

RIO TINTO

COAL AUSTRALIA

28 April 2006

Queensland Competition Authority
GPO Box 2257
Brisbane Qld 4001

Attention: Mr John Hall

Dear Mr Hall

Dalrymple Bay Coal Terminal – Request for Comments on Supplementary Submissions

We refer to the Authority's recent request for comments relating to issues and proposals raised by Anglo Coal Australia Pty Ltd (*Anglo*) and Peabody Pacific Pty Ltd (*Peabody*).

Previous Submissions by RTCA

Rio Tinto Coal Australia Pty Ltd (*RTCA*) lodged a public submission with the Authority on 31 January 2006 in response to the Authority's request for submissions, and made a further confidential submission to the Authority on 2 March 2006, in response to detailed enquiries from the Authority on RTCA's January submission. The content of these submissions relates to many of the issues in question.

In summary, RTCA submitted that:

- RTCA has never been in any doubt that expansion capacity would be awarded at Dalrymple Bay Coal Terminal (*DBCT*) on a "first to commit" basis.
- RTCA believes that other Users have likewise been of the same view – both because of the surprise expressed within the User Group when a "pro rata" allocation was first suggested, and also because it was well known that earlier applications for capacity by some Users (including RTCA) had not been able to be immediately fulfilled from the spare Stage 6 or Short Gain expansion capacity, because other applicants had priority based on the time that their applications were lodged.
- "First to commit" is consistent with the custom and practice at DBCT since its inception and the custom and practice of other infrastructure providers with whom all Users are familiar.
- Apart from custom and practice, correspondence from DBCT Management to all Users, from as early as December 2002, specifically referred to priority being awarded in chronological order of commitment (with the use of expressions such as "first in first served" and "first to commit");

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- RTCA committed to a very significant expansion, based on it being satisfied that:
 - (a) as a result of its commitment and the requirements of the Port Services Agreement (*PSA*), expansion of the Terminal would occur; and
 - (b) because of its early commitment, RTCA would have the tonnage in its application met in full and with early priority in the likely staged expansion in accordance with the 2004 Master Plan.
- RTCA has subsequently, in reliance on assurances from DBCT Management that RTCA had priority in the "queue", underwritten portions of the Phase 1 expansion (thereby incurring additional liability which others, including Anglo and Peabody, have declined to do).
- RTCA would suffer a very large and manifestly unfair financial disadvantage should the existing queue be re-formed on another basis.

Nothing in the Anglo and Peabody submissions causes RTCA to change anything in its submissions of 31 January and 2 March 2006.

Comments on the Anglo and Peabody Issues and Proposals

It is important to highlight the fact that all but two of the Users and prospective Users of DBCT have demonstrated, by unconditionally supporting the draft Access Undertaking lodged with the Authority in January 2006, that they accept the "first to commit" principle (as encapsulated in section 5.4 and the definition of "Access Application" in that draft Access Undertaking). It seems now that Anglo also accepts these provisions in the draft Access Undertaking. Accordingly, the only User which asserts that the proposals for dealing with the pre-existing queue in the draft Access Undertaking are not "equitable" is Peabody.

Peabody contends that it has been prejudiced because:

- (a) the fact that a "first to commit" principle was proposed to apply was not effectively communicated to Peabody (with the inference being that it therefore did not formally apply for tonnage from the Stage 7 expansion until after all or most others had done so); and
- (b) Peabody committed to substantial expenditure based on an expectation that it would receive an "equitable" allocation of the additional capacity to be generated by the Stage 7 expansion.

In relation to these issues, RTCA makes the following responses:

- (a) RTCA considers that there has never been any doubt that expansion capacity would be awarded at DBCT on a "first to commit" basis, because:
 - this has been the custom and practice at DBCT since its inception;

- Ports Corporation of Queensland has adopted a similar practice at Abbott Point, and our experience is that other infrastructure providers operate in a similar manner;
- DBCT Management made it clear in correspondence to **all** Users as early as 17 December 2002 and 11 June 2004, that it would continue to allocate capacity on a "first in, first served" basis or "first to commit" basis. The fact that DBCT Management had consistently communicated this message over a long period was explicitly confirmed in the circular letter of 13 October 2005;
- in its submission, Anglo points to the fact that a variety of slightly differing terms was used by DBCT Management in correspondence over a period – "first to commit", "binding indications" and "binding offers". RTCA believes that such a submission simply raises technicalities. In any event, we would contend that:
 - the fact that such terms **were** in fact explicitly used;
 - past practice; and
 - the requirements of clause 11 of the PSA and the requirements which the PSA imposes on DBCT Management to incorporate in an access undertaking (each designed to trigger an obligation on DBCT Management to individual Users to expand DBCT within a specified timeframe if a binding offer is made by such a User),

must, at the very least, have put all prospective seekers of additional tonnages on notice that DBCT Management had **some** system in mind for prioritising applications for tonnage. Indeed, the letter of 11 June 2004 (about the time that Peabody say that they were committing to a mine expansion) could not have made the point more clearly – "our intention is to allocate scarce capacity on a "first to commit basis".

It seems that Peabody finally made a request for allocation of expanded capacity on 15 June 2005, more than 12 months after all Users had been advised (not for the first time) in the clearest of terms that the intention would be to allocate scarce capacity on the basis of who had committed first.

In paragraph 12 of its submission, Peabody refers to correspondence "between January 2005 and February 2006". As indicated above, correspondence to Users dated 17 December 2002 and 11 June 2004 each establishes that DBCT Management had clearly communicated a "first to commit" principle in relation to awarding of capacity of DBCT. As well, the letter of 13 October 2005, re-confirming the principle, appears to have been overlooked by Peabody.

Peabody notes in its submission that DBCT Management wrote to it on 19 April 2005, again indicating in the clearest of terms that they were "contemplating allocating scarce capacity to Users based on the order that [they] received

binding indications...". Peabody, it appears, took almost a month to make their first request for the allocation of additional capacity to it.

- (b) It seems, from the submission of Peabody, that they committed some \$80 million to mine expansion in May 2004 "in reliance on the legitimate expectation that all Users would be treated reasonably and fairly so as to receive an equitable allocation of the expanded capacity". The Peabody submission infers that "equitable allocation" is equivalent to "pro rata allocation" if, when Peabody eventually asked for additional tonnage, it was found that there was insufficient capacity for all applications.

This is untenable as it would lead to inequitable potential outcomes, for example:

- At what point would DBCT Management stop receiving applications, and allocate all the existing applications pro rata? (Could applicants who had already lodged an application for additional tonnage lodge an additional application for additional tonnage before or shortly after the commencement of the Access Undertaking, to be added to the pool to be pro-rated? If so, until what point in time?)
- If the pro rata rules proposed by Peabody were accepted, would it (and Anglo) be in an advantageous position in relation to Users who had made earlier applications (in that Anglo and Peabody may have anticipated a pro rata distribution by the time they lodged their applications, and adjusted the tonnages applied for by them accordingly)?
- The commencement of an Access Undertaking for DBCT is a new phase in the history of DBCT, but it will nevertheless occur in the context of a continuum of events over a long period. The Terminal has been progressively expanded over the last 25 years in response to commitments for additional tonnages made before each expansion. The current planned expansion has become a reality in response to a long period of discussion between DBCT Management and various access seekers. DBCT Management has made it clear that it has continued to commit to expansion works on the order in which access seekers have committed and based on the identity of, and a financial analysis in respect of, those access seekers. To suggest that this state of affairs, which is entirely consistent with what has happened repeatedly over more than 25 years, should be displaced, and the long-established queue abolished and re-constituted, merely because a new formalised regime for new access applications is being implemented, is totally unfair to those parties who have given valuable consideration to obtain a place in the existing queue.
- A number of Users, including RTCA, have given additional valuable consideration to further secure their position in the established queue – not only by making binding commitments earlier than Peabody and Anglo, but also by underwriting the cost of initial expansion works on the basis that they had priority in the queue. Accordingly, they have a

legally binding commitment from DBCT Management guaranteeing their position in the queue.

It seems that Peabody committed to \$80 million of expenditure in early 2004 in the expectation that there would be some type of "fair" allocation of expansion capacity, without taking any steps to try to "lock in" that capacity

For its part, RTCA committed to expenditure to expand its Hail Creek mine, but only after careful consideration of the probability that an expansion of the Terminal would occur (based on, amongst other things, the terms of the PSA, which require binding commitments from Users to trigger an obligation for expansion), the Master Plan 2004 (which showed the likely stages of expansion and their estimated timing, and maximum capacity of DBCT) and an assessment of where RTCA would be in the "queue", with a recognition that early commitment would significantly increase the probability of tonnages being available and being available at the earliest practicable time.

RTCA is not in a position to speculate on possible explanations for delay on the part of Peabody, RTCA submits that it would be inequitable to allow Peabody to now disrupt the established queue.

RTCA agrees that the Access Undertaking should provide "fair and reasonable terms and conditions of access to the Terminal" (see paragraph 28 of Peabody's submission). However RTCA strongly submits that the "first to commit" basis of allocation, which has applied to the Terminal since its inception and which was accepted and understood by an overwhelming majority of Users and access seekers (if not all of them), is the most fair and equitable way of allocating capacity when all applications cannot be met. In the case of RTCA, it committed significant amounts of money in reliance on receiving that additional capacity, and it would be significantly prejudiced if that additional capacity was reduced.

Other Observations

We are not entirely sure why paragraph 13 of the Peabody submission was included. It refers to the DBCT User Group, and its negotiations with DBCT Management from June 2005. Peabody was provided with progressive drafts of the Access Undertaking documentation being negotiated by User Group representatives with DBCT Management. On 29 July 2005 (together with all other members of the User Group at that time) it received a redraft of the draft Access Agreement which contained wording directly relating to the subject issue. However, that date is after the date (15 June 2005) that Peabody apparently first made a formal request for the allocation of additional capacity, so we are not sure how this issue is relevant or why it was raised.

Impact on Legal Rights

As outlined above, RTCA has not only lodged binding offers with DBCT Management, but it has also provided additional valuable consideration to DBCT Management by underwriting significant expenditure by DBCT Management, on the basis that it has a guaranteed position in the "queue". Several other Users have done the same. Each of them may well have legal rights interfered with if the alternative proposal for allocation submitted by Peabody were

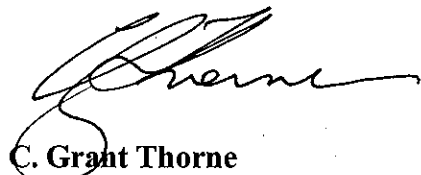
accepted either explicitly in relation to the established queue (i.e. applications which have not yet become firm User Agreements or conditional User Agreements) or in relation to User Agreements and conditional User Agreements executed in the period (possibly as far back as 2004) leading up to the commencement of the Access Undertaking.

On the other hand, RTCA finds it hard to understand what legal rights of Peabody will be affected if their "pro rata" proposal is rejected. It seems the reason for that proposal is, that they may otherwise receive less (or no) capacity from the expansion (or receive it later). However, RTCA submits, based on the public information available to it, that is a result of the timing of their application and not a breach of any of their legal rights.

Conclusion

For the reasons outlined above, RTCA strongly submits that the only fair and equitable rules for allocation of capacity are those which BBI has applied up to this point in time, and which are continued in the current draft of the Access Undertaking.

Yours sincerely



C. Grant Thorne
Managing Director
Rio Tinto Coal Australia Pty Ltd