



7 March 2011

By email

David Hatfield
Director
Adjudication Branch
Australian Competition and Consumer Commission

Copy to:
Luke Griffin

Dear Mr Hatfield

A91147 – A91149 & A91168 & A91169 – Response to request by Aston Resources to review authorisation

I refer to your letter of 10 February 2010 inviting interested parties to make submissions with any information that may be relevant to the ACCC's decision on whether to commence a review of the authorisation of the Capacity Framework Arrangements at the Port of Newcastle.

1 Background

As the ACCC is aware, Newcastle Port Corporation (**NPC**) is a statutory state-owned corporation and is responsible for establishing, managing and operating the port facilities and services in the Port of Newcastle.

NPC, along with Port Waratah Coal Services Limited (**PWCS**) and the Newcastle Coal Infrastructure Group (**NCIG**), were granted authorisation in December 2009 for the Capacity Framework Arrangements.

At the time of the decision to authorise the Capacity Framework Arrangements in December 2009, the ACCC considered that the arrangements appear to facilitate, and are a critical part of, the implementation of a long term solution across the Hunter Valley coal chain. The ACCC also noted that:

The Capacity Framework Arrangements are a complex set of arrangements that require a number of parties to work together to ensure the Hunter Valley coal chain operates efficiently and effectively. The ACCC is granting authorisation for an extended period of time on the basis of the information before it and the commitments made by the Applicants in the Capacity Framework Arrangements.

NPC has had the opportunity to review the submissions from Aston Resources dated 15 December 2010 and 22 February 2011 and the submissions from other relevant parties.

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In this letter, NPC sets out why there is no basis for a review of the authorisation under section 91C(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). NPC also provides a response to the points raised in your letter of 10 February 2011.

2 No basis to consider a review of the authorisation

Section 91C(3) of the CCA provides that the ACCC must decide whether to review the authorisation of the Capacity Framework Arrangements on the basis 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.

In response, NPC considers that:

- Aston Resources has not provided evidence nor is there any other reason to suggest that the authorisation of the Capacity Framework Arrangements was based on false or misleading material.
- This is an irrelevant consideration as the authorisation was not granted subject to conditions.
- Circumstances have not changed since authorisation of the Capacity Framework Arrangements was granted. The authorised arrangements are being implemented in accordance with their terms and are working as intended.

It follows that there is no basis for the ACCC to consider a review of the authorisation under section 91C(3) of the CCA.

3 The timing of the T4 expansion has not been delayed

The development of Terminal 4 is subject to two separate but interrelated commercial arrangements – the Kooragang Island Terminal 4 – Agreement for Lease between NPC and PWCS (**T4 AFL**) and the Lease between NPC and PWCS (**T4 Lease**).

The T4 AFL was executed on 31 August 2009 and the T4 Lease will become binding when the development approval for Terminal 4 has been obtained. However, by operation of clause 11.6(b) of the T4 AFL, the capacity framework provisions contained in Schedule 6 of the T4 Lease became effective when, as part of the 2010 nominations and allocation process, contracted nominations for capacity at the PWCS terminals exceeded the available and expansion capacity of the Kooragang and Carrington terminals.

The T4 AFL imposes a series of obligations on PWCS to develop Terminal 4. The relevant obligations are set out below:

- PWCS must establish a sub-committee of its Board, which must include persons who represent an appropriate cross section of producers and have a role in the process for making decisions about the design, construction and mode of operation of Terminal 4 (clause 4);
- PWCS must report to NPC every 6 months on progress of, among other things, the investigation of the land, the development of the concept design and project plan, including proposed output capacity, environmental issues and other material issues (clause 6.1);

- PWCS must deliver a report by 31 August 2011 on PWCS' development of its concept design, project scope and program for the project (clause 6.2(a));
- PWCS must lodge a development application by 30 November 2011 or one month after PWCS obtains the consents required from NPC and third parties to the design works required (clause 7.2(b)); and
- once NPC has approved the development application, PWCS must pursue the development application with the Consent Authority and resolve any issues in a mutually satisfactory manner (clause 7.4).

At this stage, PWCS has complied with its obligations under the T4 AFL. PWCS has established a sub-committee pursuant to clause 4(b) and attended the progress meetings as required by clause 6.1. As at the time of writing, NPC has not been informed by PWCS that it is not in a position to meet its obligations under the T4 AFL and clauses 6.2(a) and 7.2(b) in particular.

The capacity framework provisions in Schedule 6 of the T4 Lease impose a series of obligations on PWCS regarding the timeframes for the construction of, and access to, Terminal 4. Specifically:

- PWCS must allocate capacity in accordance with the authorised nomination and allocation procedure and, subject to the terms of the lease and the authorised Capacity Framework Arrangements, must ensure that access to capacity is open to all producers on a non-discriminatory basis (clauses 2.1 and 2.2 of Schedule 6);
- PWCS must build Terminal 4 within four years after the date that contracted nominations for capacity exceed the available and expansion capacity of Kooragang and Carrington terminals (clause 3.1 of Schedule 6); and
- PWCS may apply for a review of the four year build time in certain circumstances (clause 5 of Schedule 6).

These provisions are consistent with the arrangements that have been authorised by the ACCC in its determination dated 9 December 2009 (in particular, see sections 2, 6 and 10 of Attachment A to the determination).

As noted above, in the 2010 nominations and allocation process, the aggregate of the contracted nominations exceeded the available and expansion capacity of the Kooragang and Carrington terminals. Therefore, by operation of clause 3.1 of Schedule 6, the clock started running for PWCS to build Terminal 4 by 1 January 2015.

NPC is aware that statements have been made about the completion time for Terminal 4 but at this point we can confirm that PWCS has not applied for a review under clause 5 of Schedule 6 of the T4 Lease. If an application is received, the process for review (which is specifically described in section 6(e) of Attachment A to the ACCC's determination) will be adhered to.

In summary, NPC's view is that PWCS has been compliant with its obligations under the T4 AFL and Schedule 6 of the T4 Lease to date. NPC has no reason to consider that PWCS is not going to fulfil its future obligations under the T4 AFL and the T4 Lease.

4 The “anti-hoarding provisions” are working as intended

The ‘anti-hoarding provisions’ of the Capacity Framework Arrangements are intended to work as follows:

- firstly, producers with contracted allocations at PWCS are required to use their best efforts to transfer any unused capacity allocations (clause 11.2 of the PWCS Long Term Ship or Pay Agreement);
- secondly, a Capacity Transfer System (CTS) has been established in accordance with clause 3 of the Capacity Framework Agreement – with the Hunter Valley Coal Chain Coordinator (HVCCC) being appointed as the person responsible for administering the CTS;
- thirdly, if a producer is entitled to an exemption to anti-hoarding compression (see next point below), the producer will lose this entitlement if it is unable to satisfy the Reviewer (being NPC or its nominee) that it has complied with the requirement to use best efforts to transfer (which can be satisfied automatically if the CTS is used), or if the producer does not register a transfer of capacity with the CTS (clause 11.2 of the PWCS Long Term Ship or Pay Agreement); and
- finally, if there is a delay in bringing on expansion capacity by the date that is required under the PWCS leases (including capacity to be delivered by Terminal 4), or there is a shortfall in the amount of capacity that is delivered by an expansion, then ‘anti-hoarding compression’ will apply under clause 10(a)(ii) of the PWCS Terminal Access Protocol to all producers that have not used and/or transferred at least 95% of their aggregate contracted allocations on average over the 18 month period immediately prior to the date of the delay or shortfall (with an exception for usage that did not occur due to a force majeure event). As there has not been a delay or shortfall in a capacity expansion at this stage, it has not been necessary to apply the ‘anti-hoarding compression’ provisions.

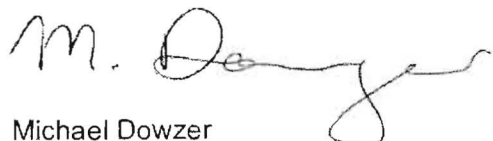
Again, these provisions are consistent with the arrangements that have been authorised by the ACCC in its determination dated 9 December 2009 (in particular, see sections 5 and 7 of Attachment A to the determination).

NPC has been advised by the HVCCC that around 4% of capacity is traded between producers each month using the CTS. In NPC’s view, the CTS is working as intended and, based on the information that NPC has before it, the obligations under the agreements have been complied with to date.

5 Conclusion

NPC considers that the Capacity Framework Arrangements that have been authorised are operating as intended and there is no basis on which to consider reviewing the authorisation under section 91C(3). In its letter to the ACCC dated 23 December 2010, NPC identified some of the key public benefits which it considers have been delivered through the operation of the Capacity Framework Arrangements since their authorisation in December 2009.

Yours sincerely



Michael Dowzer

GENERAL MANAGER STRATEGY, EFFICIENCY & GOVERNANCE