



Determination and interim authorisation

Application for minor variations to authorisations A91205-A91207
lodged by

Rio Tinto Aluminium Limited

in respect of

Gladstone Power Station's electricity supply arrangements related to the
Boyne Island aluminium smelter and the NEM

29 October 2021

Commissioners: Sims
Rickard
Brakey
Crone
Ridgeway

Summary

The ACCC has decided to vary authorisations A91205-A91207 granted to the Gladstone Power Station joint venture participants for agreements in relation to electricity generated by the Gladstone Power Station and supplied to the Boyne Island Aluminium Smelter and the National Electricity Market.

From 1 October 2021 the electricity spot price in the National Electricity Market, of which the Gladstone Power Station is a part, moved to being determined and settled on a per-5 minute basis, rather than on a per-30 minute basis (the Five Minute Rule Change). The variations allow certain commercial arrangements relating to the generation and supply of electricity at the Gladstone Power Station to continue to operate as they did prior to the Five Minute Rule Change. That is, on a 30-minute basis.

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 authorisations A91205-A91207 outweighs any detriment to the public.

The ACCC has also decided to grant interim authorisation to enable the amended arrangements to commence immediately.

Authorisations A91205-A91207 will remain in effect until 29 March 2029, which is expiry date of the original authorisations.

1. The application for Minor Variation

- 1.1. On 20 September 2021, Rio Tinto Aluminium Limited (**Rio Tinto**) applied, on behalf of itself and the other participants in the Gladstone Power Station joint venture (the **GPS JV**) (the **Participants**), for a Minor Variation to authorisations A91205-A91207 granted by the Australian Competition and Consumer Commission (the **ACCC**). The Minor Variation application was made under subsection 91A of the *Competition and Consumer CCA 2010* (Cth) (the **CCA**).
- 1.2. The ACCC granted authorisations A91205-A91207 on 2 June 2010 for agreements (the **GPS JV Agreements**¹) made by the Participants in relation to electricity generated by the Gladstone Power Station and either:
 - a) supplied to the Boyne Island Aluminium Smelter², or
 - b) if beyond the needs of the Boyne Island Aluminium Smelter, traded by CS Energy Limited (**CS Energy**, a Queensland Government owned corporation), as a wholesaler in the National Electricity Market (the **NEM**).³
- 1.3. The authorisations were granted until 29 March 2029 (the **Authorised Conduct**).
- 1.4. From 1 October 2021, the electricity spot price in the NEM has been determined and settled on a per-5 minute basis, rather than on a per-30 minute basis (the **Five Minute Rule Change**). Prior to 1 October 2021 the Australian Energy Market Operator (**AEMO**) centrally dispatched generators' energy into the NEM in 5 minute dispatch

¹ 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.

² There is a very substantial overlap between the Participants and the owners of Boyne Smelter Limited through various subsidiaries and related bodies corporate.

³ See <https://www.csenergy.com.au/who-we-are/company-profile>.

intervals, but generators were paid on a half-hourly basis (based on the average of the 6 interval dispatches over the 30 minute period).

- 1.5. Although the Five Minute Rule Change has changed the time interval for payments in the NEM from 30 minutes to 5 minutes, the Australian Energy Market Commission⁴ has recognised that, for some market processes such as 30 minute pre-dispatch data provided to generators, it will be necessary to 'crystallise' the 30-minute pricing arrangements that currently apply in the NEM.
- 1.6. Accordingly, from 1 October 2021, in addition to publishing the 5-minute regional reference price for a region (eg Qld), Australian Energy Market Operator (AEMO) is required to continue to publish a 30-minute price for each region for each 30-minute period.
- 1.7. The Minor Variation is in relation to amendments to certain commercial arrangements under:
 - the Restated Interconnection and Power Pooling Agreement relating to Gladstone Power Station (the **IPPA**) between the Participants in the GPS JV and CS Energy; and
 - the Power Purchase Agreements relating to the Boyne Island Aluminium Smelter (the **PPAs**) between the Participants in the GPS JV and Boyne Smelters Limited (**BSL**)

to allow them to continue to operate as they did prior to the Five Minute Rule change. That is, on a 30-minute basis.

(the **Proposed Conduct Changes**).

- 1.8. As authorisations A91205-A91207 were granted to the GPS JV Agreements as they stood at the time, The Proposed Conduct Changes are not covered by the original authorisations.
- 1.9. Rio Tinto submits the proposed variations are minor. It submits that the variations sought have been made to accommodate the Five Minute Rule Change and to ensure that the parties' existing commercial arrangements under the IPPA and PPAs can continue to operate (as authorised in 2010). Rio Tinto submits that the nature of the amendments is such that there is no change to the conduct previously authorised by the Commission.
- 1.10. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the CCA for arrangements that may otherwise risk breaching those provisions in the CCA, but are not harmful to competition and/or are likely to result in overall public benefits.

2. The Applicants

- 2.1. Rio Tinto 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.

⁴ The Australian Energy Market Commission is an independent statutory body which makes the rules under the national energy laws and advises governments on overall energy market development.

3. Previous authorisations

- 3.1. The ACCC granted authorisations A91205-A91207 in 2010 following significant amendments to the GPS JV Agreements, which were subject to authorisations granted in 1994 (A40062-A40070)⁵. The two sets of authorisations run concurrently and expire on 29 March 2029. The current application for Minor Variation relates to the amendments made to the GPS JV Agreements under authorisations A91205-A91207.
- 3.2. The ACCC has also previously granted Minor Variations to A91205-A91207 on 19 January 2011, 7 September 2011 and 12 February 2016.

4. Consultation

- 4.1. Before commencing public consultation, the ACCC made an initial assessment that the application is capable of being a 'minor' variation consistent with the definition of a minor variation in the CCA.⁶
- 4.2. 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.

5. ACCC assessment

- 5.1. Under section 91A of the CCA, the ACCC may grant an application for a minor variation of an authorisation if it is satisfied that:
 - the proposed variation is minor, and
 - the variation would not be likely to reduce the extent to which the benefit to the public from the authorisation outweighs any anti-competitive detriment caused by the authorisation (the minor variation test).
- 5.2. The ACCC is able to consider multiple variations in the same application. In particular:

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
 - (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.

⁵ The ACCC granted authorisation A40062-A40070 in 1994 until 29 March 2029.

⁶ Section 87ZP(1) of the CCA.

The proposed variations are minor

- 5.3. The ACCC is satisfied that the proposed variations are minor. The ACCC considers that the proposed variations will not involve a material change in the effect of the authorisations that were originally granted.

No reduction in the net public benefit of the arrangements

Net public benefit in 2010 authorisations A91205-A91207

- 5.4. In making its 2010 determination, the ACCC concluded 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) a mechanism that provides for a secure, reliable and cost effective supply of power to the Boyne Island Aluminium Smelter, including contributions to the value of exports and the development of the Australian economy; and
 - (b) a mechanism that facilitates the supply of electricity into the National Electricity Market and enhances the flexibility of Stanwell's (now CS Energy, Stanwell's successor) ability to utilise Gladstone Power Station's excess electricity produced beyond the needs of the Boyne Island Aluminium Smelter to participate in the National Electricity Market.
- 5.5. The ACCC also considered that the Authorised Conduct was unlikely to result in any significant public detriment. In particular, 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 that the public benefit that is likely to result from the conduct was likely to outweigh the public detriment.

Net public benefit from the Minor Variation

- 5.6. Rio Tinto also 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 2010 for the following reasons:
- (a) the proposed amendments to the GPS JV Agreements have been made to accommodate the Five Minute Rule Change and to ensure that the Participants' existing commercial arrangements under the GPS JV can continue to operate (as authorised in 2010). The nature of the amendments is such that there is no change to the core conduct previously authorised by the ACCC;
 - (b) consequently, the amendments would not detract in any way from the public benefits identified by the ACCC in granting the authorisation; and
 - (c) the amendments are unlikely to give rise to an anti-competitive effect in any of the relevant markets.
- 5.7. In addition, Rio Tinto 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 minor and mechanical in nature and are intended to reflect the original intention of the parties when entering into the GPS JV Agreements.
- 5.8. The ACCC considers that that the proposed variations are unlikely to have any impact on public benefits as they preserve the status quo for certain commercial arrangements under the IPPA and PPAs. The ACCC 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.

Balance of public benefits and detriments from the variations

- 5.9. 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 Authorised Conduct.

6. Determination

- 6.1. The ACCC is satisfied that the variations sought by Rio Tinto are minor as defined by section 87ZP of the CCA.
- 6.2. The ACCC is also satisfied that the test in section 91A(4)(b) of the CCA is met. That is, the ACCC is satisfied that the variations would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of the authorisations A91205-A91207 outweighs any detriment to the public caused by the authorisations.
- 6.3. Under section 91A(3) of the CCA, the ACCC makes this determination varying authorisations A91205-A91207 to allow the Proposed Conduct Changes in the manner as described at paragraph 1.7 of this determination.

7. Interim authorisation

- 7.1. The ACCC has decided to grant interim authorisation to the Proposed Conduct Changes as described at paragraph 1.7 under section 91(2) of the CCA. The ACCC notes that interim authorisation is urgent as the Five Minute Rule Change came into effect on 1 October 2021.
- 7.2. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's determination comes into effect or when the application for Minor Variation is withdrawn.

8. Date authorisation of Minor Variation comes into effect.

- 8.1. This determination is made on 29 October 2021. If no application for review of the Minor Variation determination is made to the Australian Competition Tribunal it will come into force on 20 November 2021.