

Submission

Applications for interim authorisation by
Newcastle Port Corporation
[A91072 – A91074]:

Submission in response by:
Peabody Pacific Pty Ltd
Wambo Coal Pty Ltd
Wilpinjong Coal Pty Limited

11 December 2007



Peabody

Wilpinjong
Coal Project

1 Preservation of the status quo

Peabody agrees with Newcastle Port Corporation (**NPC**) that the current Capacity Balancing System should continue after 31 December 2007. The Capacity Balancing System is a fair system and is consistent with PWCS' common user obligations.

The application by NPC for interim authorisation of the current Capacity Balancing System is intended to give the ACCC an opportunity to preserve the status quo. It proceeds on the assumption that it would be inappropriate for the ACCC to grant authorisation of the proposed VQMS on an interim and on a final basis.

Peabody agrees that the ACCC should reject the applications for authorisation of the VQMS. Peabody repeats its earlier submissions in relation to the joint application by Pacific National (NSW) Pty Ltd, Port Waratah Coal Services Limited and QR Limited for authorisation of the VQMS that:

- There is substantial uncertainty regarding the proposed VQMS and its impact on Producers.
- The VQMS is complex and may have unintended consequences for Producers and the efficiency and effectiveness of the Hunter Valley Coal Chain.
- The VQMS lacks industry support. There has been no proper industry consultation.
- Peabody and other Producers will suffer substantial, irreparable harm should the VQMS be implemented.
- The VQMS is anticompetitive and would introduce substantial inefficiencies in the relevant markets.

Peabody also agrees with NPC that implementation of the VQMS would be contrary to the common user status of the Port. The VQMS would not benefit all the users in accordance with the obligations of PWCS under its Kooragang Island Lease with the Minister for Public Works & Services for the State of New South Wales (**Lease**).

2 Common user

Waiver of the common user provision – Capacity Balancing System

NPC states that it has, historically, waived compliance by PWCS with the common user provision through its acceptance and support for the CBS (para 3.1). Peabody has a number of concerns with this statement.

Peabody does not believe that the CBS conflicts with PWCS' obligations under the common user provision. The common user provision requires that the services provided by PWCS:

'are made available to any and every shipper of coal through the Port of Newcastle ("user") under conditions and at a cost for like services that are not discriminatory as between users'.

The CBS does not override Producers' rights to be treated in a non-discriminatory fashion under the common user provision. The fact that PWCS cannot comply with all requests to ship coal through the Kooragang Island terminal due to port-side capacity constraints does not breach the common user provision. When demand for PWCS' services exceeds its capacity, Producers are not able to export all the coal they wish to regardless of whether the constraint is caused by the CBS or the existence of the vessel queue.

The CBS provides a mechanism for PWCS to ration capacity in a non-discriminatory manner. Unlike the VQMS, the CBS does not mandate an allocation system which is contrary to the common user provision – a fact expressly recognised by PWCS in its submissions on the Draft Determination. PWCS stated that its management of 2007 demand nominations were 'in accordance with the "common user terms" of PWCS' lease

of the land on which the terminals are operated from the NSW Government' (para 7.57 of the Final Determination dated 23 May 2007).

The common user provision may only be waived by the NSW Government in accordance with clause 4.3 of the Lease.

Peabody knows of only one application for waiver of the common user provision in accordance with clause 4.3(a). This application was rejected by the NSW Government in September 2007. PWCS cannot invoke clause 4.3(b) because it is not in a position of competitive disadvantage as against other Port of Newcastle Service providers.

Waiver of the common user provision – Vessel Queue Management System

In its submission, NPC suggests that it has a discretion to waive compliance with the common user provision in favour of the VQMS. Peabody considers that any such waiver of the common user provision would be inconsistent with the terms of the Lease.

For the reasons set out in the Peabody's submissions in relation to the VQMS, the Lessor could not form a view on reasonable grounds that the VQMS is necessary in order to improve the operational efficiency of the Facility. The VQMS has been designed to benefit the Rail Providers, not to improve the operational efficiency of the Facility nor in response to a situation of competitive disadvantage.

Standing

NPC claims it is a necessary party to any capacity allocation arrangement because it must consent to any capacity allocation arrangement which is not in strict compliance with the common user provision (para 3.1). However, the fact that the NSW Government may waive PWCS' compliance with the common user provision does not involve NPC as an intentional participant in the relevant conduct. Peabody queries whether NPC is knowingly concerned in the relevant conduct for which authorisation may be sought under section 88 of the Trade Practices Act.

3 Other comments

Market definition

NPC submits that there are two relevant markets:

- a global market for coal (or in the alternative, an Asian market for coal); and
- a market for the provision of coal loading services for bulk coal carrying ships in the Newcastle area.

Peabody repeats its earlier submissions that even if coal is sold on a global market, what is relevant for any assessment of an application for authorisation (on an interim or final basis) is the benefits and costs that occur to the Australian public in its participation in the global market. The competitive behaviour between coal producers and the Service Providers is directly relevant to the analysis of the anticompetitive detriments of the proposed VQMS. The fact that Hunter Valley coal may also compete in the global coal market or possibly the Asian coal market is not relevant to this analysis.