



Dudgeon Point Coal Export Terminal Producers (Dudgeon Point Project Management Pty Ltd) – application for authorisation A91277 – request for interim authorisation

REASONS

DECISION

The Australian Competition and Consumer Commission (the **ACCC**) has decided to grant interim authorisation to allow the Dudgeon Point Coal Export Terminal Producers (the **Applicants**) to commence collective negotiations with Dudgeon Point Project Management Pty Ltd (**DPPM**). Interim Authorisation allows the Applicants to:

- (a) collectively bargain with DPPM on the terms and conditions, including price, for the development of and access to the port facilities at the Dudgeon Point coal terminal (the DPPM Terminal), expansions to the DPPM Terminal, associated infrastructure necessary to support the DPPM Terminal and all services related to those port facilities and infrastructure for the export of coal; and
- (b) discuss related matters, including terminal access price and capacity allocations, amongst themselves.

Interim authorisation does not extend to allowing the Applicants to enter into, and give effect to, contracts, arrangements or understandings with DPPM regarding the development of and provision of access to port facilities, the DPPM Terminal, associated infrastructure and services, and allocation of port capacity.

Interim authorisation commences on 27 October 2011, and will remain in place until the date the ACCC's final determination regarding the Application comes into effect or interim authorisation is revoked by the ACCC.

THE APPLICATION

The Applicants are seeking authorisation to collectively bargain with DPPM regarding the port facilities at its proposed Dudgeon Point coal terminal (the DPPM Terminal).

THE AUTHORISATION PROCESS

The ACCC can grant statutory protection from the application of the competition provisions of the *Competition and Consumer Act 2010* (the CCA) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment from the conduct. The ACCC undertakes a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

INTERIM AUTHORISATION

Section 91(2) of the CCA provides that the ACCC may, if it thinks that it is appropriate to do so, grant interim authorisation. In many circumstances interim authorisation is not appropriate as it allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

CONSULTATION

The ACCC wrote to 28 interested parties advising them of the Application on 5 October 2011, inviting comments on interim authorisation by 14 October 2011. No submissions were received.

REASONS FOR DECISION

In granting interim authorisation the ACCC has taken into account that:

- (a) there is public benefit in not unnecessarily delaying construction of the terminal by allowing the Applicant to commence negotiations immediately with DPPM;
- (b) little competitive or other detriment is likely to result from interim authorisation due to the voluntary nature of the arrangements, lack of collective boycotts and the information sharing restrictions put in place by the Applicants; and
- (c) given negotiations are expected to take three to five years, the ACCC will be able to complete its assessment of the substantive application before those negotiations are significantly advanced..

RECONSIDERATION OF DECISION

The ACCC may review its decision regarding this interim authorisation at any time. The ACCC's decision in relation to this interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

27 October 2011

Attachment A When can Interim Authorisation be Granted?

Requests for interim authorisation are considered on a case by case basis. In *International Air Transport Association and Alitalia Linea Aerea Italiana SPA¹ (the IATA case)* the Tribunal noted that it would be impossible to attempt to define all relevant principles governing the grant of an interim authorisation. It stated that much would depend on the facts of the particular case, the urgency of the occasion and the conduct the subject of the application by the parties. It also noted that in considering a request for interim authorisation, it would generally be inappropriate to examine questions of law or facts too closely at an early stage of review.

While it is not possible to outline all of the issues that the ACCC will take into account in determining whether a specific request for interim authorisation should be granted, some significant factors considered in determining whether interim authorisation should be granted include the following:

- The policy of the CCA is clearly opposed to arrangements that are in restraint of trade and other anticompetitive practices. The ACCC is therefore unlikely to grant interim authorisation to arrangements that are highly anti-competitive unless compelling reasons are provided.
- The ACCC is unlikely to grant interim authorisation where this will permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied, unless special circumstances apply. Similarly, a factor the ACCC will consider is whether a person appealing in good faith against the refusal of authorisation by the ACCC would be effectively denied their right of appeal to the Tribunal by the refusal of an interim authorisation. This would apply, for example, if the arrangement once departed from could not be reinstated in the event of a final decision favourable to the applicant.
- The ACCC will consider the possible harm, if any, that will occur to the applicant if a grant of interim authorisation is denied.
- The possible harm that will occur to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied will also be taken into account.
- The ACCC will consider whether granting interim authorisation is urgent and/or necessary.
- The ACCC will consider the extent to which the relevant market will change if interim authorisation is granted. For instance, interim authorisation is more likely to be granted in cases where it will maintain the status quo in the market.
- Any possible benefit or detriment to the public will be considered to the extent the ACCC is able to make such an assessment at the time of considering the request for interim authorisation.
- In some cases it may be thought preferable not to disturb the existing position pending a final decision as the good or bad effects of the existing situation will usually be clearer than the possible effects of a change in that situation.
- The length of time that is likely to elapse between the granting of the interim authorisation and the anticipated date of final authorisation will be considered.
- A preliminary assessment of the public benefits and anti-competitive detriments likely to result from the proposed conduct may be undertaken.
- Whether there is a risk of legal action by a third party is a relevant consideration. The ACCC has considered that it would be detrimental to the authorisation process if private legal action was commenced before an application for authorisation is determined.
- Whether a refusal to grant interim authorisation will result in potential public benefits being lost will also be considered.

¹ (1995) ATPR 40-537