



19 December 2008

By Email – dah@accc.gov.au

Mr David Hatfield
Director, Adjudication
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Dear Mr Hatfield

Centennial Coal – Submission in relation to PWCS and NCIG’s substantive application for authorisation – A91110-A91112

1. This letter is submitted by Centennial Coal Company Ltd (**Centennial**), in relation to Port Waratah Coal Services Limited (**PWCS**) and Newcastle Coal Infrastructure Group Pty Limited's (**NCIG**) substantive application for authorisation (**Application**).
2. This is a public submission and Centennial has no objection to a copy of this appearing on the public file. It does not contain any information considered "*commercial in confidence*".
3. In its submission of 8 December 2008 (**First Centennial Submission**), Centennial raised concerns with the capacity allocation methodology proposed under the interim and substantive applications and requested that a condition be imposed on the authorisation to rectify the calculation of the Producer Base Tonnage to avoid harsh and inequitable impacts on Centennial and to maximise the efficient use of allocation within the overall system constraints (**Centennial Condition**).
4. This letter provides additional information in response to the ACCC’s decision to grant interim authorisation for the PWCS Tonnage Allocation Stage 1, without imposing the condition requested by Centennial.
5. **Centennial's concerns**
 - 5.1 The ACCC's statement of reasons (as follows) suggests that the Commission may not have correctly understood Centennial's concerns:

"With respect to the issues raised by Centennial Coal, the ACCC notes that the capacity allocation methodology has previously been developed and agreed through the Greiner Process and with the NSW Government. In these circumstances, the ACCC does not consider it appropriate to reopen this issue as part of its assessment of the request for interim

authorisation." (page 11 of the ACCC's statement of reasons dated 17 December 2008)

- 5.2 However, Centennial is not seeking to reopen these issues.
- 5.3 Centennial's concern is that the capacity allocation methodology has been developed and applied by the Applicants in a manner that adds a further and superfluous requirement to the calculation of Producers tonnage, that was not found in the *"agreed methodology"* and which is the source of the damage that will be suffered by Centennial if adopted.
- 5.4 As explained in the First Centennial Submission at paragraph 3.8, the main body of the Producer Agreement of 26 June 2008 (as attached to Attachment 3 of the Confidential Version of the Applicants' Submission), adopts the definition of *"highest throughput"* for the 2004-2007 year, not *"highest actual usage"* as proposed by the Applicants.
- 5.5 In addition, subsequent to the Applicant's interim application, a revised proposal on port access arrangements was put forward by the NSW Government on 12 December 2008 (*"Tripodi Proposal"*). This proposal specifically adopts the language of *"highest throughput"* between 2004-2007 (refer paragraph 3.1) and has been unanimously supported by all producers.
- 5.6 Centennial accepts the Producer Agreement and the methodology described in it.
- 5.7 The Oxford Dictionary defines *"throughput"* as *"the amount of material or items passing through a system or process"*. It does not impose a condition on the origin of the coal, only a requirement that it pass through the system / process.
- 5.8 Attachment 1 to the Producer Agreement uses the term *"actual allocation usage"*. The natural and proper interpretation of this expression is each Producer's *"actual usage"* of its *"allocation"*.
- 5.9 That Producer Agreement and the subsequent Tripodi Proposal did not attach a condition that the coal which was shipped by each Producer had to be sourced from that Producer's mine; rather it merely had to be shipped utilising each Producer's allocation.
- 5.10 The interpretation that a producer's tonnage for the 2004-2007 year is restricted to coal sourced from that Producer's mine was made by the Greiner Review team and/or certain members of the Producer's Working Group¹ and only became apparent the day before the Producer Agreement was lodged with Mr Greiner (refer paragraph 3.10 and 3.11 of the First Centennial Submission). To the best of Centennial's knowledge, the issue has never been specifically discussed and agreed to by the broader producer group in all the discussions over a period of about 6 months.
- 5.11 This interpretation was subsequently provided to PWCS and incorporated in the interim application to the ACCC.
- 5.12 This allocation is very damaging to Centennial because it removes from Centennial's allocation under the 2009 CBS, the tonnage shipped of coal sourced

¹ The Producer's Working Group comprised a small number of producer representatives and was responsible for fleshing out certain aspects of the Producer Agreement. The Producer's Working Group typically reports back to the broader producer group and has no formal decision making power

from other producers which was shipped under Centennial's own and authorised allocation in the year 2005.

- 5.13 As such, Centennial is not arguing that the terms of the Producer Agreement should be renegotiated, but that the agreed terms have not been accurately reflected in the Application.
- 5.14 Unless remedied, this has the consequence that PWCS will be able to impose a capacity allocation methodology on Centennial which does not reflect the Producer Agreement and which is highly detrimental to Centennial's position.
- 5.15 PWCS will only be able to achieve this outcome by reason of the ACCC granting authorisation to PWCS to impose that methodology.
- 5.16 For that reason the Commission should, in Centennial's submission, require the Applicants to demonstrate the source of that condition and the public benefit claimed for it, as compared to Centennial's model which delivers a more equitable and efficient outcome.
- 5.17 If the ACCC grants the Applicant's substantive authorisation, Centennial requests that the authorisation be granted on the condition requested by Centennial to ensure that the Producer Agreement is implemented in the manner in which it was initially intended.

6. **No negative impact on the Applicants or other Producers**

- 6.1 Neither the Applicants, nor the other Producers have provided any suggestion of harm or detriment to any other Producer that would result if Centennial's condition were agreed to.
- 6.2 The matter is addressed in the Applicant's Supplementary Submission in general terms only.
 - (a) Page 4 of the Applicants' Supplementary Submission merely states: *"The PWCS Stage 1 Tonnage Allocation involves an initial allocation which is supported by all participants other than Centennial. Given the broad level of support from PWCS' customers (which no doubt, involves commercial compromises by many customers/Producers), this is the initial stage of the solution which has been put forward for authorisation"*.
- 6.3 This is merely a claim that the majority view should prevail, despite the damage that will be suffered through PWCS imposing its own view of the methodology. As discussed at paragraph 5.10, the issue has never been specifically discussed and agreed to by the broader producer group prior to the lodgement of the Producer Agreement.
 - (a) Page 4 also states: *"It is not appropriate to seek a condition which would have the effect of changing one input into the allocation methodology and assumptions relating to coal chain capacity."*

However, no reason is provided why this is inappropriate. Given the severe consequences for Centennial of the allocation outcome, no weight should be given to such a vague assertion. The Applicants have not addressed in any way the substantive merits of Centennial's position.

- (b) The bottom of page 4 states: "*The alternative solution proposed by Centennial Coal may also raise issues of equal treatment of producers and have broader ramifications in relation to the functioning of the coal chain.*"

Again, no specifics of any harm and no examples have been provided of the "*issues*" and "*ramifications*" that the Applicants allege would result from the acceptance of Centennial's condition. Further, the capacity allocation methodology is inherently "*unequal*" in its approach by the manner of the formula adopted by the Applicants and it cannot be fairly described as "*equal*" for other Producers. The net effect is that Centennial is the only producer who is unfairly disadvantaged by this issue. Centennial is not aware of any other producer who is disadvantaged in the same way.

Major efficiency gains are available if the inequities of Centennial's position are addressed.

- 6.4 As you will recall, as stated in Centennial's First Submission at paragraphs 3.26 – 3.30, Centennial's proposal will increase the overall total coal chain capacity by "back loading" empty trains. This point is not contradicted by the Applicants in their Supplementary Submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "R. Cameron". The signature is written in a cursive style with a large, looped initial "R".

Robert G Cameron
Managing Director & CEO