



Australian
Competition &
Consumer
Commission

Determination

**Application for Minor Variation of
Authorisations A91141–A91142 and
A91181–A91182**

lodged by

**Australian Amalgamated Terminals
Pty Limited (AAT)**

in respect of

**amendments to enable the AAT Joint Venture
to jointly operate Appleton Dock terminal at
the Port of Melbourne, for a transitional period
from 1 January 2014 until 31 December 2017**

Date: 5 December 2013

Sims
Schaper
Cifuentes
Walker

Summary of decision

The Australian Competition and Consumer Commission (ACCC) has decided to vary the conditional authorisations granted to Australian Amalgamated Terminals Pty Limited (AAT) on 3 December 2009. The authorisations allow AAT and the joint venture participants to give effect to provisions of certain agreements that enable AAT to jointly operate specific terminals at Port Adelaide, Port of Bell Bay, Port of Brisbane, Port Kembla and Port of Melbourne. The effect of the minor variation is to enable AAT to engage in the conditionally authorised conduct at a new terminal, namely, Appleton Dock at the Port of Melbourne, for a transitional period only, from 1 January 2014 until 31 December 2017.

The ACCC has undertaken its assessment of the proposed minor variation in accordance with the test set out in section 91A the *Competition and Consumer Act 2010 (Cth)*. The ACCC consulted interested parties and received one submission in support of the application for minor variation from the Federal Chamber of Automotive Industries. The ACCC is satisfied that the variation to allow the AAT joint venture to operate Appleton Dock for a transitional period, in all the circumstances, would not be likely to result in a reduction in the benefits to the public that arose from the original authorisations, and would not be likely to result in a reduction in the extent to which those benefits outweigh the public detriments.

1. The application for minor variation

- 1.1. On 9 September 2013, AAT lodged an application for minor variation of authorisations A91141–A91142 and A91181–A91182 (the Authorisations) under section 91A of the *Competition and Consumer Act 2010 (Cth)* (the Act).
- 1.2. The Authorisations were granted subject to conditions by the ACCC on 3 December 2009 and extend until 31 December 2019.
- 1.3. The Authorisations allow AAT to give effect to section 2 of the Shareholders Agreement, together with other provisions of the Shareholders Agreement and the Constitution of AAT, but only to the extent that those provisions allow the parties to engage in certain conduct at AAT's terminals. That conduct includes jointly operating particular automotive and general cargo terminals located at Port Adelaide, Port of Bell Bay, Port of Brisbane, Port Kembla and Port of Melbourne. The Authorisations do not extend to any new terminals established or operated by AAT.
- 1.4. Relevantly, under the Authorisations, AAT currently operates the Webb Dock West terminal at the Port of Melbourne. The minor variation sought by AAT is to enable it to engage in the conditionally authorised conduct at another terminal, namely, Appleton Dock at the Port of Melbourne, for a transitional period.¹ The transitional period would begin on or before 1 April 2014 and end on 31 December 2017.

¹ The specific amendments to give effect to the proposed minor variation are set out in AAT's response to question 2(c) of the application. Attachment D to the ACCC's 2009 Determination contains the conditions of authorisation, including provisions that currently limit the authorised conduct to specific terminals. AAT has requested amendments to paragraph 5.10 of the Authorisations, and paragraph 6.1 of Attachment D, to vary the Authorisations so they apply to relevant conduct by AAT at Appleton Dock.

- 1.5. If granted, AAT's operation of Appleton Dock would be subject to the existing conditions of Authorisation (as set out in Attachment D to the ACCC's 2009 determination). Broadly, the conditions:
- provide a mechanism for stevedores to seek access to AAT's terminals
 - impose a process for independent review of AAT's price increases to end-users
 - require AAT to provide end-users with a dispute resolution process for non-price disputes
 - impose reporting obligations.
- 1.6. A copy of the final determination granting the Authorisations is available on the ACCC's website.

Background

- 1.7. The transitional period relates to the port capacity project being undertaken by the Port of Melbourne Corporation (POMC) (the project). As part of the project, Webb Dock East, which is currently operated by Qube, will be closed for redevelopment. Cargo that is usually directed through Web Dock East will be redirected to Webb Dock West and Appleton Dock during this transitional period. The POMC approached AAT to act as the single terminal operator, operating both Webb Dock West and Appleton Dock during this transitional period.
- 1.8. AAT submits that the objective of the arrangements is to 'maximise the utilisation of available port berthing and land capacity at the Port of Melbourne during the closure and redevelopment of Webb Dock East and thereby to minimise the disruption to operations at the Port of Melbourne and the consequential impact on economic activity'.² AAT also submits that it is POMC's preferred operator of Appleton Dock during the transitional period.
- 1.9. AAT submits that the variation would not affect the benefits or detriments of the Authorisations (including in relation to pricing).³
- 1.10. After the transitional period, the POMC proposes to consolidate all automotive cargo through a single new terminal to be built at Webb Dock West (new WDW terminal). The ACCC notes that neither the Authorisations nor the proposed minor variation extend to the operation of the new WDW terminal, should AAT be selected by the POMC to operate this terminal. Further, this proposed minor variation does not affect the Authorisations as they apply to terminals operated by AAT at the other Australian ports.

2. Submissions received by the ACCC

- 2.1. After establishing that the proposed amendments were consistent with the definition of a minor variation in the Act, the ACCC invited submissions from interested parties. Only one submission was received from the Federal Chamber of Automotive Industries (FAI).⁴
- 2.2. After consulting its members, the FCAI submitted that the proposal to allow AAT to operate Appleton Dock is seen as increasing efficiency during the period of construction

² AAT application for minor variation, cover letter, 9 September 2013, page 2.

³ AAT application for minor variation, Form FA, 9 September 2013, pages 4–5.

⁴ FCAI submission, 22 October 2013.

associated with the new Webb Dock East and Webb Dock West facilities. The FCAI also submitted that its own internal modelling of indicative vessel movements and vehicle imports and exports suggests the approach is most likely to minimise the disruption and lead to the most efficient operation of the port.

- 2.3. The FCAI submits that provided the restrictions and processes in place for the current AAT operations apply equally to the operations at Appleton Dock, it has no objection to the proposed minor variation.

3. ACCC evaluation

- 3.1. The ACCC has assessed the application for a minor variation to the Authorisations in accordance with the test in section 91A of the Act.
- 3.2. The ACCC must not make a determination varying an authorisation, unless the ACCC is satisfied that:
- the proposed variation is minor, and
 - in all the circumstances, the variation would not result or would not be likely to result, in a reduction in the:
 - public benefit that arose from the original authorisation; or
 - extent to which the benefit to the public of the authorisation outweighs the detriment to the public caused by the authorisation.

The proposed variation is minor

- 3.3. Section 87ZP of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 3.4. AAT submits that the proposed variation is minor for a variety of reasons, including:⁵
- it does not involve a material change in the effect of the Authorisations
 - it does not affect the substance of the Authorisations, and in particular does not affect the underlying contracts, understandings and agreements or the conduct authorised in paragraph 5.9 of the ACCC's determination
 - it only extends the application of the conditional Authorisations to an additional terminal (Appleton Dock) for a transitional period
 - the transitional period falls within the existing period of authorisation
 - the types of cargo to be handled at Appleton Dock fall within what is contemplated by, and already authorised by, the ACCC.
- 3.5. The ACCC notes that the proposed variation is a result of the port capacity project and the POMC's decision to consolidate automotive terminal operations at Webb Dock West. Further, the ACCC notes that AAT was approached by POMC about operating the terminal at Appleton Dock for the transitional period. The ACCC notes that POMC is conducting a competitive process to establish arrangements for the long term operation of the new terminal.
- 3.6. The proposed variation will not affect AAT's operation of other terminals covered by the Authorisations, being terminals at Port Adelaide, Port of Brisbane, and Port Kembla (and the existing terminal at Webb Dock West).

⁵ AAT application for minor variation, Form FA, 9 September 2013, page 3.

- 3.7. While the submission from the FCAI was supportive of the proposed variation, it also sought guidance from the ACCC concerning the existing pricing at Appleton Dock and the applicability of that pricing model after the change in terminal operator. The FCAI submits that following the change of terminal operator, the users should be no worse off than if the current arrangements had remained.⁶
- 3.8. The Appleton Dock terminal is currently operated by Qube. Its operation and in particular its pricing, is not subject to the conditions of the Authorisations. In contrast, the proposed variation would result in AAT operating the terminal at Appleton Dock on an open access basis, and in accordance with the conditions of the Authorisations.
- 3.9. AAT is yet to determine pricing for Appleton Dock. However, the conditions provide terminal users with the ability to seek an independent review of price increases and access to a dispute resolution process for non-price disputes. The ACCC understands that the conditions have generally been effective to date and is not aware of any reason why they would not be effective if applied to Appleton Dock. In particular, there have been several price reviews undertaken by the independent price expert since the Authorisations were granted and the expert's determinations are binding. The most recent review was concluded in February 2013, with the corresponding determination available on AAT's website.
- 3.10. As the proposed variation is subject to the existing conditions of authorisation and for a transitional period only, and that the transitional period is within the existing period of authorisation, the ACCC is satisfied that the proposed variation to enable AAT to operate Appleton Dock is minor.

No reduction in the net public benefit of the arrangements

- 3.11. The assessment of the effect of the proposed variation on net public benefit takes account of the likely benefits and detriments of the arrangements as reflected in the ACCC's determination of 3 December 2009. .

ACCC's Determination to grant authorisation – 3 December 2009

- 3.12. In its 2009 determination, the ACCC was satisfied that the arrangements were likely to result in public benefits. The ACCC considered that the potential for new entry by stevedores was likely to be enhanced if access to terminals at a range of ports across Australia was possible and that this would enable the new entrant to offer a shipping line stevedoring services at multiple ports. The ACCC also considered that there were likely to be efficiencies for shipping lines from dealing with a single national stevedore.⁷
- 3.13. In its determination, the ACCC considered a range of potential detriments arising from the conduct, particularly in the context of AAT being a related entity of stevedoring businesses which creates an incentive for AAT to deny competing stevedores access to its terminals. The potential detriments included:
- the price of AAT's services
 - the terms and conditions of access by stevedores to AAT's terminals
 - the inability for importers/exporters to negotiate directly with AAT.

- 3.14. In granting authorisation the ACCC imposed conditions that would:

⁶ FCAI submission, 22 October 2013.

⁷ ACCC determination, 3 December 2009, pp. 27–28.

- prevent AAT from using its position as the sole supplier of terminal services at some ports to price its services at levels substantially above the efficient costs of providing those services. Providing access to AAT's terminals for competing stevedores at a competitive price would facilitate downstream competition and put pressure on downstream price and non-price terms.
- increase transparency and enable review of AAT's price increases and opportunity for terminal end-users to raise pricing issues with AAT and for pricing issues to be reviewed and resolved in an efficient manner
- provide a dispute resolution process to terminal users for non-price disputes. The dispute resolution condition was intended to assist terminal users negotiate directly with AAT on non-price issues such as cargo storage, cargo damage and cargo collection.

3.15. Ultimately, the ACCC was satisfied that in all the circumstances and subject to the conditions, the relevant public benefit tests were met and decided to grant authorisation until 31 December 2019.⁸

Effect of the proposed variation on the net benefit of the Authorisations

3.16. AAT submits that the proposed variation will not affect the substance of the Authorisations and therefore would not affect the public benefits or detriments of the Authorisations. AAT states that the conditions of the Authorisations would apply equally to Appleton Dock and to the extent the conditions guarantee benefits for terminal users the variation would extend those benefits to users of Appleton Dock.⁹ With respect to public detriments, AAT submits that the conditions of the Authorisations minimise or eliminate each of the potential detriments identified by the ACCC in its 2009 determination.¹⁰

3.17. AAT also submits that the purpose of the variation is to maximise the utilisation of available port berthing and land capacity at the Port of Melbourne while the new terminal is being developed at Webb Dock West and during the closure and redevelopment of Webb Dock East, in order to minimise the disruption at the Port of Melbourne and the attendant impact on economic activity.¹¹

3.18. As the proposed variation will not affect AAT's operation of other terminals covered by the Authorisations, being terminals at Port Adelaide, Port of Brisbane, and Port Kembla (and the existing terminal at Webb Dock West), the ACCC considers it would not be likely to result in a reduction in the public benefit that arose from the original Authorisation.

3.19. The ACCC notes that the proposed variation will result in AAT becoming the only automotive terminal operator at the Port of Melbourne (compared to the current situation where Appleton Dock is operated by Qube and Webb Dock East is currently operated by Asciano but is to be closed by POM during the project). However, the ACCC considers the potential for detriment to arise as a result of the reduction in the number of operators is limited as a result of the following factors:

- AAT's operation of Appleton Dock would be subject to the existing conditions of authorisation
- the proposed arrangement is for a transitional period only, with the long term arrangements the subject of a competitive process being administered by POMC.

⁸ ACCC determination, 3 December 2009, pp. 42–44.

⁹ AAT application for minor variation, Form FA, 9 September 2013, pages 4–5.

¹⁰ See paragraphs 4.60 to 4.107 of the ACCC's determination, 3 December 2009.

¹¹ AAT application for minor variation, Form FA, 9 September 2013, page 4.

3.20. The ACCC has not received any complaints concerning AAT's operation of terminals at various Australian ports. Similarly, the ACCC did not receive any submissions opposing the proposed minor variation. As noted previously, the ACCC considers that the conditions of the Authorisations have been effective to date in mitigating the potential public detriments arising from the authorised conduct.

3.21. As the proposed variation:

- involves the same conduct at a new terminal that will be subject to the existing conditions of authorisation; and
- is for a transitional period only, and the transitional period is within the existing period of authorisation,

the ACCC is satisfied that the proposed minor variation to enable AAT to operate Appleton Dock would not be likely to result in a reduction in the benefit to the public that arose from the original authorisation, and would not be likely to result in a reduction in the extent to which those benefits outweigh the detriments.

4. Determination

4.1. The ACCC is satisfied that the variation is minor.

4.2. The ACCC is also satisfied that, in all the circumstances:

- the public benefit test in section 91A (4) of the Act is met – that is, the variation would not be likely to result in a reduction in the extent to which the benefit to the public of the Authorisations outweighs any detriment to the public caused by the Authorisations.
- the public benefit test in section 91A(5) of the Act is met – that is, the variation would not be likely to result in a reduction in benefit to the public that arose from the original Authorisations.

4.3. Pursuant to section 91A(3) of the Act the ACCC makes this determination varying Authorisations A91141–A91142 & A91181–A91182, to enable AAT to operate Appleton Dock for a transitional period only, from 1 January 2014 until 31 December 2017 during the development of the new terminal at Webb Dock West and the closure and redevelopment of Webb Dock East as part of the port capacity project at the Port of Melbourne.

4.4. This determination is made on 5 December 2013. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 27 December 2013.