

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



**Australian
Competition &
Consumer
Commission**

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

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Mr Todd Hannigan
Chief Executive Officer
Aston Resources Limited
Level 10, AMP Place
10 Eagle Street
Brisbane QLD 4000

Dear Mr Hannigan

**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 requested that the Australian Competition and Consumer Commission (ACCC) review the authorisation of the Capacity Framework Arrangements (CFA) at the Port of Newcastle (the authorisation). The ACCC has since consulted with the applicants and other interested parties.

Section 91C(3) of the *Competition and Consumer Act 2010* (the Act) sets out grounds for review of an authorisation. For the ACCC to decide to review the authorisation, it must appear to the ACCC 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.

With respect to Aston Resources' request for review of the authorisation, the ACCC considers that the relevant test is whether there has been a material change of circumstances since the authorisation was granted. A material change of circumstances is one that has an impact or likely impact upon public benefit and/or detriment with respect to the circumstances as they existed at the time the authorisation was granted.

Aston Resources raised three main issues which are discussed below:

- facilitation of new entry
- timely delivery of expanded capacity (T4)

- terminal capacity hoarding.

Do anticipated benefits of the CFA include facilitation of new entry?

Historically, new entrants were granted access to terminal capacity through common user provisions involving pro rata reductions in capacity entitlements. However the uncertainty this created for existing coal producers stifled investment to the detriment of the efficiency of the coal chain as a whole. Many of the anticipated benefits of the CFA arise directly from the increase in certainty achieved by enabling long term contracts in favour of facilitating new entry via common user provisions.

Nonetheless, the ACCC considers the potential for new entry is important and would be concerned if significant barriers to entry were established. The CFA primarily address the needs of new entrants through the obligation to expand capacity as required. It is also relevant that all terminal users pay a common charge for a common service which supports a level playing field for new entrants.

The ACCC considers that the CFA have delivered benefits in the form of substantial investment across the coal chain. The certainty that is provided by the CFA has been significant in facilitating this investment. For example, Xstrata submitted that the CFA have enabled producers to enter into long term contracts which has facilitated investment at all levels of the coal chain as well as providing for better management of vessel arrivals and reduced demurrage costs. The NPC submitted that ‘since the authorisation of the CFA there has been unprecedented expansion of coal export terminal capacity in the Port of Newcastle.’

Development of T4

The CFA oblige PWCS to expand capacity when certain conditions are met. The CFA also set out default development timeframes of two years for existing sites and four years for greenfields sites. The requirement to build T4 was formally triggered on 1 January 2011 and is therefore due to commence operation at the beginning of 2015.

Aston Resources submitted that it is concerned that PWCS has already indicated an intention to apply to the NPC for an extension. The ACCC notes the project plan provided by PWCS in its T4 industry brief that indicates that it expects to miss the 1 January 2015 deadline. The NPC notes that if an application to extend the timeframe is received, the process for review set out in section 6(e) of the CFA will be adhered to. The ACCC also notes that the provision to extend the delivery timeframe was authorised by the ACCC as part of the CFA, so any application to extend could not be considered a material change in circumstances. The ACCC considers that the provisions are particularly important in relation to approval processes that can cause significant delays that are largely outside PWCS’ control.

The ACCC is not aware of any evidence to suggest that PWCS is causing undue delay with the development of T4. Rather, it appears that PWCS is progressing T4 expediently. The ACCC notes PWCS’ advice that it commenced development of T4 at least 12 months prior to it being formally triggered. The ACCC understands that T4 was triggered earlier than anticipated as a result of significant investment and development across the coal chain. The project has been granted Major Project Facilitation status by the Commonwealth Government and declared as a Major Project by the NSW Planning Minister which will streamline the approvals process.

Capacity hoarding

While Aston Resources referred to independent market analysts supporting Aston Resources' view, the ACCC has not seen any evidence to suggest that capacity hoarding or over-nominating is an issue at Port Waratah. Several interested parties noted the positive obligation within PWCS' existing long term ship or pay agreement to transfer unused capacity. Coal & Allied submitted that through the HVCCC, an effective computerised capacity trading system had been developed. Drawing on HVCCC statistics, Xstrata submitted that approximately 4 percent of terminal capacity was traded each month. The ACCC considers that while the cost of terminal capacity per tonne is low relative to the final price of coal per tonne, there is nonetheless a financial incentive for producers to ensure that they do not pay more in terminal fees than absolutely necessary.

Finally, the ACCC notes that the nomination process itself is akin to an anti-hoarding measure owing to the level of rigour and independent analysis required to demonstrate that a producer has the ability to use its nominated capacity. Nominations need to be supported with independently verified access to sufficient coal reserves, production capacity and transport capacity.

For these reasons, the ACCC does not consider there is any evidence to suggest that producers are engaged in capacity hoarding or over-nominating.

Conclusion

The ACCC considers that the CFA are operating as expected and notes the significant level of investment that has been committed since its decision to grant authorisation in December 2009. For the reasons set out above, the ACCC considers that the requirements of section 91C(3) of the Act have not been met and the ACCC will not initiate a review of the authorisation.

The ACCC notes that Aston Resources recommended several changes to the CFA, particularly concerning the interests of potential new entrants. However, the CFA are complex and interlinked and the result of extensive negotiations. The ACCC notes that compromises were required of all negotiating parties and that it would be inappropriate for individual elements of the arrangements to be assessed in isolation. The ACCC is also cognisant of the uncertainty that would be created by a review of the authorisation and the CFA more broadly. Nonetheless, the ACCC will continue to monitor the authorisation and the operation and effectiveness of the CFA.

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 David Hatfield on (02) 6243 1266 or Luke Griffin on (02) 6243 1114.

Yours sincerely



Dr Richard Chadwick
General Manager
Adjudication Branch