



Determination

Application for minor variation of authorisation A40062-A40070 and
A91205-A91207 lodged by
Rio Tinto Aluminium
in respect of
the Operations and Maintenance Agreement for the Gladstone Power
Station

31 January 2024

Commissioners: Keogh
Carver

Summary

The ACCC has decided to vary authorisations A40062-A40070 and authorisations A91205-A91207 which were granted in relation to commercial agreements concerning the expansion and operation of the Boyne Island Aluminium Smelter, and electricity generated by the Gladstone Power Station and supplied to the Smelter and the National Energy Market. The ACCC has decided to grant minor variations in respect of amendments to certain terms of the Operation and Management Agreement for the Gladstone Power Station.

The ACCC is satisfied that the variations sought are minor and are unlikely to result in a reduction in the extent to which the benefit to the public from each of authorisations A40062-A40070 and A91205-A91207 outweighs any detriment to the public.

1. The application for minor variation

- 1.1. On 20 July 2023, Rio Tinto Aluminium Limited (**Rio Tinto Aluminium**), on behalf of itself¹ and the participants in the Gladstone Power Station Joint Venture (**GPS JV**) (the **Participants**²) applied to the Australian Competition and Consumer Commission (the **ACCC**) for minor variation of authorisation A40062-A40070 and authorisation A91205-A91207.³ This application for minor variation was made under subsection 91A of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. Authorisations A40062-A40070 and A91205-A91207 relate to commercial agreements concerning the expansion and operation of the Boyne Island Aluminium Smelter (the **Smelter**) and electricity generated by the Gladstone Power Station and supplied to the Smelter and the National Energy Market (**NEM**).
- 1.3. The ACCC may grant authorisation, which provides businesses with an exemption from competition law for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. As background, in 1979, the ACCC's predecessor, the Trade Practices Commission, authorised the formation of a joint venture for the construction and operation of the Smelter, near Gladstone in Queensland.
- 1.5. On 3 March 1994, the Trade Practices Commission granted authorisations A40062-A40070 (the **1994 authorisations**) for certain agreements made by the Participants in relation to the expansion of the Smelter and the formation of a joint venture for the acquisition of the Gladstone Power Station (the **GPS JV Agreements**), which supplied electricity to the Smelter.
- 1.6. On 2 June 2010, the ACCC granted authorisations A91205-A91207 (the **2010 authorisations**), with conditions,⁴ for certain amendments to a number of the GPS JV

¹ This includes the parent company of Rio Tinto Aluminum (formerly Comalco Aluminium Limited) and Rio Tinto Aluminum (Holdings) Ltd (formerly Comalco Limited).

² The Participants are: GPS Energy Pty Limited ACN 063 207 456; GPS Power Pty. Limited ACN 009 103 422; Sunshine State Power B.V. ARBN 062 295 425; Sunshine State Power (No. 2) B.V. ARBN 063 382 829; Southern Cross GPS Pty Ltd ACN 063 779 028; Ryowa II GPS Pty. Limited ACN 063 780 058; and YKK GPS (Queensland) Pty Limited ACN 062 905 275.

³ Further information about the history of the arrangements, details of each agreement and the entities involved is available in the ACCC's final determination of A91205-A91207 Rio Tinto Aluminium Limited & Ors, 2 June 2010: <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3621896.pdf>, paragraphs 1.9-1.27.

⁴ The conditions require the Participants to advise the ACCC of any change to the parties to the amended GPS Agreements and provides the ACCC with the ability, upon receipt of such notification, to require the Applicants to provide further information or documentation regarding the change of parties.

Agreements. The 1994 authorisation was not revoked, and the 2 sets of authorisations run concurrently. The 2010 authorisation was granted until 29 March 2029.

- 1.7. Subsequently, Rio Tinto Aluminium sought and was granted minor variations to the 2010 authorisations on 19 January 2011,⁵ 7 September 2011,⁶ 12 February 2016⁷ and 29 October 2021.⁸
- 1.8. Rio Tinto Aluminium now seeks minor variation of the 1994 authorisations and 2010 authorisations in respect of further amendments to particular terms of one of the GPS JV Agreements, namely the Operational Management Agreement (the **OMA**). In essence, through the OMA, the Participants have agreed to:
 - (a) the appointment of, and acquisition of all operating and maintenance services for the Gladstone Power Station from, NRG Gladstone Operating Services Pty Limited, and
 - (b) the terms and conditions of that appointment including the fees payable to NRG Gladstone Operating Services Pty Limited.
- 1.9. Rio Tinto Aluminium submits that the latest amendments are minor and primarily reflect changes in commercial arrangements between the Participants against the background of the expiry of the previous term of the OMA. Following commercial negotiations, the Participants agreed to extend the term of the OMA with a rolling option to further extend the agreement. The proposed amendments sought in this minor variation application are a result of such an extension.⁹ For the avoidance of doubt, the ACCC notes that no extension to the duration of the 1994 and 2010 authorisations has been sought.
- 1.10. Rio Tinto Aluminium seeks minor variation to cover a number of amendments to the OMA. These amendments are as set out in a confidential copy of the updated OMA submitted by Rio Tinto Aluminium.¹⁰ Further clarification as to the specific amendments in respect of which Rio Tinto Aluminium seeks minor variation of the 1994 authorisations and 2010 authorisations was also provided by Rio Tinto Aluminium on 1 December 2023 in response to queries raised by the ACCC.¹¹ These amendments to the OMA, as identified in Rio Tinto Aluminium's submission of 1 December 2023 and set out in the confidential copy of the OMA, are referred to as the **Proposed Conduct Changes**.
- 1.11. In summary, the Proposed Conduct Changes involve amendments to:
 - I. **Payment Terms and Liability Caps** – these changes reflect the commercial agreements between the parties regarding the payment terms and the liability cap regime.
 - II. **Operational Revisions** – these include various amendments to the operational provisions including an extension period to the OMA, changes to the termination provisions, updates to the organisational chart, and other changes to the

⁵ See ACCC's final determination granting minor variation to authorisations A91205-A91207 [here](#) (19 January 2011).

⁶ See ACCC's final determination granting minor variation to authorisations A91205-A91207 [here](#) (7 September 2011).

⁷ See ACCC's final determination granting minor variation to authorisations A91205-A91207 [here](#) (12 February 2016).

⁸ See ACCC's final determination granting minor variation to authorisations A91205-A91207 [here](#) (29 October 2021).

⁹ A summary of the proposed minor variations including relevant clauses to the OMA can be found in Rio Tinto Aluminium's application for minor variation of authorisations A40062-A40070 and A91205-A91207 [here](#), [p7 – 9].

¹⁰ The copy of the confidential amended OMA was provided at Attachment 1 of the substantive application for minor variation of authorisations A40062-A40070 and A91205-A91207 [here](#), [p. 5].

¹¹ See Rio Tinto Aluminium's further submission in support of application [here](#) (1 December 2023).

obligations of NRG Gladstone Operating Services Pty Limited relating to matters such as the formatting of annual budgets and operating plans.

- III. **Other Changes** – these include a number of changes relating to the removal of statutory obligations under expired legislation or commercial changes, updated details for the service of notices and other drafting changes.

1.12. These amendments will not take effect unless and until the ACCC grants the minor variations sought.

2. The Applicants

2.1. Rio Tinto Aluminium is the manager of the GPS JV. The other participants in the GPS JV are: GPS Energy Pty Limited ACN 063 207 456; GPS Power Pty. Limited ACN 009 103 422; Sunshine State Power B.V. ARBN 062 295 425; Sunshine State Power (No. 2) B.V. ARBN 063 382 829; Southern Cross GPS Pty Ltd ACN 063 779 028; Ryowa II GPS Pty. Limited ACN 063 780 058; and YKK GPS (Queensland) Pty Limited ACN 062 905 275.

3. Consultation

3.1. For the purposes of commencing public consultation, the ACCC made an assessment that it was satisfied that the application sought ‘minor’ variation consistent with the definition of a minor variation in the Act.¹²

3.2. The ACCC then invited submissions from a range of potentially interested parties including competitors, relevant industry associations and state and federal government stakeholders. No submissions were received.

4. ACCC assessment

4.1. Broadly, under section 91A, the ACCC may grant an application for minor variation of an authorisation if it is satisfied that:

- the proposed variation is minor, and
- the variation would not be likely to result in a reduction in the extent to which the benefit to the public from the authorisation outweighs any detriment to the public caused by the authorisation (the **minor variation test**).¹³

4.2. The ACCC is able to consider multiple variations in the same application. In particular, the Act provides:

87ZP Minor variation, in relation to an authorisation, is a single variation that does not involve a material change in the effect of the authorisation.

91A(6) Nothing in this section prevents a person from applying for 2 or more variations in the same application.

91A(7) If:

- (a) a person applies for 2 or more variations:
- i. at the same time; or

¹² See sections 91A(2), 87ZP(1) and 91A(7) of the Act.

¹³ Section 91A(4)(b) of the Act.

- ii. in such close succession that the variations could conveniently be dealt with by the Commission at the same time; and
- (b) the Commission is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation; the Commission may deal with all of those variations together as if they were a single minor variation.

the ACCC may deal with all of those variations together as if they were a single minor variation.

The proposed variation is minor

- 4.3. The ACCC is satisfied that the requested variation to each of the 1994 authorisations and 2010 authorisations is minor, as on balance, the ACCC considers that the combined effect of the Proposed Conduct Changes relevant to each authorisation would not involve a material change in the effect of either authorisations.

No reduction in the net public benefit of the arrangements

Net public benefit in 1994 and 2010 authorisations

- 4.4. In making its 1994 and 2010 determinations, the ACCC concluded in each instance that the arrangements were likely to result in a net public benefit. In particular, the ACCC considered that the arrangements would be likely to result in public benefits arising from a mechanism that provides for a secure, reliable and cost-effective supply of power to the Smelter, including contributions to the value of exports and the development of the Australian economy.
- 4.5. In making its 2010 determination, the ACCC also considered that the amendments were likely to deliver public benefits by providing for a mechanism that facilitates the supply of electricity into the NEM and enhances the flexibility of Stanwell's use of the Gladstone Power Station to participate in the NEM.
- 4.6. The ACCC considered that the conduct authorised in 1994 and 2010 was unlikely to result in any significant public detriment in the relevant markets. In particular, in making its 2010 determination, the ACCC considered that it would be unlikely that the Participants would be able to influence the domestic price of aluminium or the price of electricity in Queensland. The ACCC concluded in each determination that the public benefit that is likely to result from the conduct authorised was likely to outweigh any public detriment.

Impact of the Minor Variation

- 4.7. Rio Tinto Aluminium submits that the variations will not result in any reduction in the extent to which the public benefit outweighs any detriment to the public caused by the authorisations granted in 1994 and 2010 for the following reasons:
 - The nature of the amendments is such that the conduct in respect of which a minor variation is sought is the same type of conduct previously authorised by the ACCC.
 - The variation would not detract in any way from the public benefits identified by the ACCC in granting the authorisations.
 - The variation is unlikely to give rise to an anti-competitive effect in any of the relevant markets.
- 4.8. In addition, Rio Tinto Aluminium submits that the variations to the GPS JV Agreements do not change the substantive arrangements under the GPS JV Agreements more

broadly. The amendments are mechanical in nature and are intended to reflect the original intention of the parties when entering into the GPS JV Agreements.

- 4.9. The ACCC considers that that the Proposed Conduct Changes are unlikely to lessen public benefits or increase public detriments as they relate to terms of the OMA that were not central to those benefits and detriments identified in the 1994 and 2010 determinations. More specifically, the ACCC also considers that the proposed variations will not impact the Participants' ability or incentives to influence the domestic price of aluminium or the price of electricity in Queensland. The ACCC accepts that the amendments do not change the overall framework and nature of the OMA or the substantive arrangements under the GPS JV Agreements more broadly.
- 4.10. For the reasons outlined above, the ACCC is satisfied that the proposed variations would not be likely to result in a reduction in the net public benefit from the conduct authorised in respect of each of the 1994 and 2010 authorisations.

5. Determination

- 5.1. The ACCC is satisfied that the variation to authorisations A40062-A40070 and to authorisations A91205-A91207 is minor.
- 5.2. The ACCC is also satisfied that the minor variation test under section 91A(4)(b) of the Act is met. That is, the variation would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of each of authorisations A40062-A40070 and authorisations A91205-A91207 outweighs any detriment to the public caused by each of the authorisations.
- 5.3. Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisations A40062-A40070 and A91205-A91207 to allow the Proposed Conduct Changes as described at paragraph 1.10 of this determination.

6. Date authorisation of Minor Variation comes into effect

- 6.1. This determination is made on 31 January 2024. If no application for a review of the determination is made with the Australian Competition Tribunal, the determination will come into force on 22 February 2024.