



19 November, 2004

Mr Tim Grimwade
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
470 Northbourne Ave
Dickson, ACT, 2602.

Dear Mr Grimwade

Applications for Authorisation A30236 – A30238

I am writing to you on behalf of the Newcastle Coal Infrastructure Group (“NCIG”). The NCIG currently comprises six of the sixteen coal exporters through Port Waratah Coal Services Pty Ltd (“PWCS”), namely Excel Coal, Hunter Valley Energy Coal (BHP Billiton), Centennial Coal, Donaldson Coal, AMCI Australia and White Mining. The members of the NCIG represent some 13 Mtpa of coal exports at present and their development plans account for the majority of planned growth in exports from Newcastle over the next five years.

NCIG was formed with the objectives of promoting expansion of coal infrastructure capacity to meet exporters’ needs and ensuring that alternatives for expansion of coal-loading capacity at Newcastle are assessed objectively and independently of current monopoly service providers. If necessary, NCIG is prepared to establish a third independent coal-loader, efficiently financed and operated independently of coal exporters.

Over the past few months, NCIG, representing a significant proportion of Newcastle coal exporters, has had constructive discussions with PWCS and Accenture in relation to the proposed medium-term capacity balancing scheme. Key points addressed and incorporated into the Coal Handling Services Agreement (“CHSA”) have included, amongst other things:

- The need for “over-allocation” of capacity to producers up front, in order to limit the potential for under-utilisation of coal chain capacity which has been a problem in 2004. This has been addressed through providing for a 5% conditional capacity allocation at the start of the year;
- various flexibility measures including the application of an auction process for those producers that wish to participate in such an auction; and
- requiring that any material changes to the scheme at a later date must be submitted to the ACCC for approval.

However, the NCIG has failed to reach agreement with PWCS concerning the core issue of the duration of the proposed capacity balancing scheme. The NCIG submits that it is totally inappropriate for a capacity balancing scheme being approved and applied for a period of three to five years, as currently proposed in the revised CHSA.



The NCIG also has serious concerns relating to the proposed application of take-or-pay commitments as presently incorporated in the CHSA draft.

Scheme Extension Subject to Industry Support

Newcastle coal exporters have collectively forecast total export capacity requirements of more than 125 Mtpa by 2007 and the NCIG believes further expansion will occur beyond this time. As the principal expanding exporters, the NCIG members believe that the only real solution to the capacity problem, and the best way to address concerns over vessel queuing and demurrage, is to focus on expanding capacity across the coal chain as soon as possible.

We believe that any short term demand management system should be assessed in the context of a firm plan for providing exporters' capacity requirements as soon as possible. We are very concerned that a firm plan to achieve a capacity of at least 125Mtpa has not yet been presented to exporters by PWCS.

We believe that an extended capacity balancing scheme will seriously detract from focus on achieving the prime objective (and indeed, may delay *any* significant expansion of infrastructure capacity), and has the potential for substantial negative consequences, both for promoting competitive supply of coal from NSW and for the NSW economy, if allowed to continue for an extended time period.

We believe that there is a serious risk of the scheme acting to defer and limit expansion of infrastructure capacity, lock in the status quo and result in the deferral of major new investment in coal mining activity in the Hunter Valley.

Such deferral of new coal mining investment would have substantial negative impacts on export income, employment and government revenues. If the investment is not able to be undertaken in NSW, it will be made elsewhere, including in other countries, and the opportunity for Australia could be lost for many years. NCIG has prepared estimates of the level of investment planned by its members, the employment it would generate and associated economic benefits. We would be pleased to share further details with the ACCC.

On 20th October, agreement in principle was reached with PWCS on a requirement for 75% of coal producers¹ by volume and by number of producers to be obtained in order to extend the scheme beyond 2005, and at the end of any subsequent year. Following further discussions, NCIG was prepared to agree to reduce the threshold on producer support to 51% of producers, the principle being that if a majority of producers do not support extension of the scheme, then it should not automatically be extended. This compromise was reached with the objective of enabling coal producers as a whole to support the proposed scheme for 2005 and move forward to focus on the more important task of committing to capacity expansion.

However, this compromise position has not been accepted in the Coal Handling Services Agreement submitted to the ACCC.

¹ Coal producers as set out in Attachment A of Annexure 4F of the Coal Handling Services Agreement, circulated by Accenture on 18th of November 2004, as submitted to the ACCC.



The NCIG believes that any short term scheme needs to reflect the interests of all producers, large and small, with no greater weight given to the larger producers. As outlined above, it is the NCIG members that have indicated their plans to provide the growth engine for the industry, and who will bear the cost of limiting or deferring infrastructure development.

In the absence of this provision (75% support by tonnes and 51% by number of producers), NCIG believes that Authorisation should be granted for a period of one year only, to ensure that capacity expansion receives the priority attention it demands.

Application of Take-or-Pay Obligations

NCIG believes that it is important for coal exporters to have the opportunity to objectively review all available options for port capacity expansion, including proposals by operators other than PWCS, in order to determine the best outcome for the industry as a whole.

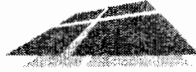
To this extent, we are particularly concerned with the take or pay provisions that have been introduced into the draft CHSA. We are not opposed to the introduction of take-or-pay in relation to the scheme. Our key concern is that the proposed take-or-pay arrangement survives even if the scheme is not operating and can be changed by the Board of PWCS unilaterally.

PWCS had proposed a requirement that all shippers commit to a take-or-pay obligation with respect to their forecast tonnage, as an integral part of the medium-term capacity balancing scheme. The reason for its introduction was to “keep producers honest” in providing forecasts to PWCS in the context of demand balancing under the scheme. However, when reviewing the documentation submitted by PWCS, it appears that the intent is to retain the take-or-pay component even if a scheme is not operating. The take or pay arrangements can be changed under clauses 2.12.1 and 2.12.2 of the CHSA without referral to the ACCC.

These take or pay provisions underpin the effectiveness of the application for authorisation, but have been introduced in separate annexure 4E to the new capacity allocation scheme in annexure 4F, in a way which evidently seeks to preserve PWCS' right to amend the terms at any time. This could potentially have the effect of inhibiting the establishment of a competing coal-loader (for example, a take or pay arrangement applied for say, five years, would “lock up” tonnes and prevent shippers from supporting a new loader).

A large number of industry representatives at an Accenture consultation meeting on 12th November appeared to agree that this was a surprising and unacceptable consequence of the draft CHSA. Some drafting changes were suggested at that meeting to link the take-or-pay obligation with the operation of the scheme. However, these have not been reflected in the CHSA submitted to the ACCC.

NCIG is not opposed to a take or pay concept in principle and will be seeking to discuss with PWCS the potential introduction of take or pay over the longer term to support any long-term expansion of PWCS. However, until such discussions have occurred, any take or pay arrangement should only be applied as an integral part of an agreed Capacity Balancing Scheme (ie within Annexure 4F) and should be limited to twelve months of tonnage forecasts. NCIG proposes that this should be a condition of any scheme approval.



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An associated condition should ensure that no changes can be made to the scheme or to the take-or-pay arrangements during the term of any authorisation.

Other Drafting Issues

There are certain other features of the current draft, including the scale of proposed bank guarantees, which may cause detriment to the industry and which may, if not resolved with PWCS through further discussion, be highly relevant to the Commission's consideration of the overall benefits of the PWCS proposal. We will seek to discuss such issues with PWCS further in coming weeks.

Conclusion

NCIG has been involved in discussions on the draft Capacity Distribution Scheme over the course of 2004, with a view to achieving an outcome that is satisfactory to the coal industry in NSW as a whole. Whilst we remain prepared to agree a document with PWCS, the draft submitted to the ACCC contains some key elements which cause us serious concern.

Hence, NCIG submits that the following conditions should be included in any Authorisation:

1. Broad industry support is required for roll-over of the scheme from one year to the next, within the period of authorisation, with a test requiring support from both 75% of producers by tonnage and 51% by number of producers using the Hunter Valley coal chain. Alternatively, the scheme should only be authorised for one year.
2. The take-or-pay elements of the scheme should be included in annexure 4F, should only be allowed to apply to forecast tonnage requirements one year in advance, and should not be changed without industry agreement.

As a final comment, we reiterate that the extended application of a capacity balancing scheme runs a very real risk that the opportunity for competitive growth in the coal industry in NSW will be lost. The focus of attention must be to expand capacity and to ensure that all efforts are made to ensure that this happens quickly.

I would be very pleased to discuss these issues with you further. Please do not hesitate to contact me on (02) 9247 2256.

Yours faithfully,

Tony Haggarty
Chairman
Newcastle Coal Infrastructure Group