



30 November 2004

Mr Scott Gregson
Acting General Manager Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Attention: Mr David Hatfield / Ms Jaime Norton

Dear Mr Gregson

**Port Waratah Coal Services Limited authorisation applications (A30236-A30238)
Response to interested parties' submissions**

1 Introduction

- 1.1 Port Waratah Coal Services Limited ("**PWCS**") has lodged applications with the Commission to authorise the proposed Medium Term Capacity Distribution System ("**Medium Term CDS**"). On 11 October 2004, the Commission wrote to industry participants requesting submissions on the authorisation application. The Commission has now received submissions from a number of industry participants.
- 1.2 This letter is to provide the Commission with a copy of the final Medium Term CDS Protocol ("**Protocol**") as approved by the PWCS Board and to respond to the submissions concerning Part II of the request for interim authorisation.

2 The Protocol

- 2.1 We have enclosed a copy of the final Protocol document for the public register. PWCS is seeking interim authorisation for the Medium Term CDS based on this Protocol.
- 2.2 In arriving at this final form of the Protocol, PWCS has held detailed discussions with industry participants (including those who made submissions to the Commission). PWCS made the detailed amendments available to the industry for over 1½ months, during which PWCS actively sought meetings with all holders of a Coal Handling Services Agreement ("**CHSA**"), including travelling to Sydney, Brisbane and Tokyo to meet with industry participants and coal exporters. Multiple meetings were held with industry participants who have made submissions to the Commission.

- 2.3 The consultation process culminated in two industry workshops on 11-12 November 2004 and a number of teleconferences in the following week. During these workshops and teleconferences, details of the proposed CHSA were reviewed with PWCS customers and issues were raised for discussion.
- 2.4 Substantially all the issues raised by the CHSA holders have been incorporated into the CHSA as it relates to the Medium Term CDS. PWCS has attained a high degree of support for the solution, and expects the scheme will continue to enjoy very good industry support.
- 2.5 Nevertheless, PWCS notes that the Medium Term CDS is just that. It is a medium term solution to the capacity constraints in the Hunter Valley coal chain. PWCS is actively working with industry participants on a long term solution. Now that the Protocol has been finalised, an industry workshop on the long term solution has been scheduled for Monday, 13 December 2004.

3 The submissions generally

- 3.1 PWCS is pleased to note that the majority of submissions received by the Commission express strong support for the Medium Term CDS. This reflects the strong industry support expressed to PWCS during its consultation with industry participants on the proposed changes to the CHSA.
- 3.2 PWCS is also pleased to note that even those submissions that raised concerns — the submissions from the Newcastle Coal Infrastructure Group (“**NCIG**”) and White Mining — do not raise substantial concerns with the design, structure or mechanics of the Medium Term CDS.
- 3.3 This reflects, in PWCS’ view, the strong support for the Medium Term CDS among industry participants, having regard to the successful operation of the current short term capacity distribution system in 2004, as previously authorised by the Commission.
- 3.4 Nevertheless, PWCS welcomes the opportunity to address some of the detail of the concerns raised by NCIG and White Mining.

4 NCIG Submission

NCIG concerns

- 4.1 The NCIG made a submission dated 19 November 2004. The key concerns it raised were that:
- (a) PWCS needs to be mindful that in the medium term solution, it does not preserve the status quo, thereby delaying a long term solution to increase capacity and that significant effort should be put into implementing a long term solution;
 - (b) the “take or pay arrangement ... only be applied as an integral part of an agreed Capacity Balancing Scheme (ie within Annexure 4F) and ... limited to twelve months of tonnage forecasts”; and
 - (c) the scheme should only be authorised for one year unless the Medium Term CDS includes a requirement to obtain industry support for its continuation each year, demonstrated by the support of 75% of producers (by tonnage) and 51% of producers (by number) using the Hunter Valley coal chain.

- 4.2 PWCS is aware of these concerns and respects the NCIG's point of view. PWCS believes that it has made substantial efforts to accommodate the NCIG's views and that some of these matters need a fuller explanation to understand PWCS' perspective on these matters. Nevertheless, PWCS wishes to continue working with the NCIG and the broader coal industry to seek to do its best by all of its customers.

Implementing the long term solution

- 4.3 PWCS has engaged in extensive industry consultation through PWCS managers and Accenture to design a Medium Term CDS. This is to ensure there is an appropriate scheme in place in the medium term (ie, until the long term solution is introduced) that enjoys broad industry support and to ensure that any issues with the current short term capacity distribution system are addressed in the Medium Term CDS.
- 4.4 PWCS has undertaken this process transparently. It is seeking to operate the Port efficiently given the overall coal chain capacity constraints the Port faces – a factual issue of which the Commission is aware. It is not in PWCS' commercial interest to frustrate capacity expansion or investment in the Hunter Valley or coal exports. PWCS' commercial incentive is actually to ensure that its customers, the coal producers, view positively and are commercially satisfied with its cost, services and facilities. PWCS has every commercial incentive to ensure that its customers do not see a commercial need to build a new terminal and are commercially satisfied with PWCS. Given the size of the customers of PWCS, and the alternative options they have, there is therefore a real commercial pressure to ensure PWCS acts efficiently and actively seeks to implement a long term solution.
- 4.5 Given the current high demand for coal exports, there is a shortage of capacity in the Hunter Valley coal chain that ultimately can only be resolved through a long term solution requiring extensive investment by ARTC, above rail operators and coal producers, as well as PWCS itself. This will take several years to achieve and, critically, much of this is outside PWCS' control. Accordingly, authorisation has only been sought to operate the Medium Term CDS for up to 5 years to enable the port to operate efficiently until the long term solution can be introduced. PWCS is not seeking authorisation beyond the lead-time required for the implementation of a long term solution.
- 4.6 PWCS also has a history, as the world's largest coal export loading port, of responding to increased demand by expanding capacity. PWCS has in fact already undertaken significant steps and committed capital aimed at addressing the long-term issues of capacity provisioning. Initiatives underway within PWCS include:
- Obtaining forecasts for the next three years from Producers to better understand the level of aggregate demand for coal chain capacity;
 - Formalisation of the Hunter Valley Logistics Team to create a body with clear objectives to maximise the capacity of the existing coal chain infrastructure, with substantive industry representation and input. There has been extensive consultation with other logistics service providers and they have already committed significant investment. The expansion plan is currently being subject to detailed engineering design in preparation for the commencement of additional construction activities in 2005. PWCS has kept its customers and the Commission informed of this work;

- Multi-million dollar investment in technology to equip the logistics team with tools to increase capacity by enabling more sophisticated planning and logistics management capabilities;
 - Detailed engineering of the investment required to increase PWCS capacity to 102 Mtpa by 2007 (25% increase);
 - A detailed engineering study is expected to commence in Q1 2005 to assess the cost and schedule required to increase the capacity to 110 Mtpa. There are a number of issues to consider, including an environmental impact assessment, consent conditions and Hunter River dredging, etc. A report is expected to be provided to the PWCS Board in March 2005 to consider the expansion scope;
 - PWCS has bid for additional land next to the Kooragang terminal to allow PWCS to build capacity in excess of 110 Mtpa. PWCS have made it clear that the bid for additional land is exclusively to deliver increased Port capacity. Substantial funds have been dedicated to the land acquisition reflecting PWCS' clear intention to expand the port capacity;
 - Conceptual planning of the level and nature of investment required to take the coal chain to beyond 120 Mtpa . Detailed modelling work is underway to further develop and cost this conceptual plan. PWCS recently submitted a comprehensive submission to the Regional Management Lands Corporation which included port expansion plans for capabilities up to 180 Mtpa; and
 - Commencement of a structured programme of industry consultation on the development of a long-term solution aimed at improving capacity utilisation and delivering new capacity in order to meet demand. PWCS is working with the industry to consider a range of mechanisms necessary to enable the investment to occur, including the potential for the introduction of longer term take-or-pay arrangements to enable clear investment signals to be provided and to underpin the necessary capital investment while providing price certainty to PWCS customers.
- 4.7 PWCS believes it has put forward a long term solution in a number of forms. PWCS commissioned work in February 2004 to identify how the entire coal chain can be expanded to 120 Mtpa. It has followed this up with detailed modelling and presentations. Slides summarising this work have been presented at industry consultation sessions, including to members of the NCIG. The evidence shows that PWCS is taking extensive action to increase its own capacity and that of the coal chain as rapidly as possible and that this information has been widely shared with senior executives of all customers.
- 4.8 Demonstrating PWCS' commitment to this issue, the directors of PWCS during the September 2004 Board meeting noted that:
- PWCS' philosophy is to ensure PWCS is never a constraint to the Hunter Valley Coal Chain. This will be achieved by always endeavouring to ensure that PWCS' capacity exceeds the current capacity of the Hunter Valley Coal Chain.
 - It is clear that PWCS needs to expeditiously expand to 102 Mtpa and PWCS should actively publicise this expansion;

- It is also critical that PWCS has a strategy to expand beyond 102 Mtpa;
 - Once a strategy to expand beyond 102 Mtpa has been developed, PWCS should immediately proceed with obtaining the required approvals to ensure they are in place and do not delay any further expansion timeframes; and
 - PWCS should engage Barlow Jonker to prepare a market analysis of future demand for Hunter Valley coal, for comparison with Producers' demand forecasts.
- 4.9 PWCS therefore believes there is ample evidence that it is not seeking to maintain the status quo or hamper development of a long term solution to coal chain capacity constraints in the Hunter Valley.
- 4.10 At a conceptual level, the PWCS authorisation should be seen in light of this transition to a long term solution. Authorising the Medium Term CDS will allow a more efficient transition to the long term solution, without in any way taking any pressure off the need to work towards implementing the long term solution.

Take-or-pay arrangements

- 4.11 NCIG has submitted that the take-or-pay elements of the Medium Term CDS:
- (a) should be included in Annexure 4F of the CHSA;
 - (b) should only be allowed to apply to forecast tonnage requirements one year in advance; and
 - (c) should not be changed without "industry agreement".
- 4.12 NCIG notes that it is "not opposed to a take-or-pay concept in principle and will be seeking to discuss with PWCS the potential introduction of take-or-pay over the longer term to support long-term expansion of PWCS".
- 4.13 The primary point PWCS wishes to make in response to NCIG's concern is that whether or not PWCS has take-or-pay contractual obligations with its customers and for how long, is essentially a commercial matter between PWCS and its customers. Take-or-pay obligations are a common feature of coal loading arrangements throughout the world and are highly desirable for infrastructure providers to manage investment risk.
- 4.14 On that basis, it is inappropriate to set out the take-or-pay arrangements in that part of the Protocol requiring authorisation by the Commission. It is also commercially inappropriate to seek to require that PWCS be restrained commercially in how it operates its business by requiring industry agreement to change or use take-or-pay obligations.
- 4.15 Nevertheless, consistent with the general approach of PWCS seeking to consult with its customers, clause 6.12 of Annexure 4E of the CHSA provides that:
- (a) the take-or-pay arrangements are associated with the Medium Term CDS insofar as they are part of the general commercial arrangements under the CHSA which involve the overall provision of coal loading services;
 - (b) PWCS will not change those take-or-pay arrangements without further consultation with Customers.

- 4.16 Accordingly, currently, the take-or-pay arrangements only apply to the binding 12 month forecasts provided under Annexure 4E, and PWCS has undertaken to consult with the industry before changing these arrangements.
- 4.17 Therefore, this essentially means that producers are only commercially obliged to deal with PWCS for one calendar year at a time under the take-or-pay arrangements and in any event have their own commercial ability to determine the extent of their obligation to deal with PWCS under the take-or-pay.
- 4.18 PWCS notes, however, that it has discussed with customers that it would like to consult with them to explore the implementation of longer-term take-or-pay arrangements to enable efficient investment in future capacity. Clause 6.12 of Annexure 4E states that PWCS “intends, by no later than 31 December 2009, to enter into longer term take-or-pay arrangements”. Take-or-pay arrangements of longer than one year are common at other coal-loading facilities (eg, 10 years at Dalrymple Bay in Queensland).
- 4.19 Consistent with this stated intention, PWCS has begun the consultation process with its customers in order to develop a long-term solution that ensures adequate capacity is provided in a way that is economically efficient, addresses the large financial risks associated with significant infrastructure investments and is effective in meeting its customers’ needs. An initial industry workshop has been scheduled for Monday, 13 December 2004 during which PWCS will be presenting its proposed approach to consultation to develop a long-term solution that includes take-or-pay arrangements.
- 4.20 The NCIG submission suggests that the introduction of longer term take-or-pay provisions will inhibit the development of a new competing coal loader. This is a commercial decision for each coal producer. If a producer is offered better terms from a new coal loader, as would undoubtedly be offered early in the planning stages of any new coal loader in order to seek commitments, then the producer would simply adjust its throughput during the relevant year to allow transition to a new coal loader as part of any existing take-or-pay arrangement with PWCS. PWCS is of the view that any competing port facility, particularly if independently funded, will require long term take-or-pay arrangements.
- 4.21 For the sake of completeness, PWCS notes NCIG’s statement that its members’ development plans account for the majority of planned growth in exports from Newcastle over the next five years. PWCS is not aware of any five year forecasts that have been given. On the basis of the three year forecasts provided, NCIG’s members account for approximately 30% of the planned growth in export output in that period. This is not to minimise the importance of NCIG members as PWCS customers. However, the challenge of how to deal with excess demand is not unique to NCIG members and any solution must be for the benefit of the industry broadly.
- 4.22 PWCS therefore believes it is inappropriate to seek any condition that fetters PWCS’ ability to include contractual take-or-pay arrangements as they are essentially a commercial matter. The take-or-pay arrangements will continue to apply in any year when the Scheme does not operate (ie, where there is not at least 3 Mt excess demand for capacity) as the take-or-pay arrangements are commercially separate from the capacity distribution. Such a condition is particularly inappropriate in the case where NCIG has indicated that it may be a potential competitor, such that fettering PWCS could be argued to be in its competitive interest. In any event, PWCS has undertaken to consult with its

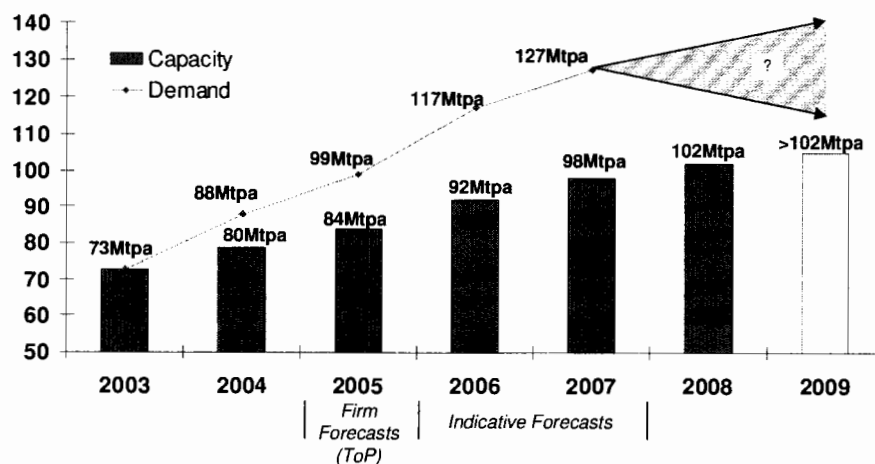
customers before changing the current take-or-pay arrangements, but needs to retain the commercial flexibility to consider longer take-or-pay arrangements in the future, without this unnecessarily affecting the operation or continuation of the Medium Term CDS.

- 4.23 Importantly, the ability to introduce or change take-or-pay obligations is already inherent in the CHSA and is not a new right sought to be included as part of the changes to the CHSA.
- 4.24 In conclusion, PWCS therefore submits that the Commission should not seek to require the take-or-pay arrangements to be part of Annexure 4F or to require that anything beyond the change procedures already in the CHSA should be required to implement changes to those take-or-pay arrangements.

The time period of authorisation

- 4.25 PWCS has applied for authorisation for the Medium Term CDS for a period of up to 5 years. As explained in the PWCS application for authorisation, a mechanism is required to be in place once the authorisation for the Short Term Capacity Distribution System expires on 31 December 2004, to ensure substantial vessel queues do not return.
- 4.26 The three year forecast obtained by PWCS for the purposes of the Medium Term CDS has identified a widening gap between the level of demand and the available capacity of the system over the next three years. That is, despite initiatives by coal chain service providers to increase capacity by approximately 20% during the next three years, demand is forecast to grow at an even greater rate as set out in the graph below:

**Hunter Valley Coal Chain Capacity & Demand
Mtpa, 2003 to 2005**



- 4.27 This suggests a demand balancing mechanism in the Medium Term CDS may be required at least until the capacity can increase sufficiently, or demand moderates, to bring the system into balance in the future. Should the Medium Term CDS not be available after 2005, the demand forecasts indicate that substantial vessel queuing and associated demurrage costs would return very quickly.

- 4.28 Despite this anticipated need for the Medium Term CDS to operate throughout the next 5 years, PWCS has included in the solution design the tests to ensure no demand balancing mechanism is applied unless there is at least 3 Mt of excess demand forecast in the particular calendar year, or if there is insufficient industry support for it to continue.
- 4.29 PWCS strongly submits that it would be inefficient, costly and time-consuming to have to seek authorisation from the Commission for the continuation of the Medium Term CDS after the first 12 months, as suggested by the NCIG in its submission.

Industry support required for continuation

- 4.30 In its consultation with customers about the proposed changes to the CHSA, the only substantial area of disagreement between PWCS and the NCIG was on the issue of requiring industry support for the continuation of the scheme in subsequent years, and what constitutes industry support.
- 4.31 NCIG proposed that industry support be obtained in order to extend the Medium Term CDS beyond calendar year 2005. NCIG proposed that the requisite level of industry support be defined as the support of 75% of currently exporting producers, calculated by volume of export coal **and** of 51% of the number of producers shipping.
- 4.32 PWCS considered a range of alternatives in respect of an industry support test and has considered the opinions of all its customers, including NCIG, in developing such a test.
- 4.33 PWCS supports the concept of requiring industry support for the continuation of the scheme, since the scheme is intended to act in the interests of PWCS' customers. Accordingly PWCS has agreed to include a test that maintains the intent of the clause requested by NCIG.
- 4.34 Instead of proceeding with a 75% **and** 51% support level as requested by the NCIG, PWCS has instead included a 75% by volume **or** 51% by number support level. Under the test as proposed by NCIG, there is a risk that during a year of high excess demand (for example 2006 demand as forecast by the producers will exceed anticipated coal chain capacity by at least 20Mt) producers with as little as 12% of the throughput (based on 2005 forecast data), but representing 51% of the Producers by number, could prevent the scheme from continuing. While that small minority of producers may find excessive vessel queuing and consequent demurrage costs to be commercially acceptable, they would essentially impose that significant cost on the remaining producers (representing 88% of throughput). It is difficult to see how such a situation would demonstrate a lack of industry support for the Medium Term CDS. Nor is it clear how this would achieve a greater public benefit than what PWCS has proposed in the Protocol.
- 4.35 Accordingly PWCS has determined that a test requiring support by 75% by volume **or** more than 50% by number of producers is a more reasonable test to achieve the intent desired by NCIG, whilst ensuring the intended benefits of the scheme cannot be prevented from being realised by a small volume of coal throughput. PWCS believes this test will achieve the desired demonstration of industry support originally envisaged, but also acts in the best interests of customers by ensuring that if the majority of producers, or a large majority of throughput, want the scheme to continue, then the intended benefits of the scheme can be realised.

- 4.36 PWCS therefore submits that the Commission should authorise the Protocol on the basis of the test for ongoing industry support set out in the Protocol, not the higher threshold NCIG has suggested, which is neither in the public interest nor in the interests of the industry as a whole.

5 White Mining Submission

White Mining concerns

- 5.1 In its submission, White Mining identified the following concerns:

- (a) the physical compensation mechanism that applies when a producer does not use its loading allocation (ie, where it is forced to operate with a reduced loading allocation in the next quarter) has a greater impact on small and medium producers;
- (b) PWCS does not guarantee to load vessels; and
- (c) the costs of conducting an auction should be borne by those participating in it.

Tonnage Compensation Mechanism for Unused Allocation

- 5.2 White Mining claim that the physical compensation mechanism, which applies when a producer does not use all its loading allocation (less the flexibility provisions), potentially imposes a higher cost on small and medium producers and that this is further compounded by the 5% conditional allocation that potentially reduces the liquidity of the secondary exchange.
- 5.3 In response PWCS notes that the Physical Compensation is a critical element of the solution, aimed at achieving two objectives:
- (a) It provides an incentive to use allocation or to transfer it to another party who can use it. This is important to ensuring maximum use of available capacity.
 - (b) It compensates other producers when one producer does not use loading allocation.
- 5.4 There are a wide variety of measures in the CHSA that are available to White Mining to reduce the risk of exposure to the physical compensation including:
- (a) +/-90kt quarterly allowance, which for small producers represents a very high percentage of flexibility relative to their underlying allocation;
 - (b) Expanded period in which allocation must be used at the end of each quarter (+5 days -9 days); and
 - (c) Availability of secondary exchange of loading allocations, which enables a producer to transfer loading allocation to another party (the Administrator is providing an enhanced web-site to facilitate exchanges in 2005).
- 5.5 Any producer may avoid the imposition of the physical compensation arrangements in a quarter by providing a notice prior to the start of the quarter of the producer's inability to use loading allocation in that quarter. This provides the producer with relief from any physical compensation arising from under-use in that quarter.

- 5.6 With forecast demand of at least 94.7 Mt for 2005, it is anticipated that the secondary exchange of loading allocation will work effectively as a tool for White Mining and all producers to manage this risk. A number of producers have already identified that they will seek to acquire additional loading allocation from a party unable to use all their entitlement during 2005.
- 5.7 In respect of the 5% conditional allocation and its impact on the secondary exchange of loading allocation, it is noted that NCIG (of which White Mining is a member) specifically requested the inclusion in the CHSA of such a conditional allocation as a key means to reduce the reliance on the secondary exchange, should there be a collective under-use of allocation across the industry. Given the level of excess demand forecast for 2005, it is not anticipated that the 5% conditional allocation will dilute liquidity in the market, and as requested by White Mining if a producer is able to identify an exchange that balances their under-use with "over-use" of another producer, then the Administrator will process an exchange of loading allocation. The enhanced secondary exchange and the Administrator will assist any producer in finding a counterparty to an exchange of loading allocation.

PWCS Have No Guarantee to Load

- 5.8 It is impractical for PWCS to guarantee the performance of the coal chain. PWCS is not able to control the delivery of coal from the mine site to the port, and is therefore unable to guarantee the loading of vessels.
- 5.9 There is however a significant commercial incentive on PWCS to deliver the planned capacity. Should PWCS (or any other logistics services provider) not deliver against the planned capacity, then PWCS will be required to reduce the loading allocation balances of all parties in line with the loss of capacity. This reduces PWCS potential take-or-pay revenue stream, providing a significant incentive for PWCS to ensure it delivers against its plans. This creates an obligation on PWCS that is just as great as the obligation on Producers to use the allocation for which they have asked.

Auction Costs

- 5.10 White Mining have indicated they believe all auction costs should be borne by auction participants only.
- 5.11 As there are no producers willing to sell any of their pro-rata loading allocation for 2005, there will be no demand reduction auction conducted in 2004 for the purposes of determining 2005 loading allocations. The fact that no coal producer is willing to reduce its coal loading allocation indicates the high degree of demand for coal handling services that will apply in 2005.
- 5.12 With respect to auctions that may occur in future years, PWCS notes that:
- (a) the administrative costs of the auction (eg the costs of any third party to conduct the auction) are paid for by PWCS out of general revenue and are therefore shared across the industry. These costs are minimal; and
 - (b) the settlement costs of the auction (ie the financial settlement of any trades arising from the outcome of the auction) are potentially substantial (>\$100 million) and born entirely by the auction participants only. There are no settlement costs levied on any party who chooses not to participate in the auction.

6 Conclusion

- 6.1 There is strong industry support for the Medium Term CDS, demonstrated in the submissions provided to the Commission and expressed to PWCS during its consultation on the Medium Term CDS.
- 6.2 The concerns raised by NCIG and White Mining do not fundamentally oppose the need for, or the proposed structure and operation of, the Medium Term CDS generally.
- 6.3 PWCS submits that NCIG's concerns about the proposed take-or-pay arrangements, and in particular PWCS' ability to change them during the term of the authorisation, go to a fundamental commercial matter between PWCS and its customers. PWCS has only imposed take-or-pay arrangements on a rolling 12-month basis at this stage (well below what is imposed by other coal terminals, and what would be expected from a new competitor) and will consult with customers before changing them. On that basis, the Commission should not impose any conditions on authorisation relating to the take-or-pay arrangements.
- 6.4 To be effective, and to achieve the desired objective of only operating until the long term solution becomes effective, the Medium Term CDS must operate for up to 5 years. NCIG's suggestion that it should only operate for 12 months is inappropriate. If there is a change in circumstances during the 5 years, the Commission can revisit the authorisation. There is no need to impose the burden of seeking re-authorisation after 12 months.
- 6.5 PWCS supports NCIG's suggestion that the Medium Term CDS should only continue each calendar year if it continues to have industry support. However, PWCS believes industry support is best demonstrated by using a 75% by throughput *or* more than 50% by number test. NCIG's test has the potential to expose the vast majority of throughput at the Port of Newcastle to excessive vessel queues and consequent high demurrage charges in years with excess demand, defeating the public benefit the Medium Term CDS is designed to achieve.
- 6.6 As a final matter, the key concerns leading to the NCIG requests for conditions as to industry support and the duration of the authorisation are, in fact, already addressed in the Protocol by the 3 million tonne threshold before the capacity distribution mechanism operates in a given year. The accuracy of the calculations which lead to the coal chain capacity being determined and therefore whether there is a 3 million tonne excess, is able to be audited at the request of producers under clause 3 of Schedule 2 of the Protocol. There is therefore already an inbuilt condition dealing with these concerns, the satisfaction of which condition can be independently audited.
- 6.7 PWCS believes liquidity in the secondary market for loading allocations will be very strong. White Mining's concerns about the impact of the physical compensation mechanism and the impact of the conditional allowance are therefore likely to be unfounded. Also the costs of any auction that would be passed on to non-participants will be minor.
- 6.8 The Medium Term CDS will deliver substantial public benefits over the 5 years of any authorisation. No party has raised any issues with the estimated public benefits associated with the extension of the Medium Term CDS for that period. PWCS respectfully asks the Commission to provide authorisation of the Protocol as submitted with this letter.

PWCS would be pleased to meet with the Commission to discuss this letter or the Protocol if that would be helpful.

Yours sincerely

A handwritten signature in cursive script that reads "John Barbagallo".

**JOHN BARBAGALLO
GENERAL MANAGER**

ANNEXURE 4F

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

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Part B – Schedules

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- Schedule 2 Capacity Declaration
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- Schedule 6 Disruptions to a Producer
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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 A30236-A30238 dated 1 October 2004.

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 6 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 or if the Producer is a Restricted Producer, 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 No material change will be made to the Scheme as described in Annexure 4F unless it is reasonably necessary in order to achieve the Objectives and except with the consent or authorisation of the Commission.
- 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 Subject to clauses 2.4 and 2.5 of this Part A, the Scheme will apply in respect of the 2005 calendar year. During September of each Relevant Year the Scheme will be reviewed 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 and any submissions received from Producers or Customers prior to 1 September of the Relevant Year.

In any case, any extension of the Scheme beyond the 2005 calendar year will for each Relevant Year require Industry Support.

- 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 (whoever 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, to the extent permitted by law, neither 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 the quantity of Coal determined as the Forecast Requirement or Loading Allocation of a Customer into vessels or to provide the level of Coal Handling Services necessary to load that 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.

11.3 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, PWCS will not 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) its 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 negligence, wilful misconduct or fraudulent act of PWCS; 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.

For the avoidance of doubt, nothing in this clause affects the liability of PWCS under clause 2.14.1 of the Coal Handling Services Agreement.

PART B – THE SCHEDULES

SCHEDULE 1

DICTIONARY

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

Capacity Auditor	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.
Capacity Profile	The distribution of annual Coal Chain Capacity across the Relevant Year expressed as quarterly percentages of the annual Coal Chain Capacity.
Carryover Tonnage	The amount of Coal loaded onto vessels at the Terminal in the Relevant Year using Loading Allocation from the year immediately prior to the Relevant Year.
Coal Chain Capacity	The forecast capacity of the Export Coal Chain in the Relevant Period to transport Coal to the Terminal and load the Coal onto vessels, expressed in tonnes.
Coal Handling Services Agreement	The agreement so titled between PWCS and each Customer for the provision by PWCS to the Customer of coal handling and other services.
Commencement Date	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.
Commission	The Australian Competition and Consumer Commission.
Conditional Allocation	This term is defined in paragraph 2 of Schedule 5.
Customer	A party to a Coal Handling Services Agreement, other than PWCS, who receives Coal Handling Services from PWCS.
Days	Calendar days unless stated otherwise.
Demand Auditor	The professional audit firm(s) appointed to conduct an audit of a Producer's Demand Nomination in accordance with Schedule 3.
Demand Profile	The percentage of the Final Demand Amount for each Calendar Quarter of the Relevant Year.
Demand Reduction Auction	The demand reduction auction facilitated by the Administrator in accordance with paragraph 6 of Schedule 4.
Excess Demand	The amount by which the Forecast System Demand for the Relevant Year exceeds the Available Capacity.
Final Demand Amount	The total demand of a Producer for Coal Handling Services for the Relevant Period, determined in accordance with paragraph 8 of Schedule 3.

Final Notice	A notice identifying each Producer's final Quarterly Loading Allocation for the Relevant Year.
Forecast System Demand	The aggregate forecast demand for Coal Handling Services during the Relevant Period, determined in accordance with paragraph 1 of Schedule 4.
HVCC Logistics	Hunter Valley Coal Chain Logistics Team.
Industry Support	Support by more than 75% of currently exporting Producers calculated by volume of export Coal tonnes (determined from the Forecast Requirement of each Producer) or support by more than 50% of currently exporting Producers calculated by number of Producers shipping by rail using the Export Coal Chain.
Loading Allocation	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.
Lower Flexibility Amount	The Lower Flexibility Amount as determined in accordance with subparagraph 1(a) of Schedule 6.
Lower Flexibility Limit	The Quarterly Loading Allocation of a Producer minus its Lower Flexibility Amount.
the Objectives	The objectives stated in paragraph 2.3 of Part A.
Operational Allowance	A queue of vessels at the Port of Newcastle determined in accordance with paragraph 2 of Schedule 2.
Quarterly Loading Allocation	The Loading Allocation that is allocated to the Allocation Holder for the relevant Calendar Quarter.
Railed Tonnes	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.
Restricted Producer	This term is defined in paragraph 7 of Schedule 3.
Schedule	A schedule to this Annexure.
Scheme	The Capacity Balancing System described in this Annexure.
Total Demand	The aggregate of all Forecast Requirements for the Relevant Year.
Unrestricted Producer	A Producer who is not a Restricted Producer.
Unused Portion	The amount (if any) by which the quantity of Coal delivered to the Terminal by the Producer in the relevant Calendar Quarter is less than the Lower Flexibility Limit.

**Upper Flexibility
Amount**

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.

Each Producer will supply to the Demand Auditor such information as may be reasonably required by the Demand Auditor in order to fulfil its role as the Demand Auditor. If a Producer does not provide that information, the Demand Auditor will determine the Relevant Quantity based on the information available to it and by reference to the capacity of the Producer that has already been demonstrated by its past, sustained shipping performance.
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, in which event for the purpose of calculating the Arbiter's Adjustment, the Arbiter's Determined Amount for that Producer shall be zero.

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 has an Unused Portion in respect 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, to a maximum amount of \$50 million. 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 Forecast System Demand for a Relevant Year shall be the aggregate of all Final Demand Amounts for that year, as determined by the Administrator.
2. 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 delivered to the Terminal 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.
3. 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.
4. 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.
5. 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**").

6. 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.

7. 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 only be utilised by each Producer after it has utilised:
 - (a) All of its Quarterly Loading Allocation for the relevant Calendar Quarter; and
 - (b) Any portion of Quarterly Loading Allocation available for use from adjoining Calendar Quarters in accordance with clause 3.5 of Annexure 4E.

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.

Once an Application has been accepted by PWCS using Conditional Allocation, that portion of Conditional Allocation that has been so used will be converted from Conditional Allocation to the Producer's Quarterly Loading Allocation for the relevant Calendar Quarter. This means that the Producer's Conditional Allocation will be decreased by the amount used in the nomination and its Quarterly Loading Allocation will be increased by the same amount. Once Conditional Allocation is converted to Quarterly Loading Allocation, it will be subject to the Take-or-Pay obligations in clause 6 of Annexure 4E.

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 Arbitrator or any other party that PWCS will be able to load that quantity of Coal onto vessels in the Relevant Period or that it will be able to provide the level of Coal Handling Services necessary to load that 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 5th day after the conclusion of any Calendar Quarter ("**Relevant Quarter**") a Producer ("**Relevant Producer**") has an Unused Portion for that Relevant Quarter 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 an Unused Portion 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 Unused Portion.
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 Unused Portion, then an amount equivalent to the Unused Portion 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 Unused Portion or the Arbiter'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 Unused Portion 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 Unused Portion exceed the Arbiter'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 Unused Portion, 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 Unused Portion 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 Unused Portion in respect of a Restricted Producer and PWCS determines in accordance with clauses 6.7 and 6.8 of Annexure 4E that part or all of the Unused Portion was not able to be delivered to the Terminal 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
Anglo Coal Australia Pty Ltd	Dartbrook Drayton
BHP Billiton	Mt. Arthur
Bloomfield Collieries	Bickham Bloomfield Rix's Creek
Camberwell Coal Pty Ltd	Camberwell Open Cut
Centennial Coal Company	Newstan
Coal & Allied	HVO Warkworth / Mt Thorley Bengalla Mine
Donaldson Coal	Donaldson Tasman
Wambo Coal Pty Ltd	Wambo
Gloucester Coal	Stratford Mine
Muswellbrook Coal Co Ltd	Muswellbrook Coal Co No. 1 & No. 2 Open Cut Boggabri*
Glennies Creek Coal Management Pty Ltd	Glennies Creek Underground & Opencut
Southland Coal Pty Ltd	Southland Colliery
White Mining Limited	Ashton
Xstrata Coal Australia	Cumnock United Liddell Bulga West Wallsend / Teralba Mt Owen Complex Ulan
Lake Coal	Chain Valley (Road Coal Only)
Whitehaven Coal Mining Limited	Whitehaven Werris Creek* East Boggabri*
Resource Pacific Ltd	Newpac No.1 Colliery
Hunter Enviro- Mining Operation	Hebburn No.3*
Specialty Coal Pty Ltd	Great Greta Extended*

* Indicates a new mine commencing production during calendar year 2005