



18 October 2004

Mr Tim Grimwade  
General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
DICKSON ACT 2602

Attention: Mr David Hatfield

Dear Sir

**Authorisation applications lodged by Port Waratah Coal Services Limited (A30236-A30238) - Submission for Public Register**

1. BACKGROUND

We refer to the Commission's recent letters to industry participants seeking comments on the applications for interim authorisation submitted to the Commission (applications A30236, A30237 and A30238) by Port Waratah Coal Services Limited ("**PWCS**") in relation to the proposed Medium Term Capacity Distribution System ("**Medium Term CDS**").

PWCS would like to provide a brief update on the status of industry consultation and to provide a public copy of what is a very close to final version of the Protocol governing the Medium Term CDS, which Protocol is Annexure 4F to the Coal Handling Services Agreement ("**CHSA**"). The Protocol is described as close to being final as we are still finalising minor language and aspects of the Protocol with PWCS customers. Naturally the Protocol remains subject to the interim authorisation application approval and final PWCS Board approval.

Accordingly, attached is a copy for the public register of the current working draft of the Protocol. It is noted that this document has been circulated to industry participants and is being provided for the purposes of increased public disclosure by the Commission on the authorisation public register.

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## 2. INTERIM AUTHORISATION REQUEST - PARTS I AND II

Thank you for clarifying on 11 October 2004 the operation of Parts I and II of the PWCS request for interim authorisation.

As the Commission has noted, the conduct for which PWCS seeks interim authorisation under Part I is for PWCS to conduct the demand reduction auction in late October/early November 2004. The auction is now likely to be in early November 2004 due to the additional consultation that is occurring. As stated, the demand reduction auction is a mechanism for coal producers to increase or decrease their allocation by bidding with other auction participants to effectively buy or sell loading allocation around the pro-rata reduction position.

In relation to Part II of the request for interim authorisation, PWCS has requested interim authorisation from 1 January 2005 to:

- commence the tonnage tracking and management elements of the Medium Term CDS; and
- decline to load vessels that exceed the first quarter's allocation by producer.

PWCS commits that it will not implement any financial consequences of the auction (such as compensatory payments) until final authorisation is granted by the Commission.

## 3. CURRENT STATUS OF INDUSTRY CONSULTATION

As we have advised the Commission, extensive consultation in relation to the Medium Term CDS has been carried out by PWCS and Accenture on behalf of PWCS.

Given timing issues, it is important for PWCS to have ensured that each of the processes to allow the auction to take place (if interim authorisation is granted) has occurred. To this end, in order to facilitate approval for Part I of the interim authorisation request, PWCS confirms that the following has occurred:

- 1 *17 September 2004* - Indicative coal chain capacity forecast was provided to Producers.
- 2 *30 September 2004* - Draft Protocols (including the CHSA) was provided to Producers.
- 3 *6 October 2004* - Indicative Demand Forecasts were presented to attendees of the Producer Forum to consider the Audit of Demand Forecasts.
- 4 *6 October 2004* - Formal Distribution of the Demand Forecasts in summary form.
- 5 *7 October 2004* - Updated Protocols, including amendments to Conditional Allocation, were circulated to Producers.

As of 6 October 2004, every Producer was able to calculate an indicative loading allocation allowance for 2005 based on the aggregate demand, indicative coal chain capacity and their own forecast as provided to PWCS.

In addition, on 12 October 2004, Accenture provided a preliminary and indicative calculation of each Producer's quarterly loading allocation with and without new mines. This data is to be updated and distributed by Accenture to Producers as Accenture confirms and finalises the following:

- finalise the coal chain capacity forecast - to be completed by PWCS in consultation with HVCCLT once track maintenance information is provided by ARTC;
- the audit process is performed - arbiters and auditors are being appointed after industry consultation and data analysis is being undertaken by Accenture.

These steps mean that all Producers will have **all** necessary information by the end of this month and certainly before the auction in which to have their loading allocation determined and on which they can base their decision as to whether to participate in the auction and whether they will seek to increase or decrease allocation.

Accordingly, all steps are being taken from a practical and operations perspective to ensure that everything is in order for the auction if it is granted interim authorisation.

Equally, once the auction is carried out, Accenture and PWCS will finalise allocations based on the auction and then all steps will be in place for Producers to prepare for the commencement of the Medium Term CDS on 1 January 2005 (again subject to interim authorisation of Part II of the interim authorisation application).

#### 4. CONCLUSION

PWCS trusts that this letter completes all necessary factual questions the ACCC or industry participants may have on Part I of the interim authorisation request.

If the Commission has any further questions, PWCS would be pleased to assist.

Yours sincerely

**MARK EAMES**  
**GENERAL MANAGER**  
**PLANNING & LOGISTICS**

*cc Anthony Pitt, Accenture*

## ANNEXURE 4E

### DEMAND NOMINATIONS, LOADING ALLOCATION AND TAKE-OR-PAY

#### 1. Dictionary

In this Annexure 4E, the following terms shall have the following respective meanings:

<b>Administrator</b>	The person or entity appointed by PWCS to administer a Scheme during the Relevant Period.
<b>Allocation Holder</b>	A Producer who has a Loading Allocation for the Relevant Period.
<b>Annual Loading Allocation</b>	The Loading Allocation for a Producer for the Relevant Year.
<b>Approvals to Operate</b>	All necessary authorisations (such as mining leases and development consents) to operate the relevant Mine.
<b>Available Capacity</b>	The forecast amount of Coal, expressed in tonnes, to be loaded onto vessels at the Port of Newcastle in the Relevant Year or, if a Scheme applies, it shall have the meaning provided in the Protocols Document.
<b>Demand Nomination</b>	The forecast by the Producer that is in accordance with clause 2.2 of this Annexure.
<b>Event</b>	Either: <ol style="list-style-type: none"><li>(1) a breakdown in the Export Coal Chain;</li><li>(2) any war or act of government; or</li><li>(3) a reduction in mine output caused by strike or other industrial action that is not confined to the Producer, machinery or equipment breakdown, inclement weather, accident or other circumstance that is not reasonably foreseeable;</li></ol>

where the Producer is able to establish to the satisfaction of PWCS (or the Administrator, if a Scheme applies during the Relevant Period) that the Producer has not been able to take any steps to avoid or mitigate the affects of the event on its ability to use Loading Allocation, for example by arranging an alternate vessel, using an alternate transport method, hiring contract labour, transferring Loading Allocation to another Producer, using flexibility provisions or any other relevant means.

<b>Event of Force Majeure</b>	An Event that is beyond the control of the Producer, without the fault or negligence of the Producer or any other person or party that the Producer is able to control and which directly causes the Producer to not use all of its Quarterly Loading Allocation in respect of a Calendar Quarter.
<b>Export Coal Chain</b>	The system of transporting Coal from Hunter and adjacent region Mines to the Port of Newcastle and loading the Coal onto vessels for export using the Coal Handling Facility.
<b>Forecast Requirement</b>	The amount of Coal, expressed in tonnes, that the Producer has forecast in a Demand Nomination for the Relevant Period, as determined in accordance with clause 2.2 of this Annexure.
<b>Loading Allocation</b>	If a Scheme applies during the Relevant Period, "Loading Allocation" has the meaning given to that term in the Protocols Document applicable to the Scheme. If a Scheme does not apply during the Relevant Period, "Loading Allocation" means the volume of Coal Handling Services (expressed in tonnes) allocated to a Producer during the Relevant Period, which shall be equivalent to the Forecast Requirement of the Producer for the Relevant Period.
<b>Lower Flexibility Amount</b>	90,000 tonnes, unless a Scheme is in operation, in which event it shall have the meaning as defined in the Protocols Document for that Scheme.
<b>Mine</b>	A mining operation in the Hunter or adjacent regions producing coal for export through the Terminal.
<b>New Mine</b>	A Mine that commences production during the Relevant Period from a Mine that either has previously ceased production or has never previously produced.
<b>New Producer</b>	The Producer in respect of a New Mine.
<b>Producer</b>	Either a Customer producing Coal from one or more Mines, as identified in Attachment A to Annexure 4F, and who has all Approvals to Operate in respect to each such Mine, or a New Producer. This definition does not imply management or ownership of a particular Mine but merely provides groupings for the purposes of determining Loading Allocation.
<b>Quarterly Loading Allocation</b>	The amount of Coal, expressed in tonnes, that has been allocated to the Allocation Holder by way of Loading Allocation for the relevant Calendar Quarter.
<b>Road Coal</b>	Coal that is transported to the Terminal by road, not rail.
<b>Upper Flexibility Amount</b>	90,000 tonnes, unless a Scheme is in operation, in which event it shall have the meaning as defined in the Protocols Document for that Scheme.

## **2. Demand Nominations**

- 2.1 Without limiting the generality of clause 2.4.1 of the Coal Handling Services Agreement, by 30 September in each year the Customer must, if it is a Producer, provide to PWCS a Demand Nomination:
- (a) for each calendar quarter of the next year; and
  - (b) for the whole of the calendar year for the 2 years thereafter.
- 2.2 The Demand Nomination shall be in the format determined by PWCS and must:
- (a) provide a forecast for all productive mines of the Producer;
  - (b) provide an indicative forecast for all New Mines of the Producer;
  - (c) provide individual mine-by-mine forecasts;
  - (d) represent the Producer's best estimate of the quantity of Coal that the Producer has the capacity and intent to produce and export through the Export Coal Chain in each calendar quarter of the Relevant Year;
  - (e) contain sufficient information for the Producer to substantiate the forecasts and other information provided by the Producer in the Demand Nomination; and
  - (e) contain such other information as PWCS may reasonably require.
- 2.3 If the Producer fails to submit a Demand Nomination to PWCS within the time required by clause 2.1 of this Annexure, the Producer will be deemed to have no demand for Coal Handling Services during the Relevant Year.
- 2.4 The aggregate Forecast Requirement of each Producer may be provided to all other Producers.

## **3. Loading Allocations**

- 3.1 Subject to the other provisions of this Annexure, the Customer must ensure that for each tonne of Coal that is the subject of an Application to PWCS for Coal Handling Services for vessel arrivals during the Relevant Period, there is a Loading Allocation for that Coal for the Relevant Period.
- 3.2 Each Application received from the Customer by PWCS must specify the Allocation Holder whose Loading Allocation for the relevant Calendar Quarter is to be applied to the Coal to be shipped, and an authorisation by the specified Allocation Holder, in such form as is determined by PWCS from time to time.
- 3.3 The usage of Loading Allocation for each Allocation Holder will be determined from the transport provider's measurement of the quantity of Coal received by rail and road by PWCS at the Terminal for the particular shipment, and the nominated component tonnages for the vessel in the shipping stem.
- 3.4 PWCS or the Administrator will determine that sufficient Quarterly Loading Allocation is available from the source Allocation Holder, prior to accepting the Application.

- 3.5 Subject to the other provisions of this Annexure, each Quarterly Loading Allocation of the Producer must be used either:
- (a) in the relevant Calendar Quarter that has been allocated for that Loading Allocation; or
  - (b) in the five days immediately preceding the relevant Calendar Quarter; or
  - (c) in the five days immediately following the relevant Calendar Quarter.
- 3.6 Loading Allocation is deemed to be used at the time of the vessel's ETA until the vessel arrives, at which point the usage is deemed to be used at the time of the vessel's ATA.
- 3.7 Any portion of the Producer's Quarterly Loading Allocation that is not used by the Producer in the manner stated in clause 3.5 of this Annexure ("**Unused Portion**") may not be used in any subsequent Calendar Quarter, except that PWCS (or the Administrator if a Scheme applies) will add to the following quarter's Quarterly Loading Allocation (which might be in the following calendar year) the Lower Flexibility Amount, unless the Unused Portion is less than the Lower Flexibility Amount, in which event the amount so added will be the Unused Portion.
- 3.8 Subject to the other provisions of this Annexure, PWCS will not accept any Application for Coal Handling Services from a Producer that causes usage of Loading Allocation for that Producer to exceed the Producer's relevant Quarterly Loading Allocation plus the Upper Flexibility Amount for that Producer.
- 3.9 Any usage in excess of the Producer's Quarterly Loading Allocation will be deducted from the Producer's Loading Allocation for the following Calendar Quarter (which might be in the following calendar year).
- 3.10 In the event that the Application is not supported by an authorised identification of Loading Allocation for the relevant Calendar Quarter, or there is insufficient Loading Allocation available for the relevant Calendar Quarter, PWCS will determine if additional allocation can be issued to the Allocation Holder when taking into account current demands on the Export Coal Chain and, if a Scheme applies, the objectives of the Scheme. If additional allocation cannot be issued then PWCS will reject the Application.
- 3.11 Notwithstanding any other provision in this Annexure or the Coal Handling Services Agreement but subject to clause 3.5 of this Annexure, if the vessel's ATA occurs in the Calendar Quarter immediately following the Calendar Quarter of the ETA of the vessel as stated in the relevant Application, PWCS may cancel that Application, in which event if the Customer requires the vessel to be loaded, it must lodge a fresh Application with PWCS. If a Scheme applies, PWCS may only cancel the Application if the Administrator gives a determination in accordance with clause 3.12 of this Annexure.
- 3.12 If:
- (a) a Scheme applies during the Relevant Period;
  - (b) a vessel arrives late as described in the previous clause; and

- (c) the Administrator forms the view, in its absolute discretion, that if PWCS proceeds to provide Coal Handling Services to that vessel in accordance with the relevant Application it will, or will in all probability, cause an adverse affect on the efficient operation of the Scheme or create an outcome that is otherwise contrary to the Objectives (as described or defined in the Protocols Document),

the Administrator may determine that the relevant Application should be cancelled by PWCS.

- 3.13 If the Producer proposes that there be an amendment to an Application by the Producer in respect of Loading Allocation for the relevant Calendar Quarter and notifies PWCS or the Administrator of that proposed amendment prior to the ATA of the relevant vessel, PWCS (and, if a Scheme applies during the Relevant Period, the Administrator) will, subject to clause 3.2 of the Coal Handling Services Agreement and clauses 3.1 and 3.2 of this Annexure, process that amendment.
- 3.14 If a New Producer intends to commence production of Coal at a New Mine during the Relevant Year, then:
  - (a) the New Producer must give to PWCS at least one full Calendar Quarter's notice prior to the commencement of its use of the Export Coal Chain in respect of the New Mine;
  - (b) If the New Producer has not previously provided a Demand Nomination for the New Mine in respect of the Relevant Year, it must do so at the time it provides the notice in accordance with the previous subparagraph;
  - (c) PWCS (or the Administrator if a Scheme applies) will determine if the Forecast Requirement of the New Producer should be subject to an audit. In the event that an audit is required, the New Producer will need to satisfy the auditor appointed by PWCS that the Forecast Requirement reflects a genuine capability and intent to produce from the New Mine and export through the Export Coal Chain the quantity of Coal stated in the Demand Nomination;
  - (d) PWCS (or the Administrator if a Scheme applies) will calculate the pro-rata share of the New Producer's audited demand and will notify the New Producer of its Loading Allocation as soon as practical following the calculations. The New Producer will be granted a Loading Allocation for the New Mine only in respect of the period from the date of commencement of production at the New Mine; and
  - (e) PWCS or the Administrator will notify all Producers of corresponding adjustments to their Loading Allocations as soon as practical following the calculations.
- 3.15 If a Producer ceases production at a Mine, PWCS (or the Administrator if a Scheme applies) will make appropriate reductions to the Producer's Loading Allocation for the remainder of the Relevant Period in respect of that mine.
- 3.16 PWCS may determine by no later than 1 December in the year prior to the commencement of a Relevant Year that Loading Allocation will not be issued in respect of Road Coal, in which event the provisions of this Annexure and, if a Scheme applies, the provisions of the Protocols Document shall not apply in respect of Road Coal for that Relevant Year.



#### **4. Transfer or Exchange of Loading Allocation**

- 4.1 If the Producer wishes to have Loading Allocation transferred or exchanged, it must complete the "Loading Allocation Exchange Notification" form and provide that form to PWCS or, if a Scheme applies, to the Administrator.
- 4.2 The Producer may only transfer or exchange its Loading Allocation up to and not beyond its Quarterly Loading Allocation.
- 4.3 If the Producer notifies PWCS (or the Administrator if a Scheme applies) prior to the commencement of the relevant Calendar Quarter (the "**Relevant Period**") that it is unable to use a portion of its Loading Allocation for that quarter ("**Surplus Allocation**") then PWCS or the Administrator will seek to distribute the Surplus Allocation to those other Producers ("**Participating Producers**") who notify PWCS or the Administrator that they are willing to accept and use part or all of their pro-rata portion of the Surplus Allocation. If PWCS or the Administrator cannot redistribute the Surplus Allocation, the Producer will, subject to clause 3.7 of this Annexure, retain the Surplus Allocation as part of its Loading Allocation, and will be required to pay to PWCS the Take-or-Pay Amount in respect of that part of the Surplus Allocation that is not either used by the Producer or transferred to another Producer.
- 4.4 PWCS (with the assistance of the Administrator if a Scheme applies) will determine further procedures from time to time concerning transfers or exchanges of Loading Allocations.
- 4.5 Neither PWCS nor the Administrator will have any responsibility in arranging the transfer or exchange of Loading Allocation, other than as stated in this clause 4.

#### **5. Register**

- 5.1 PWCS will maintain a register of each Allocation Holder's usage of Loading Allocation and will upon request from an Allocation Holder provide it with any information reasonably requested by the Allocation Holder concerning information held on the register in respect to the Allocation Holder.

#### **6. Take-or-Pay Amount**

- 6.1 If the Customer is a Producer, subject to the following paragraphs of this Annexure, in addition to the Standard Coal Handling Charge the Producer must in respect of each Calendar Quarter pay to PWCS a Take-or-Pay Amount determined in accordance with the following formula:

$$\text{Take-or-Pay Amount} = \text{SCHC} \times (\text{QLA} - \text{LFA} - \text{Actual Demand})$$

Where:

"**SCHC**" means the Standard Coal Handling Charge stated in Part A of Annexure 4A.

"**QLA**" means the Quarterly Loading Allocation of the Producer as at the end of the relevant Calendar Quarter in each case.

"**LFA**" means the Lower Flexibility Amount.

**"Actual Demand"** means the actual quantity of Coal, expressed in tonnes, shipped through the Port of Newcastle using Loading Allocation for the Relevant Period belonging to the applicable Producer.

- 6.2 If the formula in clause 6.1 produces a negative amount, the Producer shall not be entitled to a credit or refund of the Take-or-Pay Amount.
- 6.3 If a Scheme is in operation during the Relevant Period, at the end of each Calendar Quarter the Administrator will advise PWCS of the Take-or-Pay Amount that is payable by the Producer.
- 6.4 If a Scheme is not in operation during the Relevant Period, PWCS will calculate the Take-or-Pay Amount at the end of each Calendar Quarter.
- 6.5 PWCS will then invoice the Take-or-Pay Amount to the Producer. Payment of the invoiced amount to PWCS shall be in accordance with clauses 2.3.3, 2.3.4, 2.3.6 and 2.3.7 of the Coal Handling Services Agreement.
- 6.6 If part or all of a Producer's Quarterly Loading Allocation is transferred or exchanged to another Producer ("**the Recipient**"), the obligation to pay to PWCS the Take-or-Pay Amount in respect of the transferred or exchanged tonnes will transfer to the Recipient. This means that if the Producer is the Recipient, it assumes the obligation to pay the Take-or-Pay Amount for the relevant amount that is transferred or exchanged.
- 6.7 If the Producer establishes to the complete satisfaction of PWCS that the total quantity of Coal shipped by the Producer through the Port of Newcastle (as measured by transport provider weights) during the relevant Calendar Quarter is less than its Quarterly Loading Allocation by more than its Lower Flexibility Amount due to an Event of Force Majeure, the Producer will not, subject to the next clause of this Annexure, be required to pay PWCS a Take-or-Pay Amount in respect to the quantity of tonnes declared as force majeure.
- 6.8 The Producer may not invoke the benefits of clause 6.7 of this Annexure unless it has declared force majeure to a customer and has provided written evidence to the complete satisfaction of PWCS of the Event of Force Majeure and of the quantity of tonnes so affected by that event.
- 6.9 If the Producer disagrees with any decision of PWCS in accordance with clauses 6.7 or 6.8 of this Annexure, it may invoke the dispute resolution procedures in Section 2.15 of the Coal Handling Services Agreement.
- 6.10 The Producer may not invoke the protection of clause 2.11.4 of the Coal Handling Services Agreement to avoid paying or delay the payment of a Take-or-Pay Amount.
- 6.11 If the Quarterly Loading Allocation of the Producer has increased due to an increase during the relevant Calendar Quarter in Available Capacity and the Producer at the time of that increase notified PWCS (or, if a Scheme applies, the Administrator) that it will accept that increase, then the amount by which the Loading Allocation has been increased will be subject to the Take-or-Pay Amount.

## **7. General**

- 7.1 If, in any authorisation or interim authorisation granted by the Australian Competition & Consumer Commission ("**the Commission**") under the *Trade Practices Act 1974*,

the Commission imposes any condition in respect to, relating to or affecting any provision of this Annexure, a variation may be made to this Annexure to accommodate those conditions by resolution of the Board and, despite clause 2.12 of the Coal Handling Services Agreement, without the need for PWCS to consult with any Customers concerning the variation

- 7.2 PWCS will notify the Customer of any variation to this Annexure.
- 7.3 Notwithstanding any other provision of this Annexure or in the Coal Handling Services Agreement or otherwise, any amount determined for the Forecast Requirement or Loading Allocation of the Producer for a Relevant Period is not a guarantee by PWCS or, if a Scheme applies, the Administrator or any other party that PWCS will load any particular quantity of Coal onto vessels in the Relevant Period or will otherwise provide Coal Handling Services in respect to any particular quantity of Coal in the Relevant Period.
- 7.4 All Relevant Information received by the Recipient must be kept confidential by the Recipient, subject to those other provision of this Annexure and of the Protocol Document (if a Scheme applies) that permit disclosure of specific information.

For the purposes of this clause:

**"Recipient"** means the Relevant Party who, in the particular context, receives Relevant Information.

**"Relevant Party"** means either PWCS or the Customer and, if a Scheme applies, the Administrator, Auditor or Arbiter, whoever is relevant in the context.

**"Relevant Information"** means any information provided under or in relation to any provision of this Annexure or the Protocol Document (if a Scheme applies during the Relevant Period), except for any information that:

- (a) the Discloser agrees in writing may be released;
- (b) is part of the public domain through no fault of the Recipient;
- (c) is received by the Recipient from a third party who is not directly or indirectly associated with the Discloser and who is not under any obligation of confidence with respect to that information;
- (d) is required to be disclosed by any applicable law or legally binding order of any court, government, semi-government, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity acting within its powers or, where PWCS is the Recipient, it is appropriate for it to provide on a confidential basis to a government regulatory authority for the purposes of a Scheme; or
- (e) where a Scheme is in effect during the Relevant Period and PWCS is the Recipient, is reasonably required to be disclosed by PWCS to any administrator, auditor, arbitrator or professional adviser for the effective operation of the Scheme, provided that before making any such disclosure PWCS will ensure that any such other party is bound by obligations of confidentiality in respect of the information on terms that are no less onerous than those provided in this clause.

For the purposes of paragraph (a) of this definition, information shall not be deemed to be part of the public domain merely because it has been disclosed to one or more Producers in accordance with clause 2.4 of this Annexure or clause 2.4.2 of the Coal Handling Services Agreement or disclosed to any administrator, auditor, arbitrator or professional adviser of a Scheme as part of that Scheme.

"**Discloser**" means the Relevant Party who, in the particular context, discloses Relevant Information to the Recipient.

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# ANNEXURE 4F

## MEDIUM TERM CAPACITY BALANCING SYSTEM OBJECTIVES, PRINCIPLES & PROTOCOLS

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## **PART A – GENERAL CONDITIONS OF CAPACITY BALANCING SYSTEM**

### **1. Defined Terms & Interpretation**

- 1.1 Any terms that are defined in the Dictionary at Schedule 1 of this Annexure or the Dictionary at Annexure 4E shall, when used in this Annexure, have the meaning given to that term in the Dictionary. If there is any inconsistency between the meaning given to a term in either Dictionary, the meaning in the Dictionary at Schedule 1 of this Annexure shall apply.
- 1.2 The Schedules form part of this Annexure.

### **2. Scope**

- 2.1 The Board will as soon as possible in its absolute discretion appoint the Administrator, who will be independent of any Producer or Customer.
- 2.2 The Administrator will administer the Scheme according to the objectives, principles and protocols set out in this Annexure.
- 2.3 The objectives of the Scheme are to:
- (a) achieve minimum vessel demurrage consistent with maximum export Coal throughput;
  - (b) comply with all relevant legal requirements;
  - (c) efficiently distribute the available Coal Chain Capacity, in so far as it relates to the Coal Handling Facility, among Producers in an equitable, transparent and accountable manner; and
  - (d) not adversely affect the efficient operation of the Coal Handling Facility.
- 2.4 The Scheme shall apply:
- (a) to all Coal that is the subject of an Application for Coal Handling Services which is delivered to the Terminal by rail and, subject to clause 3.16 of Annexure 4E, road from midnight on the day before the Commencement Date; and
  - (b) to all Coal Handling Services provided to each Customer by PWCS in respect of each such shipment of Coal.
- 2.5 The Scheme will not come into operation and this Annexure will have no force or effect until such time that authorisation or interim authorisation is granted under the *Trade Practices Act 1974* in relation to applications to the Commission numbered <insert no.> dated <insert date>.

### **3. Capacity Declaration**

- 3.1 The Coal Chain Capacity and desired Operational Allowance for the Relevant Year will be calculated in accordance with the procedures stated in Schedule 2.

### **4. Forecast Requirement**

- 4.1 The Forecast Requirement for each Producer and the Forecast System Demand for the Relevant Period will be calculated and determined in accordance with the procedure stated in Schedule 3.
- 4.2 The Forecast Requirement for any New Mine will also be calculated and determined in accordance with the procedure stated in Schedule 3.

### **5. Demand and Supply Balancing**

- 5.1 The need for demand and supply balancing will be assessed and, if required, carried out in accordance with the procedure stated in Schedule 4.

### **6 Capacity Distribution**

- 6.1 The Available Capacity during the Relevant Year will be distributed amongst Producers on a pro-rata basis, in proportion to the Forecast Requirement of each Producer, which may be adjusted through the conduct of a demand reduction auction facilitated by the Administrator in accordance with paragraph 7 of Schedule 4.
- 6.2 The Loading Allocation for each Producer will be calculated by the Administrator for the Relevant Period and then notified to PWCS and each Producer in accordance with Schedule 5.

### **7. Disruptions to a Producer**

- 7.1 If, notwithstanding the other provisions of this Annexure or the provisions of Annexure 4E, a Producer is unable at any time to use its Quarterly Loading Allocation, the provisions of Schedule 6 will apply.

### **8. Amendments to Scheme**

- 8.1 The Administrator will monitor the operation of the Scheme and consult with Producers and Customers regularly regarding the operation and outcomes of the Scheme. This consultation process will provide a forum by which participants in the Scheme can provide feedback, guidance and suggestions on the operation of the Scheme.
- 8.2 Throughout the duration of the Scheme the Administrator may formulate and make recommendations to the Board on proposals for variations to the operational aspects of the Scheme as set out in Part B of this Annexure that



it determines are necessary or desirable to meet the Objectives or to facilitate the Scheme's effective operation.

- 8.3 Any decision by the Board to vary the operational aspects of the Scheme as set out in Part B of this Annexure will take into account any recommendations submitted to the Board by the Administrator in relation to that amendment.
- 8.4 If at any time the Board determines that a proposed variation to the operational aspects of this Scheme as set out in Part B of this Annexure will not, when introduced, have substantial adverse effects on any Producer and is otherwise consistent with the Objectives, the proposed variation may, subject to any Authorisation Conditions, be made by resolution of the Board and, despite clause 2.12 of the Coal Handling Services Agreement, without the need for PWCS to consult with any Customers concerning the proposed variation.
- 8.5 If the Board does not make a determination in accordance with paragraph 8.4 in relation to a proposed variation to the operational aspects of the Scheme as set out in Part B of this Annexure, the proposed variation must be made in accordance with clause 2.12.1 and 2.12.2 of the Coal Handling Services Agreement.
- 8.6 For the avoidance of doubt, any variations to Part B of this Annexure referred to in paragraphs 8.3 to 8.5 will relate to the operational aspects of the Scheme (that is, for the purpose of facilitating the Scheme's effective operation) and will be consistent with the Objectives.
- 8.7 If the Commission imposes any Authorisation Conditions in respect to, relating to or affecting any provision of the Scheme, a variation may be made to this Annexure to accommodate those conditions by resolution of the Board and, despite clause 2.12 of the Coal Handling Services Agreement, without the need for PWCS to consult with any Customers concerning the variation.
- 8.8 PWCS will notify all Customers of any variation to this Annexure.

## **9. Extension of Duration of the Scheme**

- 9.1 During September of each Relevant Year the Scheme will be reviewed by the Board to determine whether it should continue for part or all of the following calendar year. Any decision to continue the Scheme will take into account any Authorisation Conditions, recommendations made by the Administrator to the Board, any submissions received from Producers or Customers prior to 1 September of the Relevant Year and the requirements of paragraph 1 of Schedule 4.
- 9.2 A key indicator as to whether the Scheme should continue during part or all of the following calendar year will be whether the Coal Chain Capacity, in so far as it relates to the Coal Handling Facility, is sufficient to meet the demand without causing excessive queuing of vessels at the Port of Newcastle.

## **10. Dispute Resolution**

- 10.1 In making or completing any determination, declaration, calculation or audit in accordance with any provision of this Annexure, the Administrator, the Auditor or independent expert (whichever is relevant in the context) is acting as an expert and not as a mediator or arbitrator. Any determination, declaration, calculation or audit by the Administrator, Auditor, Arbiter or independent expert in accordance with any provision of this Annexure will in the absence of manifest error be final and binding on PWCS and each Producer and Customer and may not be the subject of the dispute resolution procedures contained in Section 2.15 of the Coal Handling Services Agreement.
- 10.2 The provisions of clause 2.15 of the Coal Handling Services Agreement shall, subject to paragraph 10.3 of this Part A, apply exclusively in the event that there are any disputes or issues relating to the Scheme, other than in relation to any determination, declaration, calculation or audit by the Administrator, Auditor, Arbiter or independent expert as described in paragraph 10.1 of this Part A.
- 10.3 Any mediator or arbitrator appointed in accordance with clause 2.15 of the Coal Handling Services Agreement must have regard to this Protocols Document if the dispute is in relation to the Scheme or arises from its application.

## **11. Limitation of Liability**

- 11.1 Notwithstanding any other provision of this Annexure or in the Coal Handling Services Agreement or otherwise, but subject to clause 2.14.1 of the Coal Handling Services Agreement and to the extent permitted by law, neither PWCS, the Administrator, the Demand Auditor, the Capacity Auditor or the Arbiter will be liable (and any such liability that may exist is hereby excluded) for any loss or damage suffered or incurred by any Producer or Customer caused by or arising from or relating to:
- (a) their participation in or use of the Scheme;
  - (b) any calculation, determination or decision made by the Administrator, PWCS, any of the Auditors or the Arbiter under the Scheme or under Annexure 4E;
  - (c) the exercise or non exercise by the Administrator, PWCS, any of the Auditors or the Arbiter of any power relating to the Scheme, whether given to them under this Annexure or otherwise;
  - (d) any failure to achieve the objectives of the Scheme;
  - (e) the administration by the Administrator, PWCS, any of the Auditors or the Arbiter of any administrative responsibility provided to any of

them in relation to the Scheme or in relation to Annexure 4E and whether under this Annexure or otherwise;

- (f) any failure on the part of PWCS to load any particular quantity of Coal into vessels or to provide Coal Handling Services in respect to any particular quantity of Coal in any Relevant Period; or
- (g) any failure on the part of the Administrator, PWCS, any of the Auditors or the Arbiter to make any determination, exercise any power or carry out any administrative act in relation to the Scheme or in relation to Annexure 4E and whether under this Annexure or otherwise;

unless:

- (h) the event giving rise to the loss or damage is caused by the wilful misconduct or fraudulent act on the part of the party against whom the claim is made; or
- (i) the particular liability is not able to be excluded or limited pursuant to the provisions of the *Trade Practices Act 1974* and reciprocal State legislation.

11.2 The Customer must not make any claim or demand or take any action or proceeding against the Administrator, the Demand Auditor, the Capacity Auditor, the Arbiter or the Independent Expert in respect of, arising from or relating to any of the causes, matters or events in respect of which liability is excluded or limited in accordance with paragraph 11.1 of this Part A.

## PART B – THE SCHEDULES

### SCHEDULE 1

#### DICTIONARY

<b>2005 Year</b>	The calendar year commencing 1 January 2005
<b>Allocation Holder</b>	A Producer who has allocated to it a Loading Allocation for the Relevant Period.
<b>ACCC Authorisation</b>	Any authorisation or interim authorisation granted by the Commission under the <i>Trade Practices Act 1974</i> in relation to applications to the Commission in relation to the Scheme.
<b>Annual Capacity Factor</b>	The multiplier defined in accordance with paragraph 5 of Schedule 4.
<b>Annual Pro-Rata Allocation</b>	The capacity allocation of each Producer after the Forecast Requirement has been adjusted in accordance with Schedule 2 and after the application of the Annual Capacity Factor in accordance with Schedule 4.
<b>Auditors</b>	The Capacity Auditor (if required) and the Demand Auditor.
<b>Authorisation Conditions</b>	Any conditions imposed by the Commission on the Scheme and contained within the ACCC Authorisation.
<b>Arbiter</b>	The person or entity appointed to determine the Arbiter's Determined Amount in accordance with paragraph 4 of Schedule 3.
<b>Arbiter's Adjustment</b>	The difference between the Producer's Forecast Requirement for the relevant Calendar Quarter and the Arbiter's Determined Amount for that quarter.
<b>Arbiter's Determined Amount</b>	This term is defined in paragraph 4 of Schedule 3, subject to paragraph 2 of that Schedule.
<b>Auction Clearing Price</b>	The auction price at which the cumulative tonnage reduction bid into the Demand Reduction Auction is equal to the required reduction amount.
<b>Authorisation Date</b>	The first date that the ACCC Authorisation is effective, as determined by the Commission.
<b>Available Capacity</b>	The forecast amount of Coal, expressed in tonnes, less the Carryover Tonnage, to be loaded onto vessels at the Port of Newcastle in the Relevant Period such that an operational queue is maintained as determined in accordance with paragraph 4 of Schedule 2.

<b>Board</b>	The board of directors of PWCS.
<b>Carryover Tonnage</b>	The amount of Coal loaded onto vessels at the Port of Newcastle in the Relevant Year using Loading Allocation from the year immediately prior to the Relevant Year.
<b>Capacity Auditor</b>	The professional audit firm(s) appointed (if required) to conduct an audit of PWCS's calculation of the Coal Chain Capacity in accordance with Schedule 2.
<b>Capacity Profile</b>	The distribution of annual Coal Chain Capacity across the Relevant Year expressed as quarterly percentages of the annual Coal Chain Capacity.
<b>Coal Chain Capacity</b>	The forecast capacity of the Export Coal Chain in the Relevant Period to transport Coal to Newcastle and load the Coal onto vessels, expressed in tonnes.
<b>Coal Handling Services Agreement</b>	The agreement so titled between PWCS and each Customer for the provision by PWCS to the Customer of coal handling and other services.
<b>Commencement Date</b>	The date that the Scheme commences, being the latter of either 1 January 2005 or 14 days after the date that notice of the decision of the Board to amend the Coal Handling Services Agreement to adopt the Scheme has been given by PWCS to Customers or 14 days after the Authorisation Date.
<b>Commission</b>	The Australian Competition and Consumer Commission.
<b>Customer</b>	A party to a Coal Handling Services Agreement, other than PWCS, who receives Coal Handling Services from PWCS.
<b>Days</b>	Calendar days unless stated otherwise.
<b>Demand Auditor</b>	The professional audit firm(s) appointed to conduct an audit of a Producer's Demand Nomination in accordance with Schedule 3.
<b>Demand Reduction Auction</b>	The demand reduction auction facilitated by the Administrator in accordance with paragraph 7 of Schedule 4.
<b>Demand Profile</b>	The percentage of the Final Demand Amount for each Calendar Quarter of the Relevant Year.
<b>Excess Demand</b>	The amount by which the Forecast System Demand for the Relevant Year exceeds the Available Capacity.
<b>Final Demand Amount</b>	The total demand of a Producer for Coal Handling Services for the Relevant Period, determined in accordance with paragraph 8 of Schedule 3.
<b>Final Notice</b>	A notice identifying each Producer's final Quarterly Loading Allocation for the Relevant Year.

<b>Forecast System Demand</b>	The aggregate forecast demand for Coal Handling Services during the Relevant Period, determined in accordance with paragraph 2 of Schedule 4.
<b>HVCC Logistics</b>	Hunter Valley Coal Chain Logistics Team.
<b>Industry Support</b>	Support by not less than 75% of Producers, calculated by both volume of export Coal tonnes and by number of Producers shipping by rail using the Export Coal Chain.
<b>Loading Allocation</b>	The volume of Coal Handling Services, expressed in tonnes, allocated to a Producer during the Relevant Period, determined in accordance with paragraph 1 of Schedule 5 and adjusted in accordance with other provisions of this Annexure.
<b>Lower Flexibility Amount</b>	The Lower Flexibility Amount as determined in accordance with subparagraph 1(a) of Schedule 6.
<b>the Objectives</b>	The objectives stated in paragraph 2.3 of Part A.
<b>Operational Allowance</b>	A queue of vessels at the Port of Newcastle determined in accordance with paragraph 2 of Schedule 2.
<b>Quarterly Loading Allocation</b>	The Loading Allocation that is allocated to the Allocation Holder for the relevant Calendar Quarter.
<b>Railed Tonnes</b>	The actual amount of Coal, expressed in tonnes as measured by the transport provider, that is received by rail by PWCS from a Producer to be loaded on behalf of a Customer onto a vessel by PWCS under a Coal Handling Services Agreement.
<b>Restricted Producer</b>	This term is defined in paragraph 7 of Schedule 3.
<b>Schedule</b>	A schedule to this Annexure.
<b>Scheme</b>	The Capacity Balancing System described in this Annexure.
<b>Total Demand</b>	The aggregate of all Forecast Requirements for the Relevant Year.
<b>Unrestricted Producer</b>	A Producer who is not a Restricted Producer.
<b>Upper Flexibility Amount</b>	The Upper Flexibility Amount as determined in accordance with subparagraph 1(b) of Schedule 6.

## SCHEDULE 2

### CAPACITY DECLARATION

1. PWCS, with assistance from HVCC Logistics, will calculate the Coal Chain Capacity for each Calendar Quarter in the Relevant Year in accordance with the following procedures:
  - (a) Actual delivery performance data for a relevant historical period will be used to determine a base volume for capacity for the Relevant Year and for each Calendar Quarter during the Relevant Year.
  - (b) The volume will be adjusted for major planned outages (e.g. ARTC possessions, major projects) and anticipated non-operating days.
  - (c) Adjustment will be made for expected performance gains.
2. PWCS, with assistance from HVCC Logistics, will declare the volume of the Operational Allowance, expressed in tonnes, consistent with meeting the Objectives, specifically to minimise vessel demurrage consistent with maximum coal chain throughput.
3. Following the calculation by PWCS of the Coal Chain Capacity and if requested in writing by a majority of Producers, PWCS may arrange for the Capacity Auditor to audit PWCS's calculation of the Coal Chain Capacity. The decision rationale and all supporting information used by PWCS and HVCC Logistics will be made available to Producers for inspection.
4. The Administrator will determine the Available Capacity for the Relevant Period taking into account the Coal Chain Capacity, Operational Allowance and Carryover Tonnage.
5. The Administrator and PWCS, with the assistance of HVCC Logistics, will continue to monitor the performance of the Export Coal Chain throughout the Relevant Period. Following advice from PWCS, the Administrator may from time to time revise the Available Capacity for the balance of the Relevant Year in order to achieve the Objectives.
6. In order to ensure that PWCS does not make available on a take-or-pay basis more Coal Handling Services than it and the Export Coal Chain can reasonably provide, if at any time there is, or there is reasonably forecast by the Administrator to be, a material, objectively demonstrable change in the Available Capacity for a Relevant Period, the Administrator may make adjustments to the Loading Allocation of each Producer for the Relevant Period in a manner that reasonably reflects that change. Prior to implementing the adjustment, the Administrator will advise each Producer of its calculations of the adjustment.

## SCHEDULE 3

### FORECAST REQUIREMENT

1. The Administrator will determine in accordance with guidelines prepared by PWCS and the Administrator in consultation with the industry which, if any, of a Producers' mine-by-mine Forecast Requirement will be subject to audit by the Demand Auditor. The Administrator will notify the Producer of its determination.
2. The Producer may notify the Administrator within 5 days of the date of the notification provided in accordance with the previous paragraph that it declines the audit, in which event:
  - (a) the Producer will be exempt from an audit;
  - (b) the Producer's Final Demand Amount will be equal to its Forecast Requirement;
  - (c) for the purpose of calculating the Arbiter's Adjustment, the Arbiter's Determined Amount shall be zero; and
  - (d) the conditions in paragraph 7 of this Schedule shall apply.
3. The Demand Auditor will, for each Producer that is subject to audit, determine the Relevant Quantity for each Calendar Quarter and the quantity so determined, along with supporting evidence, shall then be notified to the Arbiter and the Producer. For the purposes of this paragraph, "**Relevant Quantity**" means the quantity of Coal that the Producer has the capacity and intent to produce and export through the Export Coal Chain in each Calendar Quarter of the Relevant Year.
4. The Arbiter will consider the Demand Auditor's determination of the Relevant Quantity and the supporting evidence provided by the Auditor to determine both quarterly and annual amounts ("**the Arbiter's Determined Amount**"), which most accurately reflect the definition of "Relevant Quantity" in paragraph 3. The Arbiter will notify the Administrator and the Producer of its determination.
5. In the event the Arbiter's Determined Amount is less than the Forecast Requirement for the Producer and the Producer disagrees with the determination by the Arbiter of the Arbiter's Determined Amount, the Producer may by notice to the Administrator within 5 days of the date of the notification provided in accordance with the previous paragraph ("**the Relevant Date**") reject the Arbiter's Determined Amount and retain its Forecast Requirement as its Final Demand Amount.
6. A Producer whose Forecast Requirement has been audited and who does not provide a notice to the Administrator within 5 days of the Relevant Date in accordance with the previous paragraph will be deemed to have accepted the Arbiter's Determined Amount.
7. A Producer who has chosen to decline an audit or to reject the Arbiter's Determined Amount (such Producer hereafter referred to as a "**Restricted Producer**") will be subject to the following conditions:
  - (a) A Restricted Producer may only participate in the disposal (either by a transfer or exchange) of Loading Allocation in accordance with clause 4 of



Annexure 4E if, by so doing, the quantity of its Annual Loading Allocation does not fall below that of its Forecast Requirement;

- (b) A Restricted Producer may participate in the Demand Reduction Auction as a buyer only, and thus will be excluded from bidding beyond its pro-rata reduction;
- (c) In the event that the Restricted Producer's Quarterly Loading Allocation in excess of the Lower Flexibility Amount is unused at the end of a Calendar Quarter, the Restricted Producer must provide compensation to other Producers in accordance with paragraph 7 of Schedule 6; and
- (d) In order to secure the obligations of the Restricted Producer under paragraph 7 of Schedule 6, within 30 days of the date that the Restricted Producer declines an audit or rejects the Arbiter's Determined Amount in respect of a Relevant Year, the Restricted Producer must provide to PWCS an irrevocable, unconditional bank guarantee, or equivalent security acceptable to PWCS, in such form and from such institution as is acceptable to PWCS, for the amount being not less than the Relevant Sum (as defined in subparagraph 7(a) of Schedule 6) multiplied by the average of the Restricted Producer's Arbiter's Adjustment for each Calendar Quarter of the Relevant Year. If the Restricted Producer does not provide such security to PWCS, then notwithstanding any other provision of the Coal Handling Services Agreement, PWCS may refuse to provide Coal Handling Services to the Producer. The security will be returned to the Restricted Producer by 31 January in the year following the Relevant Year, unless prior to that time PWCS has drawn down on the security in accordance with this subparagraph and paragraph 7 of Schedule 6.

8. The Administrator will determine the Final Demand Amount as follows:

- (a) If the Arbiter's Determined Amount is greater than the Forecast Requirement, or if the Producer has not been audited, the Final Demand Amount shall equal the Forecast Requirement;
- (b) If the Arbiter's Determined Amount is less than the Forecast Requirement and the Producer accepts the Arbiter's Determined Amount, the Final Demand Amount shall equal the Auditor's Determined Amount; and
- (c) If the Auditor's Determined Amount is less than the Forecast Requirement and the Producer rejects the Arbiter's Determined Amount, the Final Demand Amount shall equal the Forecast Requirement and the Producer will be subject to the conditions stated in paragraph 7 of this Schedule.

## SCHEDULE 4

### DEMAND AND SUPPLY BALANCING

1. The introduction of the Scheme in any Relevant Year is subject to Industry Support.
2. The Forecast System Demand for a Relevant Year shall be the aggregate of all Final Demand Amounts for that year, as determined by the Administrator.
3. If at least one month prior to the commencement of the Relevant Year it is determined that the Forecast System Demand for the Relevant Year is equal to or less than the forecast Available Capacity plus 3 million tonnes for the Relevant Year:
  - (a) The Loading Allocation of each Producer for the Relevant Year shall be equal to its Final Demand Amount for that year;
  - (b) Provided that sufficient additional Coal Chain Capacity is available, any Producer may apply to the Administrator for additional Loading Allocation, which will be issued on a first-come, first-served basis;
  - (c) If at any point during the year PWCS determines that the Objectives are not being met due to excess demand, then it will direct the Administrator to implement the Scheme for the remainder of the year in accordance with this Annexure. Under the Scheme each Producer will be given its pro-rata allocation of the available capacity for the year according to its Forecast Requirement, less amounts already shipped by the Producer in the year, distributed on a quarterly basis; and
  - (d) The remainder of this Schedule will not apply, unless the circumstances described in the previous subparagraph apply.
4. If the Forecast System Demand exceeds the Available Capacity by 3 million tonnes or more in the Relevant Year, the Administrator will determine the Annual Pro-rata Allocation of each Producer through capacity balancing in accordance with this Schedule.
5. The Annual Pro-rata Allocation for each Producer will be determined by the Administrator as follows:
  - (a) The Administrator will calculate the factor ("**Annual Capacity Factor**") that, when multiplied by the Forecast System Demand for the Relevant Year, will produce an amount that is equal to Available Capacity; and
  - (b) The Annual Pro-rata Allocation will be calculated for each Producer by multiplying the Annual Capacity Factor by the Producer's Final Demand Amount.
6. Each Producer must notify the Administrator ("**Producer Notice**") that it:
  - (a) Accepts the Annual Pro-rata Allocation as determined by the Administrator to be its Annual Loading Allocation; or
  - (b) Wishes to participate in the Demand Reduction Auction (each such Producer so participating hereafter referred to as a "**Participating Producer**").

7. If sufficient interest exists, the Administrator may facilitate the Demand Reduction Auction. The conduct of the Demand Reduction Auction and the subsequent determination of Annual Loading Allocations will be agreed between the Administrator and Participating Producers prior to commencement of the auction, however will include the following features:
- (a) Participating Producers will be required to submit a series of bids indicating their willingness to reduce demand by more or less than their required pro-rata reduction at specified per tonne prices;
  - (b) The auction clearing price will be determined by the Administrator;
  - (c) The Administrator will facilitate any redistribution of Loading Allocation around Participating Producers' pro rata allocations as required by the auction outcome. That is, Participating Producers whose required pro-rata reduction is less than their accepted bids will transfer allocation to Participating Producers whose required pro-rata reduction exceeds their accepted bids, with all transactions completed at the auction clearing price; and
  - (d) Settlement of the auction will take place as agreed between Participating Producers prior to its conduct.
8. If a Producer can demonstrate that its Final Demand Amount can be shipped without affecting the amounts exported by other Producers (for example use of a different delivery method), PWCS may instruct the Administrator that the Loading Allocation of the Producer for the Relevant Year shall be equal to its Final Demand Amount for that year.

## SCHEDULE 5

### CAPACITY DISTRIBUTION

1. The Administrator will in respect to the Relevant Year determine Quarterly Loading Allocations for each Producer in a manner which seeks to match both the capacity profile and individual Producers' demand profiles as closely as possible.
2. At the start of each Relevant Year each Producer will be provided an additional allocation ("**Conditional Allocation**") for each Calendar Quarter of that year equal to 5% of the Producers' Quarterly Loading Allocation, which may be utilised by each Producer after it has utilised its Quarterly Loading Allocation and its upper flexibility amount for the relevant Calendar Quarter.

A Producer may only make an Application utilising a particular Calendar Quarter's Conditional Allocation during that quarter and after it has lodged Applications utilising its Quarterly Loading Allocation and its upper flexibility amount for that quarter.

If the vessel queue at the Port of Newcastle exceeds an average of 25 vessels over a three week period, the Administrator will notify Producers that Conditional Allocation can no longer be used. The Administrator will reinstate the use of the Conditional Allocation if the average vessel queue falls below 15 over a three week period.

The three week period in each case will include one week of actual queue data and two weeks of forward queue data.

For the purposes of this paragraph, the queue shall be calculated excluding vessels for which unavailability of Coal at the loadpoint is restricting vessel loading.

In the event that the Administrator advises Producers that Conditional Allocation can no longer be used, PWCS will not accept Applications that include any Conditional Allocation amount, however PWCS may not cancel any existing Shipment Contract that includes a Conditional Allocation amount, subject to the other provisions of the Coal Handling Services Agreement.

Conditional Allocations may not be exchanged or transferred between Producers.

3. Notwithstanding any other provision of this Annexure or in the Coal Handling Services Agreement or otherwise, any amount determined by the Administrator for the Forecast Requirement or Loading Allocation of a Producer, or Forecast System Demand, Coal Chain Capacity or Operational Allowance for a Relevant Period, is not a guarantee by PWCS, the Administrator, any of the Auditors, the Arbiter or any other party that PWCS will load any particular quantity of Coal onto vessels in the Relevant Period or will otherwise provide Coal Handling Services in respect to any particular quantity of Coal in the Relevant Period.

## SCHEDULE 6

### DISRUPTIONS TO A PRODUCER

1. For the Purposes of the Scheme:
  - (a) the Lower Flexibility Amount will be determined as follows –
    - for Producers with a Loading Allocation for the Relevant Year equal to or in excess of 1,000,000 tonnes, the Lower Flexibility Amount will be 90,000 tonnes;
    - for Producers with a Loading Allocation for the Relevant Year less than 1,000,000 tonnes, the Lower Flexibility Amount will be reduced proportionally. For example if a Producer's Loading Allocation is 500,000 tonnes (50% of 1,000,000 tonnes), its Lower Flexibility Amount will be 45,000 tonnes (50% of 90,000); and
  - (b) the Higher Flexibility Amount will be determined as follows –
    - for Producers with a Loading Allocation for the Relevant Year equal to or in excess of 1,000,000 tonnes, the Higher Flexibility Amount will be 90,000 tonnes; and
    - for Producers with a Loading Allocation for the Relevant Year less than 1,000,000 tonnes, the Higher Flexibility Amount will be reduced proportionally. For example if a Producer's Loading Allocation is 100,000 tonnes (10% of 1,000,000 tonnes), its Higher Flexibility Amount will be 9,000 tonnes (10% of 90,000).
2. If during the Relevant Period there is a change in the groupings of Producers from that described in Attachment A, the Administrator may, in order to achieve the Objectives, determine that the flexibility amounts referred to in the previous paragraphs of this Schedule be changed to a different amount.
3. If at midnight on the 5<sup>th</sup> day after the conclusion of any Calendar Quarter ("**Relevant Quarter**") a Producer ("**Relevant Producer**") has an Unused Portion (as defined in clause 3.7 of Annexure 4E) that exceeds the Lower Flexibility Amount for that Relevant Quarter (such excess amount referred to as "**Relevant Amount**") then subject to the other provisions of this Schedule the Relevant Producer must, in the manner provided below, compensate those other Producers who do not themselves have a Relevant Amount for the Relevant Quarter (such Producers referred to hereafter in this Schedule as "**Participating Producers**"), for the opportunity they have lost in not being able to use the Relevant Amount.
4. If the Relevant Producer is an Unrestricted Producer and has not, prior to the start of the Relevant Quarter, notified the Administrator in accordance with clause 4.3 of Annexure 4E of its inability to use the Relevant Amount, then an amount equivalent to the Relevant Amount will be deducted from the Producer's Loading Allocation for the next Calendar Quarter and shared among those Participating Producers who are prepared to accept the allocation and the obligations attaching to that allocation during that next Calendar Quarter, as determined by the Administrator.

5. The extra Loading Allocation will be shared pro-rata amongst the Participating Producers in accordance with their respective Loading Allocations at the end of the Relevant Quarter.
6. If the next Calendar Quarter falls in the following calendar year and a Scheme exists in that year, then the deduction of Loading Allocation will be applied in that next Calendar Quarter.
7. If the Relevant Producer is a Restricted Producer, then the Producer must compensate all Participating Producers in the following manner:
  - (a) The Relevant Producer must pay to PWCS an amount ("**Financial Compensation Amount**") calculated on the quantity (in tonnes) that is the lower of either the Relevant Amount or the Arbitrator's Adjustment for the Relevant Quarter, multiplied by the sum ("**the Relevant Sum**") of \$20.00.
  - (b) The Board may prior to the commencement of each Relevant Year in its absolute discretion vary the Relevant Sum, to apply in the Relevant Year, to reflect changes in the value of the lost opportunity for Participating Producers in not being able to use the Relevant Amount in each case.
  - (c) After calculating the Financial Compensation Amount, PWCS will issue an invoice to the Restricted Producer for that amount, which must be paid to PWCS within 30 days of the date of the invoice. The provisions of clause 2.3.6 to 2.3.9 inclusive of the Coal Handling Services Agreement will apply in respect of the amount so invoiced.
  - (d) If the Restricted Producer fails to pay to PWCS the Financial Compensation Amount within the time provided in accordance with the previous subparagraph, PWCS may immediately draw down upon the bank guarantee provided by the Restricted Producer in accordance with paragraph 7 of Schedule 3, in payment of the Financial Compensation Amount.
  - (e) Any Financial Compensation Amount paid to PWCS in accordance with this paragraph will be distributed by PWCS to all Participating Producers in proportion to their respective Loading Allocation at the end of the Relevant Quarter.
  - (f) Subject to the following subparagraph, should the Relevant Amount exceed the Arbitrator's Adjustment for the Relevant Quarter then the amount of that excess will be deducted from that Producer's Loading Allocation for the next Calendar Quarter and pro-rata shared among the Participating Producers, in the same manner as described in paragraphs 4, 5 and 6 of this Schedule; and
  - (g) In the event that a Restricted Producer notifies the Administrator in accordance with clause 4.3 of Annexure 4E of its inability to use the Relevant Amount, the compensation obligations described in the previous subparagraph will not apply to the Producer in respect of the Relevant Quarter, even if the Administrator is unable to redistribute the Relevant Amount during the Relevant Quarter. Nothing in this subparagraph shall affect the obligation of the Restricted Producer to pay the Financial Compensation Amount in accordance with this paragraph 7.

8. If in a Relevant Period there is a Relevant Amount in respect of a Restricted Producer and PWCS determines in accordance with clause 6.7 of Annexure 4E that part or all of the Relevant Amount was not able to be shipped during the Relevant Period due to an Event of Force Majeure (as defined in Annexure 4E), the Producer will not, in respect of the amount so determined, be required to pay the Financial Compensation Amount otherwise payable under paragraph 7 of this Schedule.
9. The Producer may not invoke the operation of clause 2.11.4 of the Coal Handling Services Agreement to:
  - (a) affect the application or operation of this Schedule or any calculation or determination made under this Schedule; or
  - (b) avoid any obligation applying to the Producer in accordance with this Schedule, or to delay the performance of that obligation.
10. By issuing invoices to Restricted Producers, receiving payment of Financial Compensation Amounts and paying those amounts to Participating Producers in accordance with this Annexure, PWCS is acting as agent for Participating Producers.

For the purposes of the GST law:

- (a) PWCS will be treated as making the supplies to the relevant Restricted Producer or acquiring the supplies from the relevant Restricted Producer or both;
- (b) the relevant Participating Producers will be treated as making corresponding supplies to PWCS or acquiring the supplies from PWCS or both; and
- (c) in the case of supplies to the relevant Restricted Producer:
  - (1) PWCS will issue to the Restricted Producer, in PWCS's own name, all the tax invoices and adjustment notes relating to those supplies; and
  - (2) the relevant Participating Producers will not issue to the Restricted Producer any tax invoices and adjustment notes relating to those supplies.

For the purposes of this paragraph, "GST law" means the law in Australia applying to goods and services tax, including under A New Tax System (Goods and Services Tax) Act 1999 (Cth).

## ATTACHMENT A

### LIST OF PRODUCERS AND ASSOCIATED MINES

(as per September 2005 Demand Forecasts)

Producer	Mine
<b>Anglo Coal Australia Pty Ltd</b>	Dartbrook Drayton
<b>BHP Billiton</b>	Mt. Arthur
<b>Bloomfield Collieries</b>	Bickham Bloomfield Rix's Creek
<b>Camberwell Coal Pty Ltd</b>	Camberwell Open Cut
<b>Centennial Coal Company</b>	Newstan
<b>Coal &amp; Allied</b>	HVO Warkworth / Mt Thorley Bengalla Mine
<b>Donaldson Coal</b>	Donaldson Tasman
<b>Wambo Coal Pty Ltd</b>	Wambo
<b>Gloucester Coal</b>	Stratford Mine
<b>Muswellbrook Coal Co Ltd</b>	Muswellbrook Coal Co No. 1 & No. 2 Open Cut
<b>Glennies Creek Coal Management Pty Ltd</b>	Glennies Creek Underground & Opencut
<b>Southland Coal Pty Ltd</b>	Southland Colliery
<b>White Mining Limited</b>	Ashton
<b>Xstrata Coal Australia</b>	Cumnock United Liddell Bulga West Wallsend / Teralba Mt Owen Complex Ulan
<b>Lake Coal</b>	Chain Valley (Road Coal Only)
<b>Whitehaven Coal Mining Limited</b>	Whitehaven Werris Creek* East Boggabri*
<b>Resource Pacific Ltd</b>	Newpac No.1 Colliery
<b>Idemitsu Boggabri Coal Pty Ltd</b>	Boggabri*
<b>Hunter Enviro- Mining Operation</b>	Hebburn No.3*
<b>Specialty Coal Pty Ltd</b>	Great Greta Extended*

\* Indicates a new mine commencing production during calendar year 2005