



**Australian
Competition &
Consumer
Commission**

Our Ref: A91147 - A91149 & A91168 & A91169
Contact Officer: Luke Griffin
Contact Phone: (02) 6243 1114

GPO Box 3131
Canberra ACT 2601

23 Marcus Clarke Street
Canberra ACT 2601

tel: (02) 6243 1111
fax: (02) 6243 1199

www.accc.gov.au

10 February 2011

Dear Sir / Madam

**Port Waratah Coal Services Limited (PWCS), Newcastle Coal Infrastructure Group (NCIG) and Newcastle Port Corporation (NPC) authorisation
A91147 - A91149 & A91168 & A91169 — request for review by Aston Resources**

On 15 December 2010 Aston Resources made a submission requesting that the Australian Competition and Consumer Commission (ACCC) review the authorisation of the Capacity Framework Arrangements at the Port of Newcastle (the authorisation). The submission and responses from the applicants (PWCS, NCIG and NPC) along with the ACCC's December 2009 final decision to grant authorisation are available from the public register on the ACCC's website: www.accc.gov.au.¹

The Authorisation

The ACCC authorised the Capacity Framework Arrangements at the Port of Newcastle in December 2009, to enable a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain. Under the Capacity Framework Arrangements, coal producers are required to nominate for their desired capacity. Further, the terminal owner, PWCS, is required to build new capacity within certain timeframes when triggered in the course of the capacity allocation process.

Issues raised by Aston Resources

The issues raised by Aston Resources are set out in its submission of 15 December 2010. In brief, Aston Resources was unable to secure its desired capacity in the 2010 capacity allocation process undertaken by PWCS. Capacity expansion triggers within the Capacity Framework Arrangements have been met, however Aston Resources is concerned that the expanded capacity will not be delivered within the timeframe set out in the Capacity Framework Arrangements. Aston Resources also considers that there are inadequate anti-hoarding provisions within the Capacity Framework Arrangements.

¹ Relevant documents can be easily located by entering "A91147" into the search field on the ACCC's website.

Role of the ACCC

The ACCC must decide whether to review the authorisation of the Capacity Framework Arrangements pursuant to section 91C(3) of the *Competition and Consumer Act 2010*. For the ACCC to decide to review the authorisation, it would need to form the view that:

- the authorisation was based on false or misleading material, or
- a condition has not been complied with, or
- there has been a material change in circumstances since the authorisation was granted.

The ACCC has recently become aware that there may be other interested parties with issues similar to those set out by Aston Resources. Before finalising its decision on whether to commence a review of the authorisation as requested by Aston Resources, the ACCC is inviting other interested parties to provide any information that may be relevant.

Request for submissions

The ACCC invites you to make a submission with any information that may be relevant to the ACCC's decision, including but not limited to:

- whether the Capacity Framework Arrangements are operating as intended
- whether there has been or is likely to be any undue delay in the delivery of further capacity at the Port of Newcastle
- whether there is any evidence of capacity hoarding.

If you intend to provide a submission please do so by close of business **Monday, 28 February 2011**. 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).

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

Timetable

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

15 December 2010	Submission by Aston Resources requesting a review of the ACCC's authorisation.
December 2010 / January 2011	Initial responses received from applicants.
February 2011	Further consultation with interested parties
March 2011	ACCC to conclude its assessment

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. In doing so, please provide an appropriate contact person and email address for future correspondence.

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 me on (02) 6243 1266 or Luke Griffin on (02) 6243 1114.

Yours sincerely



David Hatfield
A/g General Manager
Adjudication Branch



Australian
Competition &
Consumer
Commission

Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes

Public process

The Australian Competition and Consumer Commission (ACCC) is responsible for assessing non-merger authorisation and merger clearance applications and notifications. Successful applicants and notifying parties are protected from legal action under specific competition provisions of the *Competition and Consumer Act 2010* (the Act). The provision of such legal protection is not taken lightly. The ACCC's assessment of authorisation and merger clearance applications and notifications is therefore conducted openly and transparently with extensive consultation.

Under the Act the ACCC must maintain public registers of information provided in the authorisation, merger clearance and notification processes. The ACCC may place information from its public registers on the ACCC website.

Can information be excluded from the public registers?

The Act allows for applicants, notifying parties and interested parties providing information about an authorisation or merger clearance applications or notifications to ask that the information, or parts of it, be excluded from the relevant public register.

Under the Act, when a request to exclude information from the public register is made, the ACCC must exclude the information from the public register if it contains the details of:

- a secret formula or process
- the cash consideration offered for the acquisition of shares or assets
- the current costs of manufacturing, producing or marketing goods or services.

The ACCC also has discretion under the Act to exclude material from the public registers if it is satisfied that it is desirable to do so, either because of the confidential nature of the material or for any other reason.

How to request information be excluded from the public register

The Competition and Consumer Regulations outline what parties need to do if they want information provided to be excluded from the public register.

The regulations state that if such a request is made for a whole document or parts of a document, the words 'Restriction of Publication Claimed' should appear in red writing near the top of each page.

When a request is made for exclusion of part of a document, the regulations state that the words 'Restriction of Publication of Part Claimed' should appear in red near the top of the first page and the part of the document for which exclusion is requested should also be clearly marked in red. If the request concerns a document longer than five pages, a description of the whereabouts of the parts for which exclusion is requested should be provided.

The ACCC asks that you provide a full copy of the document, and a public register version with the information to be excluded from the public register omitted.

You should remove headers claiming 'Confidential communication' from documents (for example, emails and facsimiles) unless they contain information that you want excluded from the public register. If the information is not confidential and the header cannot be removed, you should clearly state at the beginning of correspondence to the ACCC that exclusion from the public register is not requested.

Applicants, notifying parties and parties requesting that information be excluded from the public register must do so when they submit the information to the ACCC. Reasons must be provided in support of the request.

How does the ACCC assess requests to exclude information from the public register?

Information subject to a request for exclusion will not be placed on the public register while the ACCC assesses the request.

The ACCC will try to respond to requests to exclude information from the public register within one to two business days. The ACCC is generally able to respond much faster if requests are limited to information that is genuinely confidential, if confidential information is clearly marked and if requests are accompanied by a detailed explanation of why it should be excluded from the public register.

When the ACCC agrees to a request, the information will be excluded from the relevant public register. This information may still be used by the ACCC under its powers under the Act. Information withheld from the public register may still be accessed through other legal processes such as under the *Freedom of Information Act 1982*.

If the ACCC denies a request because the request is not accompanied by sufficient supporting information or because it considers that the information is not confidential in nature, the ACCC will inform the party making the request of its decision.

If the ACCC denies a request, the information for which exclusion was denied will be considered as withdrawn from the ACCC's consideration—unless the party advises that it wishes to withdraw or amend the request. As a general rule, the ACCC will allow the party one to two business days to respond.

If a party chooses to withdraw the information subject to an exclusion request, the ACCC will not use the information in its decision-making processes.

Generally speaking, the ACCC will decline a request to exclude information from the public register where that information is necessary to identify the conduct or arrangements for which protection is sought.

Checklist for requesting that information be excluded from the public register

- Have you identified the specific sections of the document to which the request relates?
- Have you outlined reasons for requesting that information be excluded from the public register?
- Have you provided a copy of the full document and identified those parts you want excluded?
- Have you provided a public register version of the document and masked or removed those parts you want excluded?
- Are you aware that requests to exclude information from the public register must be submitted at the time the information is provided to the ACCC?

Related publications

Access to public registers

Merger guidelines

Merger review process guidelines

Formal merger review process guidelines

Guide to authorisation

Guide to collective bargaining notifications

Guide to exclusive dealing notifications

ACCC contacts

Infocentre 1300 302 502

Website www.accc.gov.au

For other business information, go to www.business.gov.au

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory 2601
© Commonwealth of Australia 2011

Important notice

The information in this publication is for general guidance only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern.

The ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

ISBN 978 1 921887 18 5

ACCC 11/10_26549_209