

22 February 2011

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Australian Competition and Consumer Commission  
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**Port Waratah Coal Services Limited (PWCS), Newcastle Coal Infrastructure Group (NCIG) and Newcastle Port Corporation (NPC) authorisation A91149 & A91168 & A91169 – request for review by Aston Resources**

Dear Mr Griffin

On 15 December 2010, Aston Resources Limited (**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. This letter is provided in response to the ACCC's request for submissions dated 10 February 2011.

As noted in its previous submission, Aston Resources was advised on 1 December 2010 that it had received an initial coal export loading allocation for the Port of Newcastle from Port Waratah Coal Services (**PWCS**) of approximately 1.7Mtpa in 2013 and 2014 and 10.5 Mtpa from 2015. The ramp up in allocation was to be provided through the delivery of PWCS Terminal 4. Aston Resources, the first significant new entrant to seek an allocation since the Capacity Framework Arrangements were approved by the ACCC in December 2009, had sought an allocation of 2 million tonnes in 2012, 5 million tonnes in 2013 and 10.5 million tonnes from 2014 onwards.

Aston Resources' key concern is that expanded greenfield capacity, Terminal 4, will not be delivered within the timeframe originally set out in the Capacity Framework Arrangements. This means that capacity allocations that depend upon the delivery of Terminal 4 are highly contingent and provide an uncertain basis for new entrants making final investment decisions.

This effective barrier to entry would be alleviated if the Capacity Framework Arrangements were amended to provide that mandatory compression is triggered either:

1. automatically in the case of under-utilisation; or
2. from the targeted 2015 delivery date for Terminal 4 (rather than any extended delivery date).

This would enable new entrants to model capacity usage and know that, in the event that producers had over-nominated for port capacity, such capacity would be made available from a fixed date. New entrants would not be required to rely on the less certain prospect of voluntary trading.

In its request for submissions, the ACCC asked, amongst other things:

1. whether there has been or is likely to be an undue delay in the delivery of further capacity at the Port of Newcastle; and
2. whether there is any evidence of capacity hoarding.

**1. Whether there has been or is likely to be an undue delay in the delivery of further capacity at the Port of Newcastle**

In relation to the delivery of Terminal 4, Aston Resources is particularly concerned that PWCS has already indicated an intention to apply to Newcastle Port Corporation (**NPC**) for an extension of the targeted 2015 delivery date for Terminal 4. In its allocation offer letter, PWCS expressly noted an intention to seek an extension to the required delivery date. They state that the approvals process represents a "significant schedule risk" for the project.

Aston Resources is firmly of the opinion that it is premature for:

1. PWCS to be indicating that a 2016 start date is more realistic; or
2. NPC to be considering an extension,

when the expansion has only just been triggered and the Part 3A application has not yet been lodged.

This is inconsistent with the delivery timeline that was proposed at the time the Capacity Framework Arrangements were approved. Terminal Four, as a greenfield expansion, should be capable of being delivered in the four year timeframe contemplated in the initial ACCC authorisation decision (i.e. by the start of 2015). This four-year period was intended to include the time required to obtain necessary development consents.

This is a critical issue – it means that, shortly after the Capacity Framework Arrangements were approved, the incumbent producers secured all of the 'certain' growth capacity at PWCS and relegated new entrants what is now becoming the 'highly uncertain' growth capacity at Terminal 4.

## **2. Whether there is any evidence of capacity hoarding**

In relation to capacity hoarding, Aston Resources has previously noted that it is possible that incumbent producers have over-nominated for port capacity and will prove unable to fully utilise their allocations in the short to medium term. Modeling conducted by independent market analysts supports Aston's view.

However, even if there is currently no evidence of hoarding, it is critical that the Capacity Framework Arrangements have adequate mechanisms in place to resume capacity should it be discovered (at some point in the future) that over-nominations have in fact occurred. The Capacity Framework Arrangements should be structured to ensure that producers not only have the capacity to fully utilise their port allocation, but also intend to fully utilise their port allocation – and if they subsequently fail to do so, then that capacity should be made available to other parties who will.

As noted in Aston Resources' original submission, one or two relatively small amendments to the existing rules on mandatory compression would provide greater certainty to new entrants who are currently relying on contingent allocations of capacity from Terminal 4. Such entrants need to be assured that, even if the delivery date for Terminal 4 is extended, excess capacity will be made available to new entrants.

Under the current system it is possible that a producer who nominated for an increase to, for example, 30Mtpa in 2015 but is only shipping 20Mtpa will retain its entitlement to the full 30Mtpa simply because the delivery date for Terminal 4 has been extended. It is inconceivable that there is no mechanism for PWCS or NPC to mandatorily resume unused capacity given that new entrants are facing an increased barrier to entry because of the very extension of the delivery date.

Under the Capacity Framework Arrangements, PWCS and NCIG are required to mandatorily compress for under-utilisation in the event of an Expansion Delay or Capacity Shortfall. There are two key problems with the current provisions:

1. Compression is only triggered when there is an Expansion Delay or Expansion Shortfall, not simply in the case of under-utilisation. So, for example, Aston Resources is unable to benefit from compression in 2012, 2013 and 2014 (and most likely 2015 onwards if the Terminal 4 start date is extended) despite being allocated below its requested tonnages. Even if other producers are not using their allocated tonnages in these years (or if they fail to obtain necessary rail capacity), Aston Resources will have no certain means of obtaining access to capacity.
2. Under Part 5 of the Capacity Framework Arrangements, compression will not be triggered in 2015 if NPC grants an extension to the scheduled delivery date – there is no restriction on the number of extensions that could be granted. PWCS has already informally indicated that the 2015 target is more likely to be 2016 at the earliest, and there is no certainty that this may not slip to 2017, 2018 or in fact later. The start date has the potential to be extended multiple times without any recourse under the Capacity Framework Arrangements.

Mandatory compression under Part 5 should be triggered automatically in 2015, the original targeted delivery date for Terminal 4. Resumption for under-utilisation will not disadvantage incumbent producers if they are utilising their allocations. The change would, however, give new entrants a greater degree of certainty that, to the extent modeling predicts an excess of available port capacity prior to the construction of Terminal 4, that capacity will be made available.

Mandatory compression undoubtedly gives companies making investment decisions greater assurance than having to rely upon voluntary trading. Tightening the rules on mandatory compression would therefore lower the barrier to entry. The approach would also align with that proposed under the draft Hunter Valley Rail Access Undertaking – where compression is triggered automatically by under-utilisation.

Sincerely,



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