



25 February 2011

Mr David Hatfield and Mr Luke Griffin
Australian Competition & Consumer Commission
28 Marcus Clarke Street
Canberra ACT 2601

Your ref A91147-A91149 & A91168 Z& A91169

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

1. INTRODUCTION

We refer to your letter to industry participants dated 10 February 2011.

Xstrata Coal ("Xstrata") continues to strongly support the authorisation A91147 - A91149 & A91168 & A91169, in relation to the New South Wales coal industry long term contractual framework. The authorisation has already delivered proven significant public benefits by creating commercial certainty for producers in New South Wales. The Capacity Framework Arrangements ("CFA") have enabled producers to enter into long term ship or pay contracts with the Terminal Operators, which has facilitated investment at all levels of the coal chain as well as providing improved ability for exporters to manage vessel arrivals and reduce demurrage costs.

In the absence of the authorisation and implementation of the CFA, Xstrata is unlikely to have fully committed to its most recent substantial investments in the Hunter Valley, totalling approximately \$3.5 billion of mine expansions and investment in rolling stock since the authorisation. Refer table below:

Asset	Export Capacity	Capital Commitment	Status
Mangoola Mine	6.5Mtpa	US\$1.0 billion	Commissioning
Ravensworth Nth Mine	9Mtpa	US\$1.2 billion	Committed
Ulan West Mine	7Mtpa	US\$1.1 billion	Construction commenced
Xstrata Rail	12Mtpa + 12Mtpa	AU\$300million	Stage 1: 3 Trains operational Stage 2: 3 Trains under construction due in 2011

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2. HISTORY OF THE CURRENT AUTHORISATION

To withdraw, or even consider a review of, the current authorisation would have a significant negative impact as the authorisation has allowed the industry to put in place a contractual framework that has created commercial certainty that was previously lacking. Any review of the authorisation would undermine the benefits achieved to date and impose significant commercial risk on billions of dollars of investments already committed by Xstrata and other industry participants.

As the Commission would be aware, the CFA resulted from 2 years of negotiations between industry, the terminal owners and the NSW government and led to an industry agreement in relation to access and commercial arrangements at the Port of Newcastle. The negotiations were vital to ensure a commercial framework for investment across the entire coal chain to underpin the expansion at the Port of Newcastle.

For industry to reach this historic agreement took a substantial amount of time and resources, as well as compromises from all parties. The process involved consideration of views from a wide range of industry participants, including both large and small producers.

The authorisation was subject to a comprehensive public consultation process which ensured that the solution was as balanced as could be achieved with the broad range of parties and interests. It is a comprehensive regime, which includes independent technical review of producer's nominations, independent review of allocations and the establishment of the independence of the Hunter Valley Coal Chain Coordinator.

While there are aspects of the CFA that some parties may not like, this is a natural result of negotiations between different parties with different priorities. The CFA was the best result that could realistically and practically be agreed upon, and it has delivered substantial proven public benefits in contrast to the counterfactual (being the situation without the CFA), which are described in Section 4 below.

3. NO REASON TO CONSIDER A REVIEW OF THE AUTHORISATION

Section 91C(3) sets out the basis for which the ACCC may decide to review an authorisation of the CFA. In Xstrata's view, there is no persuasive reason as to why the current authorisation should be withdrawn as the authorisation was not based on false or misleading information, the conditions have been complied with and there has been no material change in circumstances since the authorisation has been granted.

In particular, in relation to the points raised by Aston Recourses:

- (a) **Capacity for new producers and trading of capacity:** New entrants are given access to capacity through the expansion provisions of the CFA, meaning that both new and expanding producers are given the opportunity to contract for additional capacity on an equal basis. PWCS is contractually bound to then expand the capacity of the terminal within reasonable timeframes to meet the requirements of the new and expanding producers. Xstrata notes that PWCS is the only terminal that it deals with anywhere in the world that has a contractual obligation to expand. While Xstrata appreciates that new producers may be

disappointed that they are unable to have all of their requested capacity immediately, it must be recognised that construction of port capacity is both time consuming and dependent on many factors, including granting of approvals by third parties including government and regulatory bodies. PWCS has complied with all of the obligations under the framework agreement, and the only source of risk and delay to the delivery of T4 arises as a result of the requisite approvals.

Further, new producers are able to obtain access to additional existing capacity through trading with other producers, as the long-term ship-or-pay agreements at the port include an obligation on producers to seek to transfer any unused allocation, and a limit on the fee that can be charged for transfers. There is an established capacity trading mechanism in operation at Newcastle which has successfully facilitated the trading of millions of tonnes of capacity entitlements between producers over the last 5 years. We note that Aston Resources has stated that this process is not incentivised enough, however we point out that on average approx 4% of terminal capacity is traded between producers each month (approx 5 million tonnes of port entitlement each year: source HVCCC) as evidence that there is sufficient incentive on parties to trade entitlements where they cannot be used. There is also a balance to be struck on this, as trading should not be incentivised to the point where there is incentive for gaming to occur and it creates a trading market for loading entitlements rather than seeking to allow producers certainty for mine development, expansion and shipping to long term customers. It is our view that the current system, with the level of third party audits and verifications, achieves a reasonable and workable balance to ensure there are genuine exports, limited incentives for hoarding of capacity and sufficient certainty for genuine producers.

- (b) **Expansion of T4:** As outlined in the submission of PWCS dated December 2010, while the current timeframe for the development of T4 may fall outside the four year time frame, the CFA provides realistic and practical flexibility and clearly contemplates a review process and variation to the start date of allocations where an extension of time is granted.

The CFA has facilitated growth and new entry and this growth (through the nomination process) has triggered T4. Since the CFA commenced significant work has gone into building T4 including:

- (i) purchasing land;
- (ii) commencing pre-feasibility work;
- (iii) undertaking environmental assessment work; and
- (iv) the establishment of the T4 management team.

It is evident that without the current authorisation being in place there would not be sufficient commercial certainty and investment for T4 to move forward as it is currently. It is in the best interests of all of the coal industry, including new producers, for the current authorisation to remain in place in order for the work towards T4 to continue.

We note in particular that Aston Resources approached PWCS in August 2010 seeking capacity in 2012. In an environment where port capacity is fully committed, it is unrealistic to expect that a terminal can construct and deliver new capacity in such a short time frame. The current advised timeframe for PWCS to ship first coal from the T4 expansion is in 2015, with full capacity from early 2016. PWCS has complied in every respect with its obligations under the commercial framework, and is working to ensure T4 is delivered in the shortest possible timeframes. We understand that the only risks to the timeframe lie with the approvals required from third parties.

Xstrata contrasts the design and delivery of the T4 terminal by PWCS with other terminals. For example in Queensland Xstrata has been negotiating access to additional port capacity at Gladstone in support of a number of mine expansions. Negotiations commenced in 2007 and the earliest anticipated delivery of the new terminal at Wiggins Is. is currently 2014. This is an eight year timeframe, which contrasts with the 5 years between when Aston first advised its requirements for port capacity and when the first capacity at T4 is expected to be made available. We also note that in respect of the Wiggins Is Coal Terminal that new users have been required to finance ~\$190million in feasibility and development costs and make substantial commercial commitments to progress the planning and financing of the terminal. This contrasts with PWCS where new users such as Aston are not required to make any contribution to the feasibility studies and engineering works, and will enjoy the benefits of a common pricing approach once the new terminal is constructed. Combined with the contractual obligation that PWCS must expand to meet its customers demand, Xstrata would rank the PWCS terminal as the lowest cost and shortest leadtime port for a new entrant anywhere in Australia.

Xstrata notes the ACCC's advice that there may be other parties with similar concerns to Aston Resources, and asks that the ACCC confirms whether these parties have even nominated for additional capacity at PWCS, as Xstrata's advice is that several of the parties to whom the ACCC may be referring have not actually lodged a request with PWCS to access the terminal.

4. THE CURRENT AUTHORISATION HAS DELIVERED PROVEN PUBLIC BENEFITS AND TO WITHDRAW THE AUTHORISATION WOULD CAUSE SIGNIFICANT PUBLIC DETRIMENTS

4.1 Public Benefits delivered

The CFA is part of a long term solution, and after only 13 months it has already delivered proven public benefits, including:

- (a) **Increased contractual certainty** by providing producers with a clear contractual entitlement to terminal capacity on a monthly or quarterly basis
- (b) **Facilitating contractual alignment** across the coal chain, with ARTC now seeking to align its access regime with that of PWCS and adopting a common approach to the measurement of coal chain capacity using common system assumptions and the capacity modelling of the independent Hunter Valley Coal Chian Coordinator

- (c) **Major capacity expansion** with the existing terminal being expanded to 145Mtpa and the T4 being triggered. Upstream expansions to track infrastructure, loadpoint capabilities, investments in rolling stock and the commitment to mine expansions and development are all occurring.

Each of these outcomes will ensure that the currently planned doubling of capacity at Newcastle will occur in a very short timeframe, generating significant benefits to the mining industry, State and national economy.

4.2 Public Detriment without the authorisation

Without the authorisation as it currently stands, there would be significant commercial uncertainty, leading to a lack of investment at all levels of the coal chain as well as an increased vessel queue. As the Commission is aware, financing is contingent upon financial certainty and therefore it is our view that to put into question this authorisation would create commercial uncertainty and compromise the major benefits that have arisen from the certainty created by the authorisation, in particular the expansion of PWCS and the development of T4.

The commission is aware of the environment which operated at Newcastle prior to the implementation of the CFA. It was characterised by uncertainty of access to capacity, misalignment of capacity entitlements across the supply chain, extended vessel queues and significant deadweight demurrage costs, and delays to investment in infrastructure as a result of the uncertainty of access to terminal capacity. Any threat of unwinding of the current level of certainty and progress would pose a significant risk to expansions which have been planned subsequent to the implementation of the CFA.

The CFA was agreed upon as a result of significant time and resources, and we believe that it is unlikely that another balanced solution can be reached between industry that would be able to deliver these proven public benefits.

5. CONCLUSION

The current authorisation is a result of significant negotiation, compromise and historic agreement between all members of the coal industry including large and small producers and coal chain infrastructure providers. It has delivered, and continues to deliver, significant public benefits including a commercial framework for investment and expansion. Xstrata therefore remains strongly supportive of the current authorisation, and believes that to consider a review of the authorisation at this early stage would lead to significant uncertainty and public detriment.

Please do not hesitate to contact me should you have any questions in relation to this submission.

Yours sincerely



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