

Peabody Pacific Pty Ltd – Submission to the ACCC’s final determination to grant authorisation to NPC and Donaldson

Overview

- 1 Peabody supports the proposed final determination to grant authorisation to NPC and Donaldson for the CBS until 31 December 2008. Peabody comments, however, on one aspect of the Commission’s reasoning regarding the interaction between the common user provision and the ongoing capacity constraint on the Hunter Valley coal chain.
- 2 In Peabody’s submission, the Commission has failed to analyse correctly the effect of the common user provision in the PWCS lease. The error is a serious one that may impact upon future deliberations by the Commission in respect to the arrangements to be entered into in relation to Port Waratah.

The Commission’s approach to common user

- 3 In its draft determination, the Commission states:

‘[t]here are a number of structural, regulatory and contractual issues in the Hunter Valley that appear to be contributing to the ongoing capacity imbalance’ (paragraph 6.50).
- 4 In relation to the factors that appear to be contributing to the capacity imbalance, the Commission states further(at paragraph 6.50):

[T]he ‘common user’ provisions in the PWCS lease (or its interpretation of them) have meant that PWCS has not been able to enter into long term contracts to underpin future investment with certainty. This has also had flow-on ramifications for rail contracts. The ACCC notes that PWCS requested the NSW government to remove the ‘common user’ provisions in 2007. The ACCC understands that the provisions remain in the lease.

[I]t is not clear that the mine approval process takes proper account of constrained coal chain capacity – such that new mines are coming on line before capacity is expanded and, due to the ‘common user’ provisions, existing mines must give up capacity to ‘make way’.

What the common user obligation does

- 5 The common user obligation is set out in the lease held by PWCS from the NSW Crown (clause 4.1 of the Lease). The scope and meaning of that obligation is a matter of contractual construction. Whilst it is not appropriate in this context to engage in a debate as to the construction of the relevant lease provision, it is Peabody’s submission that it does not prevent PWCS entering into long term contracts in order to underpin its future investment. It also does not require that existing coal producers give up currently utilised capacity at the facility to make way for additional capacity demands of existing or new users.
- 6 The obligation is clear and simple: PWCS must operate the facility as a common user facility in such a way that the services:

‘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’.
- 7 The draft determination rightly identifies that the ability to enter into long term contracts is important to underpin future investment and resolve the capacity

constraints. Peabody agrees that long-term contracts can be efficient and pro-competitive in specific circumstances, such as where there is specific capital.

8 The Commission has not identified the appropriate length of the contracts nor the particular reasons why long-term contracts would be a proper response in the case of PWCS. Nonetheless, it is not the common user obligation which is preventing the long-term contracts being made. The common user obligation neither mandates nor prohibits long-term contracts.

9 Should PWCS have any concerns about the effect of the common user obligation the lease specifically provides for a waiver of that obligation. Clause 4.3 of the lease provides that PWCS may seek relief for a limited time if the common user obligations:

[...] will operate in particular circumstances to unreasonably restrict the Lessee's ability to improve the operational efficiency of the Facility.

10 To date, the reasons identified by PWCS (and Rio and Xstrata) do not demonstrate specifically how the removal (or suspension) of the common user obligation would enhance the operational efficiency of the Facility. Peabody is not aware of any evidence having been produced which supports PWCS' contention that it cannot be sure of sufficient demand from coal producers if it were to undertake expansions of the facility.

Common user and access regimes

11 PWCS is in the position of a monopoly provider of coal handling services to the Hunter Valley coal chain. It operates a true 'bottleneck' facility. Such facilities are affected by the public interest. The 'common user' obligation is a term which reflects the public interest inherent in essential facilities.

12 The common user obligation is thus a form of access regulation which protects the interests of the market as a whole. In this case, however, the access process is subverted by the fact that the owners who control the PWCS bottleneck are also users of the facility.

13 The common user obligation should continue to be enforced in the public interest so that all participants have clear and certain rights of access to the essential facility, free of any exercise of market power by PWCS (or the dominant shareholders of PWCS).

14 The Commission should not favour the removal of the common user provision unless an alternative access regime consistent with the National Competition Principles is introduced covering the services provided by PWCS. This is especially important given the vertical integration of the dominant coal producers. It is important to act in the interests of the market as a whole.

15 Even when the NCIG facility has been commissioned, there will still be a shortfall of capacity and PWCS will still be a bottleneck.

What is really going on?

16 The reasons that were originally identified by PWCS in 2007 for not offering long term agreements were not pro-competitive or efficiency enhancing. In particular, there was no suggestion that the common user prevented PWCS from designing a methodology that would underpin future capital investment and which:

- treated existing users of the facility in a non-discriminatory fashion; and
- described a proper basis for addressing the demands of new users for capacity.

- 17 PWCS' complaint at that time was that the common user required it to offer capacity to existing users of the PWCS facility that will also receive capacity at the new NCIG facility. It sought the removal of the common user provision from the Government so that it may 'give preference to those customers who may not be able to obtain access to coal handling services from' Newcastle Coal Infrastructure Group.¹
- 18 The Commission should guard against allowing PWCS (and its dominant shareholders, Rio and Xstrata) to discriminate against those users of PWCS services who are members of the NCIG consortium.
- 19 Even when NCIG comes on line, Peabody Pacific and other producers will still need access to PWCS.

¹ Port Waratah Coal Services Limited, 'New regime and site expansion will create certainty for PWCS and its customers', 20 June 2007.