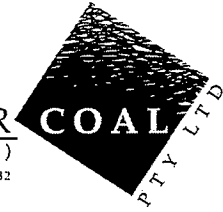


MACARTHUR  
(C & M Management)  
ABN 65 077 890 932



Level 18, 215 Adelaide Street  
Brisbane Qld 4000  
PO Box 7146 Riverside Centre  
Brisbane Qld 4001  
Tel: (617) 3239 7619  
Fax: (617) 3239 7699  
Email: glee@maccoal.com.au

28 April 2006

Mr Brian Parmenter  
Chairman  
Queensland Competition Authority  
GPO Box 2257  
BRISBANE QLD 4001

Email: ports.submissions@qca.org.au

Dear Mr Parmenter

DALRYMPLE BAY COLD TERMINAL - DRAFT ACCESS UNDERTAKING

We refer to the Queensland Competition Authority's (QCA) Request for Comments on the Supplementary Submissions made by Anglo Coal Australia Pty Limited (**Anglo Coal**) and Peabody Pacific Pty Ltd (**Peabody Pacific**).

The supplementary submissions made by Anglo Coal and Peabody Pacific argue that the Draft Access Undertaking (DAU) submitted by BBI (DBCT) Management Pty Limited (**BBI**) on 4 January 2006 should not be approved because:

- (a) **THE PROPOSED METHOD FOR ALLOCATING ADDITION CAPACITY IS 'FLAWED IN THAT THE ALLOCATION PROCESS WAS UNCLEAR AND UNCERTAIN AND, INSTEAD, CAPACITY SHOULD BE ALLOCATED ON THE PRO-RATA BASIS OUTLINED IN THE SUBMISSIONS' (QCA'S REQUEST FOR SUBMISSIONS); AND**
- (b) **'APPROVAL OF THE PROPOSED BASIS OF ALLOCATION WILL HAVE RETROSPECTIVE EFFECT!' (QCA'S REQUEST FOR SUBMISSIONS)**

Macarthur Coal (C&M Management) Pty Ltd (**MCCM**) welcomes the opportunity to provide a further submission in response to those lodged by Anglo Coal and Peabody Pacific.

**'Legitimate expectation' that capacity would be allocated on the basis set out in Section 5 of the DAU**

Peabody Pacific indicates in its submission that it had a '*legitimate expectation that all users would be treated reasonably and fairly so as to receive an equitable allocation of the expanded capacity*'. MCCM submits that, to the extent that any such 'legitimate expectation' did arise, that legitimate expectation is satisfied by Section 5 of the DAU, which provides a fair and reasonable method for allocating expansion capacity based on both historical practices at the Terminal for the allocation of capacity and the process indicated by BBI in its correspondence.

Prior to the lease of the Terminal in 2001, BBI's predecessor, Ports Corporation of Queensland, dealt with requests for capacity or additional capacity by users in the order in which binding offers for capacity were made. MCCM has always understood that BBI adopted the same process, as shown by its letters to all users dated 11 June 2004, 19 April 2005 and 3 June 2005.

By contrast, Peabody Pacific's submission disregards both the historical practice and the substantial correspondence sent by BBI to all users. It suggests that it had a legitimate expectation that BBI would only develop a process for allocating capacity at the Terminal if it involved notifying all users of the Terminal (including those who had not, despite prompting by BBI on a number of occasions, notified BBI of their desire to acquire additional tonnage at the Terminal) of the available capacity and then invited the users to request that capacity. In effect, BBI should have put the additional capacity out to tender (as is effectively proposed by Peabody Pacific's Section 5.4A, which was Annexure D to its most recent submission).

None of BBI's correspondence referred to by either Peabody Pacific or Anglo Coal suggests in any way that capacity would be allocated in the manner suggested by Peabody Pacific. Nevertheless, Peabody Pacific's submission is based on it having a legitimate expectation that a method of this kind would be adopted.

MCCM submits that this expectation is not consistent with either historical practice or BBI's correspondence to users. By contrast, MCCM's expectation that capacity would be allocated in the order in which binding offers for capacity were made derives from these matters. It was on the basis of this expectation that MCCM made its bona fide offers for additional capacity and, following notice of its provisional allocation by BBI, made significant investment decisions in reliance on BBI acting in accordance with its correspondence and the historical practices.

In this sense, MCCM refutes the suggestion that BBI's proposal will be 'retrospective'. As set out in MCCM's earlier submission, the Terminal and arrangements associated with access to and expansion of it do not suddenly arise on the approval of an access undertaking. Since an access undertaking was first lodged in June 2003, both BBI and the users have needed to continue making decisions on the development of their businesses. As the third anniversary of that date approaches, it is neither fair nor reasonable that the DAU should be required to be amended again (with its inherent further delay) on the basis that one user did not respond to the numerous requests by BBI for users to seek additional tonnes and did not make a timely application for additional tonnes.

Peabody Pacific has also suggested that it had a 'legitimate expectation' that all users would be treated 'reasonably and fairly'. However, at no point has Peabody Pacific suggested that it did not receive information that was provided to other users. MCCM submits that, as all users have received the same information from BBI and been treated in the same manner in relation to the allocation of capacity, the expectation has been met and all users have been treated reasonably and fairly.

### **Section 5 of the DAU reflects the support that was needed to be shown by users to initiate the expansion process**

BBI has made clear to users of the Terminal on a number of occasions that it will not expand the Terminal without binding offers from access seekers. MCCM appreciates that the rationale behind this position is that BBI is looking for sufficient investment certainty prior to expending the large amounts of capital needed for expansion. In a 'revenue cap' environment, this position also has the effect of protecting existing users from increases in the price paid for the services provided.

Without the binding offers that were made by a number of users, including MCCM, it is unlikely that the proposed expansion would have reached the stage that it currently has. MCCM submits that the need for the letters referred to in both the Anglo Coal and Peabody Pacific submissions only arose because other users had made binding offers to BBI, which then caused BBI to further investigate the feasibility of expanding the Terminal.

This support for expansion of the Terminal is reflected in Section 5 of the DAU, which provides both a fair and reasonable process for the allocation of additional capacity because it gives precedence to these offers that led to BBI undertaking work to prepare for that expansion. To amend Section 5 to retrospectively take away the priority that BBI has given to those users will only serve to penalise those users who were prepared to back the expansion in order to receive additional tonnes in the most timely manner.

## Peabody Pacific's Proposal

MCCM submits that the proposal set out in Annexure D of Peabody Pacific's submission is unworkable and likely to lead to arbitrary allocations of capacity that may not be sufficient for the purpose for which additional capacity is sought by a user. Both of these factors will lead to gaming by access seekers to ensure, as far as possible, that they receive the desired additional capacity.

MCCM anticipated the proposal put forward by Peabody Pacific in its submission dated 30 January 2006 (see paragraph 7 and 8 on page 2 of that submission). As set out in that submission, if the total requests for capacity exceed the total available new capacity (which seems likely) then the proposal suggested by Peabody Pacific is likely to result in no user obtaining the additional tonnage it needs to develop a new project or make a viable expansion to an existing project. This is not desirable for any user nor is it fair to those users who have put in timely offers for additional capacity and made investment decisions based on the expectation created by BBI's correspondence that tonnage would be allocated in the order that binding offers were made.

This creates an incentive for users to request additional capacity on the basis that this should reduce the likelihood that it will not receive sufficient capacity. Paragraph (f) of the proposed section 5.4A of the DAU appears designed to resolve this problem. However, the solution proposed creates a clear 'gaming' opportunity for Users as no user will want to be the first to relinquish its capacity. By hanging on to an insufficient amount of capacity for as long as possible, a user should have the greatest opportunity to obtain the whole amount sought. Therefore, there is clear disincentive for users to act in accordance with the solution proposed.

Another flaw in Peabody Pacific's proposed Section 5.4A is that it does not address which user will acquire the tonnage that becomes available in stages. It is well known among users that the additional tonnage that will become available from the Stage 7X Expansion will be staggered, with the first tranche due to be completed around the end of 2007, the second tranche around the middle of 2008 and the third tranche during 2009. The DAU submitted by BBI solves this problem by allocating the earliest tonnage to become available to the earliest binding offer received by BBI and so on. Under Section 5.4A, that tonnage would be allocated pro rata, further reducing the amount available to each user from that point. For a user that is toward the front of the queue that would be formed by the DAU submitted by BBI this could see a new project delayed for two years before sufficient tonnage became available to support the investment required for the project.

## Conclusion

MCCM submits that the QCA should approve the DAU submitted by BBI on 4 January 2006. More particularly, MCCM submits that the submissions made by Peabody Pacific and Anglo Coal provide no proper basis for the QCA to reject the DAU in that:

- (a) **PEABODY PACIFIC'S SUBMISSION IS BASED ON THE NOTION THAT IT HAD 'LEGITIMATE EXPECTATION' THAT IT WOULD RECEIVE A PROPORTION OF THE EXPANSION CAPACITY. THE LEGITIMATE EXPECTATION OUTLINED IN PEABODY PACIFIC'S LETTER IS INCONSISTENT WITH BOTH BBI'S CORRESPONDENCE TO USERS AND HISTORICAL PRACTICES ADOPTED AT THE TERMINAL.**

By contrast, MCCM had an expectation based on both of those matters that additional allocation would be allocated in the order that binding offers for that capacity were received by BBI. Based on that expectation, MCCM in fact made timely offers for additional capacity and has subsequently acted in reliance on that process being followed by making significant investments to utilise the tonnage that MCCM expects to receive from the expansion of the Terminal;

- (b) **SECTION 5 OF THE DAU IS BOTH FAIR AND REASONABLE IN THAT IT GIVES PRIORITY TO THOSE OFFERS FOR ADDITIONAL CAPACITY THAT LED TO BBI ENGAGING ON AN EXPANSION PROCESS. TO TAKE AWAY THAT PRIORITY NOW WOULD BE TO PENALISE THOSE USERS THAT HAVE CAUSED THE EXPANSION TO BE REQUIRED; AND**
- (c) **THE ALTERNATIVE PROPOSAL IS NEITHER WORKABLE, FAIR OR REASONABLE AND WILL PROMOTE GAMING BY USERS IN RELATION TO ACCESS TO EXPANSION CAPACITY.**

Finally, MCCM submits that, in addition to the reasons set out previously in this email, approving the DAU in its current form will best serve the matters to be considered by the QCA in accordance with Section 138(2) of the *Queensland Competition Authority Act 1997*, in that finalising the DAU approval process as soon as possible will serve the legitimate business interests of BBI, the public interest and the interests of the majority of access seekers by giving BBI the certainty to fully commit to the expansion of the Terminal so that it can be completed in the shortest possible time frame.

On this point, MCCM directs the QCA's attention to the final part of Anglo Coal's submission dated 22 March 2006. While Anglo Coal has criticised the proposed method of allocation in Section 5 of the DAU, it actually supports the approval of the DAU in its current form as it recognises that amending the DAU will only lead to further delays in the development of new capacity at the Terminal, which MCCM submits is not in the interest of any of the users.

Yours faithfully

**MACARTHUR COAL (C&M Management) Pty Ltd**

**GARY LEE**  
***VP - Marketing***