.1 Summaries of AAT's supporting submission and submissions from interested parties are provided below. Copies of these submissions are available from the public register on the ACCC's website (www.accc.gov.au/AuthorisationsRegister).

AAT's submission

- 3.2 AAT advises it that has taken substantial steps to identify an independent price expert. However, it has experienced unforeseen difficulties and therefore requests an extension to the time available to secure an appropriate independent price expert under the terms of the conditions of authorisation.

- 3.3 AAT submits that the proposed variation to extend the time does not impact on the role or function of the independent price expert. AAT considers that the proposed variation will not have any effect on the public benefits and detriments resulting from the authorisation.

Interested party submissions

- 3.4 The ACCC invited 20 potentially interested parties to comment on the application for minor variation.
- 3.5 The Federal Chamber of Automotive Industries submitted that it does not oppose the granting of the extension of time.
- 3.6 Port Kembla Port Corporation submitted its support for AAT's application for minor variation.

4 Statutory test

- 4.1 Section 87ZD of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 4.2 Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.
- 4.3 Relevantly, section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1) or section 88(1A), where it is satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

5 ACCC assessment

- 5.1 The variation sought by AAT extends the time available for AAT to identify and notify the ACCC of a proposed independent price expert as required by clause 2.2.1(a) of the conditions of authorisation granted by the ACCC on 3 December 2009.
- 5.2 The extension sought by AAT is for three weeks, whereby AAT will propose an expert to the ACCC by 17 February 2010.
- 5.3 Under the process provided by the conditions of authorisation, once AAT notifies the ACCC of a proposed independent price expert, the ACCC will assess whether to object to the appointment of the proposed independent price expert. In particular, the ACCC will assess the qualifications, experience and independence of the proposed expert.

- 5.4 In assessing the variation sought by AAT, the ACCC is mindful that AAT does not propose to increase any tariffs until July 2010.
- 5.5 Under clause 2.4.1 of the conditions of authorisation, AAT is required to provide at least 60 business days written notice to relevant terminal end-users and the independent price expert of a proposed price increase, as well as publish details of the proposed price increase on its website. Thus, price increases proposed to take effect on 1 July 2010 must be notified no later than 1 April 2010. Once AAT has provided written notice of a proposed price increase, terminal end-users may lodge their written objections to the announced proposed price increases with the independent price expert, who will then determine whether the proposed price increase is reasonable and justified.
- 5.6 The ACCC notes that a variation which extends the deadline until 17 February 2010 would allow sufficient time before 1 April 2010 for the ACCC to assess AAT's proposal and, in the case that the ACCC objects to the AAT's proposal, identify an alternative independent price expert.
- 5.7 The ACCC is satisfied that a variation which provides a limited extension to the time period provided in clause 2.2.1(a) of the conditions of authorisation until 17 February 2010 does not impact on the role or function of the independent price expert.
- 5.8 Based on the information before it and for the reasons noted above, the ACCC considers that a variation which extends the time period provided in clause 2.2.1(a) to 17 February 2010 is unlikely to result in a material change in the effect of the authorisation and is therefore minor.
- 5.9 Further, the ACCC does not consider that extending the time period until 17 February 2010 impacts on the public benefits and detriments of the authorised arrangements.

6 Determination

- 6.1 On 27 January 2010, AAT lodged an application for minor variation to authorisations A91141-2 and A91181-2. The application for minor variation was amended on 28 January 2010 (to correct some dates referred to in the application). Authorisations A91141-2 and A91181-2 were granted by the ACCC on 3 December 2009 subject to conditions.
- 6.2 The ACCC is satisfied that the variation is minor.
- 6.3 The ACCC is satisfied that the public benefit test in section 91A(4) of the Act is met – that is, the variation which is the subject of this application is unlikely to result in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

- 6.4 Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisations A91141, A91142, A91181 and A91182, by replacing clause 2.2.1(a) of the conditions of authorisation with the following:

By 17 February 2010, or such later date as required by the ACCC, AAT must identify a prospective independent price expert (Proposed Independent Price Expert) and provide the ACCC with written notice of the identity of the Proposed Independent Price Expert, together with such information and documents as the ACCC requires to assess whether to object to the appointment of the Proposed Independent Price Expert, including a copy of the proposed terms of appointment.

- 6.5 This determination is made on 9 February 2010. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 3 March 2010.
- 6.6 The ACCC has decided to grant interim authorisation with respect to the application for minor variation. Interim authorisation will remain in place until the date the ACCC's determination comes into effect or until the ACCC decides to revoke interim authorisation.