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LAWYERS

3 December 2007

By courier and e-mail

Mr Scott Gregson
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Gilbert + Tobin

2 Park Street
Sydney NSW 2000
Australia

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Sydney NSW 2001

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Dear Mr Gregson

Newcastle Port Corporation - Applications for authorisation

We act for Newcastle Port Corporation (**NPC**).

1 Applications for authorisation

NPC applies for authorisation pursuant to sub-sections 88(1) and 88(7) of the *Trade Practices Act 1974* (Cth) (**TPA**) for the making of, or giving effect to, any contract, arrangement or understanding involving NPC, PWCS and any producer of coal for export through the Port of Newcastle, or exporter or exporters of coal through the Port of Newcastle (whether they are shareholders in PWCS or not), which relates to or is in any way associated with the proposed medium term capacity distribution system that is described in the attached supporting submission and which may constitute:

- exclusionary provisions within the meaning of section 45 of the TPA;
- a provision having the effect of substantially lessening competition within the meaning of section 45 of the TPA; and
- a provision to which sections 45D, 45DA or 45DB of the TPA might apply.

Please also note that NPC is also seeking an interim authorisation.

Please find enclosed the following documents:

- Forms A, B and D, the application forms prescribed by regulation for authorisation of exclusionary provisions, agreements affecting competition and boycotts;
- a non-confidential supporting submission to the Commission;
- a confidential supporting submission to the Commission, containing commercially sensitive information over which confidentiality is sought; and
- a cheque for \$10,500, comprising:
 - \$7,500 for lodgement of the application under Form A; and

- a related authorisation fee of \$1,500 for each of the related applications under Form B and Form D.

In addition, the supporting submission sets out the views of NPC in relation to the recent application for authorisation lodged by PWCS, Pacific National and QR Limited in respect of the proposed capacity allocation system, known as the Vessel Queue Management System.¹

2 Confidentiality

The supporting submission marked 'Confidential Version' contains some commercially sensitive and confidential information. Pursuant to section 89(5) of the Trade Practices Act, NPC requests that the ACCC exercises its power under section 89(5A) to exclude this information from the register kept by the Commission pursuant to section 89(3).

Please do not hesitate to contact me if you have any questions.

Yours sincerely



Liza Carver
Partner
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lcarver@gtlaw.com.au

¹ Pacific National (NSW) Pty Limited, QR Limited and Port Waratah Coal Services Limited, *Applications for authorisation under sections 88(1) and 88(7) for a Vessel Queue Management System for coal loading at the Port of Newcastle*, 16 November 2007.

Form A

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (1)

EXCLUSIONARY PROVISIONS:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

1 Applicant

(a) Name of Applicant:

Newcastle Port Corporation (**NPC**).

(b) Description of business carried on by applicant:

NPC is established under the *Ports and Maritime Administration Act 1995* (NSW) (formerly the *Ports Corporatisation and Waterways Management Act 1995*) to provide safe, effective and sustainable port operations and to deliver port development that enhances the economic growth of the Hunter Region and New South Wales. NPC is statutorily mandated to establish, manage and operate port facilities and services in the Port of Newcastle.

NPC is responsible (as the delegate for the NSW Minister for Commerce) for the lease of certain land in the Port of Newcastle to Port Waratah Coal Services Limited (**PWCS**). The Kooragang Island coal loading terminal, which is owned and operated by PWCS, is situated on this land (**Terminal**). A condition of the lease is that the Terminal is operated as a “common user facility”, which requires PWCS to offer services to any and every shipper of coal through the Port of Newcastle on a non-discriminatory basis. NPC is responsible for ensuring that the Terminal is operated on a common user basis.

(c) Address in Australia for service of documents on the applicant:

Newcastle Port Corporation

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37, 2 Park Street

Sydney NSW 2000

2 Contract, arrangement or understanding

(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

The making of, or giving effect to, any contract, arrangement or understanding involving NPC, PWCS and any producer of coal for export through the Port of Newcastle, or exporter or exporters of coal through the Port of Newcastle (whether they are shareholders in PWCS or not) which relates to, or is in any way associated with, the proposed capacity distribution system to apply from 1 January 2008, which is described in the attached submission.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions:

In accordance with the contracts, arrangements or understandings described in 2(a) above, the applicant and the parties referred to in 3(a) below may, from time to time, make and/or give effect to contracts, arrangements or understandings that are, or may be exclusionary provisions within the meaning of section 45 and section 4D of the *Trade Practices Act 1974* (Cth) in connection with the supply and/or acquisition of coal handling services at the Port of Newcastle, in particular arising from the proposed auction system or capacity distribution system, which is described in the attached submission.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export, pursuant to and in accordance with the proposed capacity distribution system described in the submission.

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

From 1 January 2008 to the earlier of:

- (i) approval of the authorisation applications A91068–A91070; or
- (ii) 31 December 2008.

In relation to the grounds supporting this period of authorisation, please refer to the supporting submission.

3 Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Newcastle Port Corporation

PO Box 663
Newcastle NSW 2300

For a description of NPC's business, please refer to 1(b), above.

Port Waratah Coal Services Limited

PO Box 57
Carrington NSW 2294

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle. PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

Additionally, any producer of coal for export through the terminals or export of coal from the terminals may be a party to a contract, arrangement or understanding referred to in 2(a).

These producers and exporters include the shareholders in PWCS listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission, as well as other coal companies in the Hunter Valley in New South Wales producing coal for export listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the submission.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

Not applicable.

4 Public benefit claims

- (a) Arguments in support of application for authorisation:

Please refer to the supporting submission.

- (b) Facts and evidence relied upon in support of these claims:

Please refer to the supporting submission.

5 Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to the supporting submission.

6 Public detriments

- (a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

Please refer to the supporting submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the supporting submission.

7 Contracts, arrangements or understandings in similar terms

- (a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

- (b) Is this application to be so expressed?

No.

- (c) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

Not applicable.

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not applicable.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Not applicable.

8 Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes, PWCS is an unincorporated joint venture between the companies listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

No.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9 Further information

- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Newcastle Port Corporation

Ms Liza Carver

Partner

Gilbert + Tobin

Level 37, 2 Park Street

Sydney NSW 2000

Telephone: (02) 9263 4005

Facsimile: (02) 9263 4111

Dated: 3 December 2007

Signed by/on behalf of the applicant:



.....
(Signature)

Liza Carver (Full Name)

Gilbert + Tobin (Organisation)

Partner (Position in organisation)

DIRECTIONS

- 1 In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.
- 2 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 3 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 4 Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
- 5 Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions.

In providing these details —

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
- 6 Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 - 7 Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 - 8 Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
 - 9 Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.
 - 10 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
 - 11 Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

Form B

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (1)

AGREEMENTS AFFECTING COMPETITION:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (1) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to make a contact or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

1 Applicant

(a) Name of Applicant:

Newcastle Port Corporation (**NPC**).

(b) Short description of business carried on by applicant:

NPC is established under the *Ports and Maritime Administration Act 1995* (NSW) (formerly the *Ports Corporatisation and Waterways Management Act 1995*) to provide safe, effective and sustainable port operations and to deliver port development that enhances the economic growth of the Hunter Region and New South Wales. NPC is statutorily mandated to establish, manage and operate port facilities and services in the Port of Newcastle.

NPC is responsible (as the delegate for the NSW Minister for Commerce) for the lease of certain land in the Port of Newcastle to Port Waratah Coal Services Limited (**PWCS**). The Kooragang Island coal loading terminal, which is owned and operated by PWCS, is situated on this land (**Terminal**). A condition of the lease is that the Terminal is operated as a “common user facility”, which requires PWCS to offer services to any and every shipper of coal through the Port of Newcastle on a non-discriminatory basis. NPC is responsible for ensuring that the Terminal is operated on a common user basis.

(c) Address in Australia for service of documents on the applicant:

Newcastle Port Corporation

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37, 2 Park Street

Sydney NSW 2000

2 Contract, arrangement or understanding

(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

The making of, or giving effect to, any contract, arrangement or understanding involving NPC, PWCS and any producer of coal for export through the Port of Newcastle, or exporter or exporters of coal through the Port of Newcastle (whether they are shareholders in PWCS or not) which relates to, or is in any way associated with, the proposed capacity distribution system to apply from 1 January 2008, which is described in the attached submission.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition:

In accordance with the contracts, arrangements or understandings described in 2(a) above, the applicant and the parties referred to in 3(a) below may, from time to time, make and/or give effect to contracts, arrangements or understandings that are, or may substantially lessen competition within the meaning of section 45 of the *Trade Practices Act 1974* (Cth) in connection with the supply and/or acquisition of coal handling services at the Port of Newcastle, in particular arising from the proposed auction system or capacity distribution system, which is described in the attached submission.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export, pursuant to and in accordance with the proposed capacity distribution system described in the submission.

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

From 1 January 2008 to the earlier of:

- (i) approval of the authorisation applications A91068–A91070; or
- (ii) 31 December 2008.

In relation to the grounds supporting this period of authorisation, please refer to the supporting submission.

3 Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Newcastle Port Corporation

PO Box 663
Newcastle NSW 2300

For a description of NPC's business, please refer to 1(b), above.

Port Waratah Coal Services Limited

PO Box 57
Carrington NSW 2294

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle. PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

Additionally, any producer of coal for export through the terminals or export of coal from the terminals may be a party to a contract, arrangement or understanding referred to in 2(a).

These producers and exporters include the shareholders in PWCS listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission, as well as other coal companies in the Hunter Valley in New South Wales producing coal for export listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the submission.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

Not applicable.

4 Public benefit claims

- (a) Arguments in support of authorisation:

Please refer to the supporting submission.

- (b) Facts and evidence relied upon in support of these claims:

Please refer to the supporting submission.

5 Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to the supporting submission.

6 Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

Please refer to the supporting submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to the supporting submission.

7 Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No.

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

Not applicable.

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not applicable.

Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Not applicable.

8 Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes, PWCS is an unincorporated joint venture between the companies listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

No.

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9 Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Newcastle Port Corporation

Ms Liza Carver
Partner
Gilbert + Tobin
Level 37, 2 Park Street
Sydney NSW 2000
Telephone: (02) 9263 4005
Facsimile: (02) 9263 4111

Dated: 3 December 2007

Signed by/on behalf of the applicant:



.....
(Signature)

Liza Carver (Full Name)

Gilbert + Tobin (Organisation)

Partner (Position in organisation)

DIRECTIONS

- 1 In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen competition.
- 5 In providing these details:
 - (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that of any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
- 6 Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
- 7 Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
- 8 Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
- 9 Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
- 10 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

Form D

Commonwealth of Australia

Trade Practices Act 1974 — subsection 88 (7)

SECONDARY BOYCOTTS:

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (7) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to engage, in concert with other persons, in conduct that hinders or prevents, or may hinder or prevent, a third person supplying goods to services to, or acquiring goods or services from, a fourth person
- to engage, in concert with other persons, in conduct that prevents or substantially hinders, or may prevent or substantially hinder, a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

1 Applicant

(a) Name of Applicant:

Newcastle Port Corporation (**NPC**).

(b) Description of business, activity or occupation carried on by applicant:

NPC is established under the *Ports and Maritime Administration Act 1995* (NSW) (formerly the *Ports Corporatisation and Waterways Management Act 1995*) to provide safe, effective and sustainable port operations and to deliver port development that enhances the economic growth of the Hunter Region and New South Wales. NPC is statutorily mandated to establish, manage and operate port facilities and services in the Port of Newcastle.

NPC is responsible (as the delegate for the NSW Minister for Commerce) for the lease of certain land in the Port of Newcastle to Port Waratah Coal Services Limited (**PWCS**). The Kooragang Island coal loading terminal, which is owned and operated by PWCS, is situated on this land (**Terminal**). A condition of the lease is that the Terminal is operated as a “common user facility”, which requires PWCS to offer services to any and every shipper of coal through the Port of Newcastle on a non-discriminatory basis. NPC is responsible for ensuring that the Terminal is operated on a common user basis.

(c) Address in Australia for service of documents on the applicant:

Newcastle Port Corporation

c/- Ms Liza Carver
Partner
Gilbert + Tobin
Level 37, 2 Park Street
Sydney NSW 2000

2 Conduct

(a) Description of the conduct proposed to be engaged in, for which authorisation is sought:

The making of, or giving effect to, any contract, arrangement or understanding to which sections 45D, 45DA or 45DB of the *Trade Practices Act 1974* might apply involving NPC, PWCS and any producer of coal for export through the Port of Newcastle, or exporter or exporters of coal through the Port of Newcastle (whether they are shareholders in PWCS or not) which relates to, or is in any way associated with, the proposed auction system or capacity distribution system to apply from 1 January 2008, which is described in the attached submission.

(b) Number of persons proposing to engage, in concert, in the conduct:

NPC and PWCS, as well as any producer of coal for export through the Port of Newcastle or exporter of coal from those terminals may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include shareholders in PWCS listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission, as well as other coal companies in the Hunter Valley in New South Wales producing coal for export listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the submission.

(i) Where number of persons stated in item 2 (b) is less than 50, their names and addresses:

Newcastle Port Corporation

PO Box 663
Newcastle NSW 2300

Port Waratah Coal Services Limited

PO Box 57
Carrington NSW 2294

Newcastle Coal Producers

For the details of the Coal Producers, please refer to Attachment A (List of Producers and Associated Mines) of Annexure 4F in Attachment 1 of the supporting submission.

(c) Description of the goods or services to which the conduct (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export, pursuant to and in accordance with the proposed capacity distribution system described in the submission.

(d) The term for which authorisation of the provision of the conduct is being sought and grounds supporting this period of authorisation:

From 1 January 2008 to the earlier of:

- (i) approval of the authorisation applications A91068–A91070; or
- (ii) 31 December 2008.

In relation to the grounds supporting this period of authorisation, please refer to the supporting submission.

3 Parties

(a) Name and address of the third person whose supply or acquisition of goods or services, or whose trade or commerce involving the movement of goods overseas, is to be, or may be, hindered or prevented by the conduct:

In accordance with the contracts, arrangements or understandings described in 2(a) above, the parties referred to in 2(b) may, from time to time, be hindered or prevented in relation to the export of coal through PWCS's coal handling facilities at the Port of Newcastle.

- (b) Name and address of person to or from whom, or the place to or from which, supply or acquisition of goods or services is to be, or may be, hindered or prevented by the conduct:

Please refer to 3(a).

- (c) Names and addresses of persons on whose behalf application is made:

Not applicable.

4 Public benefit claims

- (a) Arguments in support of application for authorisation:

Please refer to supporting submission.

- (b) Facts and evidence relied upon in support of these claims

Please refer to supporting submission.

5 Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please refer to supporting submission.

6 Public detriments

- (a) Detriments to the public resulting or likely to result from the conduct for which authorisation is sought, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (c) above and the prices of goods or services in other affected markets:

Please refer to supporting submission.

- (b) Facts and evidence relevant to these detriments:

Please refer to supporting submission.

7 Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*):

Yes, PWCS is an unincorporated joint venture between the companies listed in Attachment 2 (Shareholders in PWCS and Newcastle Coal Shippers Pty Limited) of the supporting submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

No.

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

8 Further information

(a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Newcastle Port Corporation

Ms Liza Carver
Partner
Gilbert + Tobin
Level 37, 2 Park Street
Sydney NSW 2000
Telephone: (02) 9263 4005
Facsimile: (02) 9263 4111

Dated: 3 December 2007

Signed by/on behalf of the applicant:



.....
(Signature)

Liza Carver (Full Name)

Gilbert + Tobin (Organisation)

Partner (Position in Organisation)

DIRECTIONS

- 1 In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 Describe that part of the applicant's business relating to the conduct in respect of which authorisation is sought.
- 4 Provide details of the conduct in respect of which this authorisation is sought.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
- 5 Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
- 6 Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
- 7 Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed conduct. Provide quantification of those detriments where possible.

Newcastle Port Corporation

Submission in support of application for authorisation pursuant to section 88 of the Trade Practices Act

Public Version

3 December 2007

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1 Introduction

This submission is made by Newcastle Port Corporation. It supports the application for authorisation made by Newcastle Port Corporation, on its own behalf, pursuant to sections 88(1) and 88(7) of the *Trade Practices Act 1974* (Cth) of a system to address capacity imbalances between the demand for coal loading services at the Port of Newcastle and capacity.

In addition, Newcastle Port Corporation seeks an interim authorisation of its proposed capacity allocation system pursuant to section 91(2) of the Trade Practices Act.

2 Executive Summary

2.1 Background

On 15 April 2005, the Australian Competition and Consumer Commission (**Commission**) issued a determination authorising Port Waratah Coal Services Limited (**PWCS**) to utilise a Medium Term Capacity Balancing System (**CBS**) to address the imbalance between the demand for coal loading services at the Port of Newcastle and capacity within the Hunter Valley coal chain.

On 23 May 2007, the Commission revoked these authorisations and approved substitute authorisations for a modified CBS (**Existing Authorisation**), which sought to introduce a system of monthly allocations for 'large producers' and doubled the 'buffer' amounts to recognise fluctuations in demand and to give greater flexibility to producers.¹

The Existing Authorisation will expire on 31 December 2007.

2.2 Legal basis for lodgement of an application for authorisation by Newcastle Port Corporation

Newcastle Port Corporation is a statutory state owned corporation with responsibility for the management and operation of the Port of Newcastle.

Newcastle Port Corporation has a statutory mandate to operate and manage the port in a way that:²

- promotes and facilitates trade, for example, by protecting the international reputation of the Port of Newcastle; and
- takes into consideration the interests of the community, such as continuing employment and development of the local economy.

PWCS operates the Kooragang Island terminal pursuant to a long term lease with the NSW Government (which has delegated its responsibilities in relation to the terminal to the Newcastle Port Corporation) (**Lease**).

¹ ACCC, Final Determination, *Revocation of authorisations A30236 – A30238 and substitution of authorisations A91033 – A91035* (23 May 2007).

² *Ports and Maritime Administration Act 1995* (NSW), section 9.

The Lease requires PWCS to operate the Kooragang Island terminal as a 'common user facility', which requires PWCS to offer services to any and every shipper of coal through the Port of Newcastle on a non-discriminatory basis (**Common User Provision**).

Any capacity allocation arrangement adopted by PWCS for the management of port-side constraints must be consistent with the Common User Provision, unless compliance with that contractual obligation is either explicitly or implicitly waived by the Newcastle Port Corporation (as the delegate of the NSW Government) pursuant to the terms of the Lease.

In doing so, however, Newcastle Port Corporation is a party to an arrangement or understanding that may contravene the anti-competitive prohibitions in Part IV of the Trade Practices Act. As a party to such an arrangement or understanding, Newcastle Port Corporation makes this application for authorisation of such an arrangement or understanding pursuant to sections 88(1) and 88(7) of the Trade Practices Act.

2.3 New capacity allocation system from 1 January 2008

There is currently no authorised arrangement in place for the allocation of capacity and the management of vessel queues for the year commencing 1 January 2008.

In the absence of an authorised arrangement for the allocation of capacity, vessel queues and associated demurrage charges are likely to increase significantly in the new year due to continued high levels of demand and continuing capacity constraints.

Newcastle Port Corporation considers that the system proposed in Attachment 1 provides an appropriate basis for the management of the imbalance between demand for coal haulage and loading services at the Port of Newcastle and coal chain capacity (**Proposed System**).

The Proposed System is, in all material respects, consistent with the CBS that is currently in effect and subject to the Existing Authorisation.

If PWCS adopts a capacity allocation arrangement that is inconsistent with the Common User Provision, Newcastle Port Corporation would be a necessary party to that arrangement by virtue of its need to agree to any arrangement that is inconsistent with the Common User Provision.

2.4 Interim authorisation

Due to the pending expiration of the authorisation of the CBS, Newcastle Port Corporation seeks an urgent interim authorisation of the Proposed System to take effect from 1 January 2008 for a period of 6 months.

As the Proposed System is consistent, in all material respects, with the CBS, Newcastle Port Corporation considers it can be reviewed and approved by the Commission on an expedited basis.

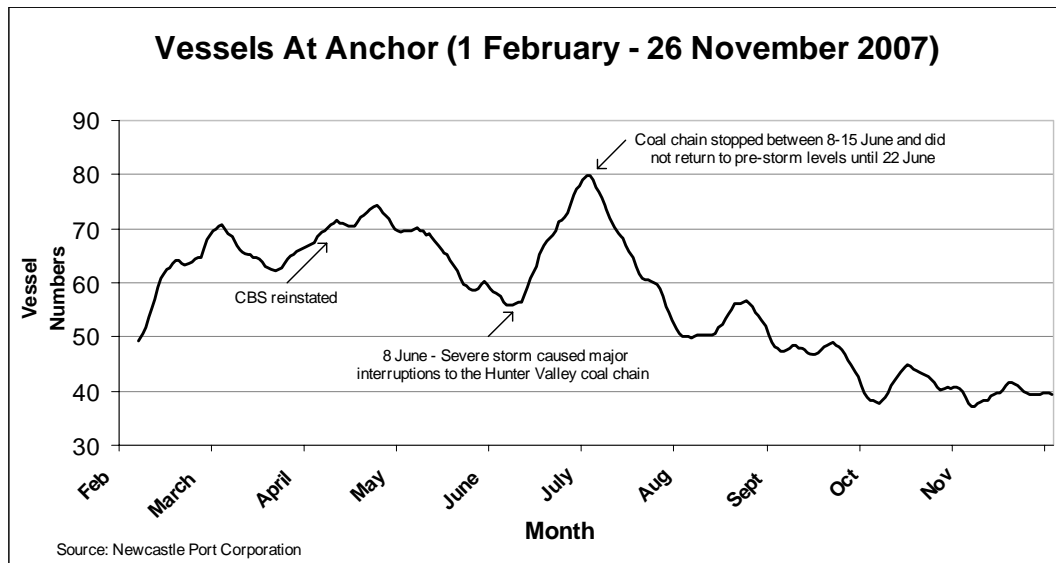
The public benefits and detriments of the CBS have been the subject of extensive consideration by the Commission in the context of the Existing Authorisation. The public benefits and detriments of the Proposed System would be the same as or similar to the CBS.

The adoption of the Proposed System will ensure that there is an appropriate (and well understood and tested) system of capacity allocation in place to ensure that:

- coal shippers have access to a reasonable level of capacity in the Hunter Valley coal chain; and
- vessel queues are able to be minimised to the extent possible.

The adoption of the Proposed System on an interim basis will provide an appropriate basis for dealing with the continuing imbalance that exists between the demand for coal and the coal chain constraints at the Port of Newcastle.

Evidence to date suggests that the CBS has had a positive impact on vessel queues, which have reduced and appear to have stabilised (although they still remain reasonably high).



Accordingly, Newcastle Port Corporation considers that the Proposed System will minimise the high levels of demurrage charges that would otherwise be incurred by coal shippers due to overwhelming export demand and coal chain capacity constraints.

In the absence of the Proposed System, these demurrage charges are likely to increase significantly in 2008.

Indeed, demurrage charges are currently averaging US \$13,750 per vessel, per day (calculated based on demurrage charges for both Panamax and Capesize vessels). Based on a queue of 40 vessels at the Port of Newcastle as at 26 November 2007 and the averaged daily charge of US \$13,750, the daily cost for the industry is US \$550,000.

This figure is likely to be considerably higher in the absence of the Proposed System.

2.5 Proposed authorisation of Vessel Queue Management System

PWCS, Pacific National and QR Limited have recently lodged a separate application for authorisation of a new capacity allocation system to replace the CBS, known as the Vessel Queue Management System (**VQMS**).³

Newcastle Port Corporation has not formed a view on the merits of the VQMS, but notes that it envisages a significant change in the manner in which capacity is allocated to coal shippers.

In particular, Newcastle Port Corporation understands that:

- as a consequence of the proposed “lesser of port or rail” methodology, the VQMS may have the effect of reducing the capacity allocations of certain coal shippers relative to those that are available to those shippers under the CBS;
- as the proposed “lesser of port or rail” methodology may limit access to capacity in a manner that is not proportionate to the level of demand for that capacity, the VQMS appears to be inconsistent with the obligations on PWCS to operate the Kooragang Island terminal as a ‘common user facility’; and
- the VQMS may create implementation issues in early 2008, given that coal shippers have made advance orders for vessels based on their entitlements under the CBS.

Given these and other issues associated with the VQMS, Newcastle Port Corporation believes that it is appropriate to preserve the status quo for a period of time by granting interim authorisation to the Proposed System (which is consistent in all material respects with the existing CBS).

This will provide the Commission and interested parties with sufficient time to consider the merits of the VQMS, with a view to granting authorisation following a considered analysis of the public benefits and public detriments that flow from the VQMS.

Accordingly, the Proposed System needs to be implemented on an urgent basis to ensure that:

- coal shippers have certainty of access; and
- vessel queues and associated demurrage charges are minimised to the extent possible in the new year.

2.6 Term of authorisation

The Newcastle Port Corporation requests that the Proposed System be authorised for the period 1 January 2008 to 31 December 2008, or until the Commission approves the application for authorisation of the VQMS, whichever is earlier.

³ Pacific National (NSW) Pty Limited, QR Limited and Port Waratah Coal Services Limited, *Applications for authorisation under sections 88(1) and 88(7) for a Vessel Queue Management System for coal loading at the Port of Newcastle*, 16 November 2007.

3 Description of anti-competitive conduct subject to application for authorisation

3.1 Legal basis for application for authorisation

Newcastle Port Corporation is a statutory state owned corporation with responsibility for the management and operation of the Port of Newcastle.⁴ In carrying out its responsibilities, Newcastle Port Corporation must have regard to its statutory objectives, which include:

- the promotion and facilitation of trade,⁵ for example, by ensuring that queues of ships remain as small as possible, and protecting the international reputation of the Newcastle coal industry; and
- the exhibition of social responsibility by having regard to the interests of the community,⁶ for example, by ensuring continued employment and the development of the local economy.

PWCS is the owner and operator of the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle. Part of the land upon which the Kooragang Island terminal is situated is owned by the NSW Government and is leased to PWCS pursuant to the terms of the Lease.

Therefore, as the terminal operator, PWCS derives its control over movement of coal through the Port of Newcastle as a consequence of its rights and obligations under the Lease.

The NSW Government has delegated its responsibilities to the Chief Executive Officer of Newcastle Port Corporation in relation to the administration of the Kooragang Island terminal.⁷

A condition of the Lease is that the terminal is operated as a “common user facility”.

Clause 4.1 of the Lease states:

“...the Demised Premises shall not be used otherwise than for the construction of the Facility and for the operation of the Facility as a common user facility in such a way that the Services are made available to any and every shipper of coal through the Port of Newcastle (“user”) under conditions and at a cost for like services that are not discriminatory as between users...”

The term “common user facility” is not defined in the Lease, but is generally understood to mean that the services provided through an essential facility will be made available to all on a non-discriminatory basis. The Lease also requires PWCS to give fair and equitable service to any and every vessel.

⁴ *Ports and Maritime Administration Act 1995* (NSW), section 10(2)(a).

⁵ *Ports and Maritime Administration Act 1995* (NSW), section 9(b).

⁶ *Ports and Maritime Administration Act 1995* (NSW), section 9(a)(iii). Newcastle Port Corporation is a statutory state owned corporation subject to the terms of the *State Owned Corporations Act 1989* (NSW) (SOC Act). The provisions of section 20E of the SOC Act enumerate complementary principal objectives of Newcastle Port Corporation in that capacity.

⁷ *Delegation by the NSW Minister for Public Works and Services*, 1 September 1999.

While the Common User Provision requires PWCS to provide access to the Kooragang Island terminal on a non-discriminatory basis to all producers who wish to ship coal, PWCS cannot currently comply with all requests due to port-side capacity constraints.

PWCS has therefore implemented a capacity allocation arrangement as a means of addressing this issue and allocating scarce capacity. As the Commission is aware, the relevant capacity allocation system, the CBS, is an arrangement between coal shippers to reduce their purchase of services from PWCS so that queues of vessels off the Port of Newcastle and associated demurrage charges are minimised.

The Lease provides that the requirement for PWCS to comply with the Common User Provision may be waived in cases where such a provision unreasonably restricts the ability of PWCS to improve the operational efficiency of the facility. Clause 4.3(a) of the Lease states:

“If the Lessee forms the reasonable opinion that clauses 4.1 and 4.2 will operate in particular circumstances to unreasonably restrict the Lessee’s ability to improve the operational efficiency of the Facility, it may make a submission to that effect to the Lessor setting out the particular circumstances and the matters to which the Lessee has had regard in forming its opinion. The Lessor will consider the Lessee’s submission and decide, in its absolute discretion, whether or not it will waive compliance with clauses 4.1 and 4.2 for those particular circumstances for a limited time”.

Historically, the Newcastle Port Corporation (as the delegate of the NSW Government) has waived compliance by PWCS with the Common User Provision through its acceptance and support for the CBS.

In doing so, however, Newcastle Port Corporation is a party to an arrangement that may contravene the anti-competitive prohibitions in Part IV of the Trade Practices Act. In the Newcastle Port Corporation’s view, this kind of arrangement may breach either limb, or both, of section 45 of the Trade Practices Act. That is, the capacity allocation system might constitute:

- an arrangement that contains an exclusionary provision within the meaning of section 45 of the Trade Practices Act; and
- an arrangement that contains a provision having the effect of substantially lessening competition within the meaning of section 45 of the Trade Practices Act.

The capacity allocation system may also constitute a secondary boycott, prohibited by sections 45D and 45DA, or a boycott affecting trade or commerce, prohibited by section 45DB.

As the terminal operator, PWCS is a necessary party to any capacity allocation arrangement with third party coal producers and has been the applicant for the previous authorisation applications. However, Newcastle Port Corporation is *also* a necessary party to any capacity allocation arrangement as a consequence of the need for the Newcastle Port Corporation (as the delegate of the NSW Government) to consent to any capacity allocation arrangement which is not in strict compliance with the Common User Provision. Consequently, the Newcastle Port Corporation is an appropriate applicant in respect of the authorisation of the Proposed System

Where an understanding is made or an arrangement is arrived at that might contravene the competition provisions of the Trade Practices Act, and where that understanding or arrangement may be inconsistent with the Common User Provision of the Lease, PWCS will need to come to an understanding or arrive at an arrangement with the Newcastle

Port Corporation (as the delegate of the NSW Government) under which the Newcastle Port Corporation waives compliance by PWCS with the Common User Provision. PWCS must therefore obtain the express or implied consent of the Newcastle Port Corporation to any arrangement or understanding that it enters into to allocate capacity.

It is on this basis that Newcastle Port Corporation seeks an authorisation for any contract, arrangement or understanding involving Newcastle Port Corporation, in its capacity as the delegate of the Lessor, PWCS and any producer of coal for export (or exporter of coal) through the Port of Newcastle, which relates to or is in any way associated with the Proposed System and which may constitute:

- an exclusionary provision within the meaning of section 45 of the Trade Practices Act;
- a provision having the effect of substantially lessening competition within the meaning of section 45 of the Trade Practices Act; and
- a provision to which sections 45D, 45DA or 45DB of the Trade Practices Act may apply.

3.2 Market definition

Newcastle Port Corporation submits that there are two relevant markets:

- a global market for coal (or in the alternative, an Asian market for coal); and
- a market for the provision of coal loading services for bulk coal carrying ships in the Newcastle area.

The proposed market definition is consistent with the Existing Authorisation.⁸

4 Rationale for adoption of the Proposed System

4.1 Summary of the Proposed System

Newcastle Port Corporation is applying to the Commission for authorisation of a Proposed System for coal chain capacity allocation from 1 January 2008. The Proposed System is, in all material respects, consistent with the Existing Authorisation, which is due to expire on 31 December 2007.

As such, the steps in a capacity allocation made under the Proposed System are broadly as follows:

- 1 producers submit demand nominations to PWCS on a monthly basis for the forthcoming calendar year;
- 2 PWCS declares the coal chain capacity for each month and the desired volume of an operational vessel queue at the port. The declared capacity is based on actual historical performance, adjusted for known maintenance outages and expected performance gains;

⁸ ACCC, *Application for revocation and substitution lodged by Port Waratah Coal Services Ltd*, 23 May 2007, paragraph 7.10.

- 3 the demand adjustment mechanism operates by all producers accepting a pro-rata reduction of their demand nominations; and then
- 4 the CBS Administrator manages allocations accordingly.

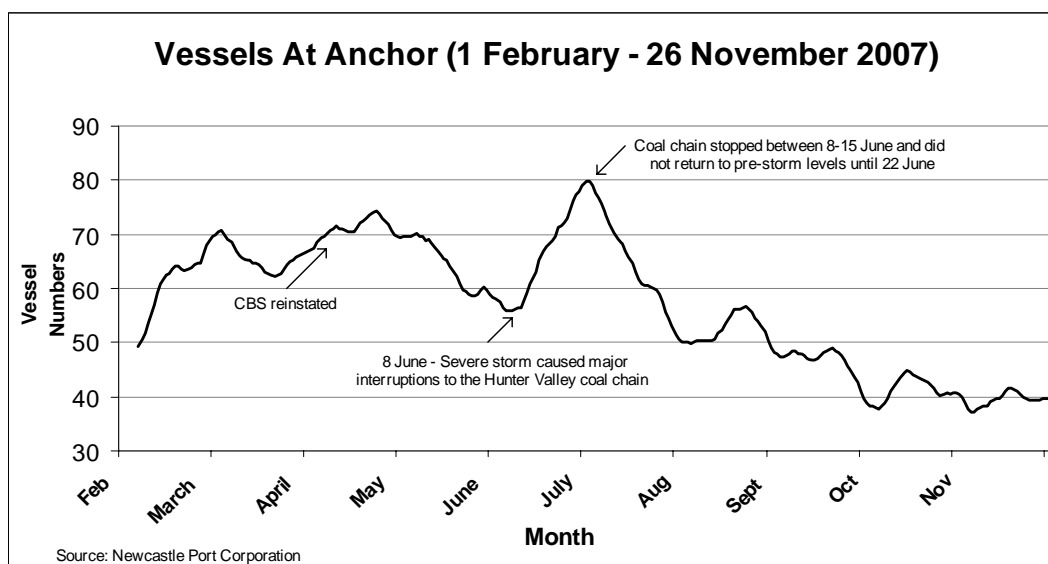
Attachment 1 outlines the Proposed System in detail.

4.2 The Commission's previous consideration of the CBS is relevant

The Commission most recently considered the CBS in its determination of 23 May 2007, finding that the modified CBS is likely to result in a significant benefit to the public that would outweigh any likely public detriment. Key benefits of the CBS were found to be reduced demurrage costs for the coal industry, and improved economic efficiency relative to a situation where the queue persists.⁹

Newcastle Port Corporation agrees with the Commission's assessment and considers that the re-introduction of the CBS has had a positive impact on decreasing vessel queues in the Port of Newcastle and the associated demurrage charges.

This is demonstrated by the following diagram, which demonstrates that vessel queues have reduced and appear to have stabilised at approximately 40 vessels at anchor at the end of 2007 (although this figure is also quite high).



Accordingly, Newcastle Port Corporation considers that there are strong grounds for the adoption of the Proposed System (which is effectively a continuation of the existing CBS) for 2008 when the existing performance of the CBS in reducing vessel queues is taken into account.

4.3 Continuing high demand for coal and constraints in the coal chain

In addition to the above, Newcastle Port Corporation submits that the economic constraints that justified the reintroduction of the CBS continue to exist and are unlikely to subside in 2008.

⁹ Ibid, paragraph 7.72.

Newcastle Port Corporation considers that the Proposed System is necessary in light of:

- continuing high levels of demand for export coal; and
- continued existence of port-side capacity constraints at the Kooragang Island terminal and further down the Hunter Valley supply chain.

ABARE has estimated that demand for export coal will continue to grow over the medium term:¹⁰

“Over the medium term, Australia’s total coal exports are projected to grow at an average rate of 4.4 per cent a year, reaching 300 million tonnes by 2010-11. Beyond the medium term (between 2011-12 and 2029-30), coal exports are projected to increase by a further 50 per cent to 438 million tonnes in 2029-30”.

Similarly, on the supply side, it is clear that port constraints and constraints in the Hunter Valley coal chain are likely to persist. While some increases in capacity have been completed, planned or will be coming ‘online’ in 2008, these increases will not be sufficient to meet demand for export coal.

In particular:

- coal production in the Hunter Valley is forecast to increase by an additional 5 million tonnes in 2008 with the opening of new mines. Further mine openings and tonnage increases have also been forecast for the next 5 years – these additional mines exist in more remote regions of the Hunter Valley and require a larger proportion of rail capacity relative to the older and more established mines that are closer to export infrastructure; and
- the Hunter Valley Coal Chain Logistics Team has assessed that 2008 coal chain capacity amounts to 95 million tonnes,¹¹ while nominations from producers for 2008 port capacity is 116 million tonnes – despite commencement of upgrades to rail capacity (above and below rail) and the planned ‘Phase 1 Expansion’ of the PWCS port terminal, it is clear that this mismatch between demand and available capacity continues to exist and is likely to persist into 2008 and beyond.

Further details of the above are provided in Attachment 3 of the confidential version of this supporting submission (not included in this public version).

Newcastle Port Corporation does not consider that the adoption of the Proposed System (which essentially reinstates the existing CBS) will have a negative impact on the total volume of coal exported through the Port of Newcastle or the production of coal by coal providers in the Hunter Valley for the reasons outlined in previous authorisation applications.

4.4 The counterfactual

In order to identify and measure the public benefit and public detriment generated by the contract, arrangement or undertaking that is subject to an application for authorisation, the Commission applies the ‘future with-and-without test’.

¹⁰ ABARE Research Report, *Australian Energy: National and State Projections to 2029-30*, Canberra, December 2006, page 40.

¹¹ Source: Hunter Valley Coal Chain Logistics Team.

Applying this test to present circumstances, there are two possible counterfactual scenarios:

- first, the world without any capacity allocation system in place; and
- second, the world without the CBS, but with the VQMS proposed by PWCS, Pacific National and QR Limited in authorisations A91068 – A91070.

Counterfactual 1: the world without any capacity allocation system

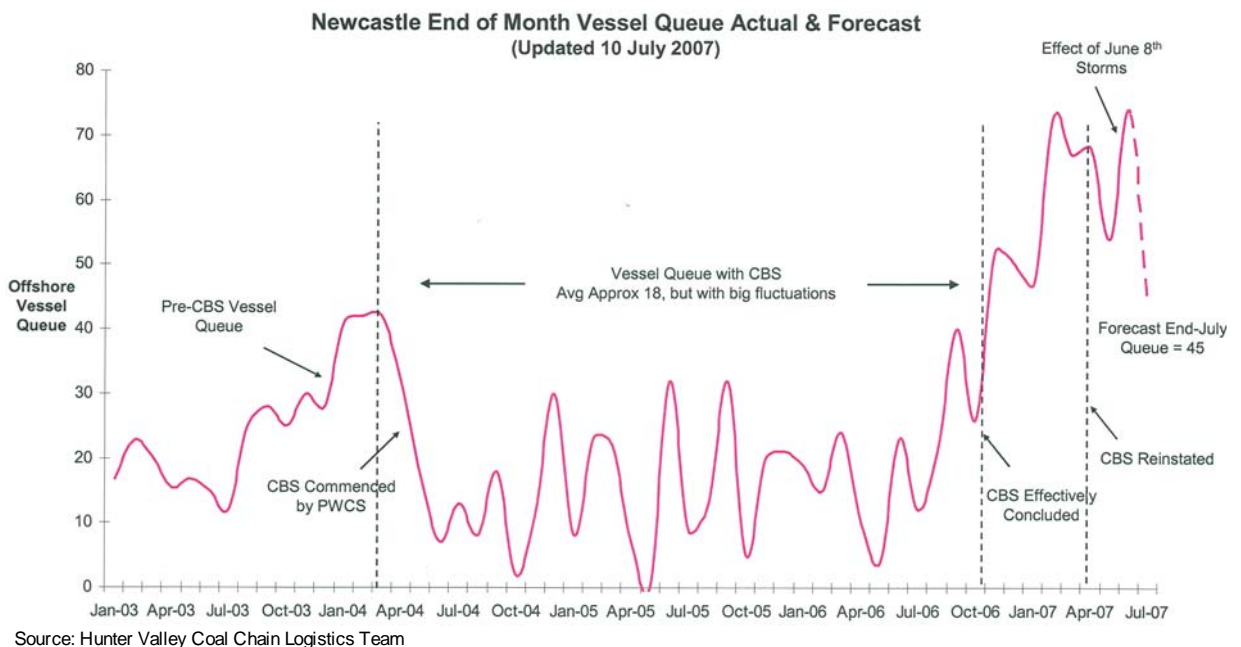
In its various authorisations of the CBS, the Commission concluded that the demand for coal loading services would exceed the capacity of the Hunter Valley coal chain at least until the end of 2007. The Commission concluded, therefore, that absent authorisation of the CBS, excessive vessel queues would be likely to form at the Port of Newcastle.

Newcastle Port Corporation submits that this provides an accurate depiction of what would happen in the event that the CBS expires on 31 December 2007.

A precedent of this counterfactual already exists. When the industry decided to discontinue the CBS towards the end of 2006, it operated without any capacity allocation system in place.

Following this decision, an imbalance between demand for coal loading services and capacity within the Hunter Valley coal chain resulted in an excessive queue rapidly reforming at the Port of Newcastle. At the time when PWCS lodged its application to reinstate the CBS in February 2007, there were 69 vessels in the queue.¹²

The following diagram summarises the ‘spike’ in the vessel queue following the cessation of the CBS at the end of 2006, as well as the decline in the vessel queue following the initial commencement of the CBS:



¹² ACCC, Final Determination, *Revocation of authorisations A30236 – A30238 and substitution of authorisations A91033 – A91035* (23 May 2007) at paragraph 7.15.

Newcastle Port Corporation believes that, having regard to the imbalance between demand and coal chain capacity, and in the absence of another thoroughly considered and evaluated mechanism for matching the imbalance, this queue would persist or grow throughout 2008.

Market forces alone did not manage to reduce the vessel queue that reformed at the port at the end of 2006, and would be unlikely to solve the capacity imbalance arising from the lack of a capacity allocation system from the first quarter of 2008. As a result, Australian coal producers would incur substantial demurrage costs.

In its consideration of the reinstatement application for the CBS, the Commission also made it clear that it believes that without some kind of capacity balancing system in place, a large queue of vessels is likely to persist (in that case for 2007).¹³

Circumstances have not essentially changed since the reinstatement application to support a different view. On this basis, the adoption of the Proposed System would be superior to a counterfactual without any capacity balancing system.

Counterfactual 2: the world with the VQMS

The second possible counterfactual envisages a world where the CBS is not reinstated on 1 January 2008, but the VQMS proposed by PWCS, Pacific National and QR Limited in their applications for authorisation A91068 – A91070 is put in place instead.

The Commission will need to effectively choose between the two proposed capacity balancing systems:

- the effective continuation of the CBS as proposed by this application; or
- implementation of the VQMS, as proposed by PWCS, Pacific National and QR Limited (**the VQMS Applicants**).

In other words, this is the more credible counterfactual.

However, the Commission cannot assume that, even if the VQMS is authorised by the Commission, that it will necessarily be adopted by PWCS. PWCS is contractually obliged to comply with the Common User Provision. If the implementation of the VQMS is inconsistent with the Common User Provision, PWCS, acting prudently, will seek the consent of the Newcastle Port Corporation. The Newcastle Port Corporation cannot say at this time that it will consent to the VQMS.

The VQMS is proposed to be implemented for a period of one year, from 1 January 2008 to 31 December 2008. The VQMS is proposed to be administered by an Administration Panel, comprising one representative from each of PWCS, Pacific National and QR Limited.

The VQMS Applicants propose the following method of allocating capacity under the VQMS:

- 1 Forecast system demand is determined by reference to the lesser of each producer's port or rail contracted volumes;

¹³ Ibid, paragraph 7.18.

- 2 the Hunter Valley Coal Chain Logistics Team (**HVCCLT**) forecasts the coal chain capacity for each month;
- 3 the Administration Panel determines each rail provider's share of available capacity on a pro rata basis according to the aggregate of their respective customers' contracted volumes;
- 4 rail providers determine their respective customers' individual rail allocations based on their individual commercial rail haulage agreements; and
- 5 PWCS loads the individual rail allocation amount determined above, provided that amount is within the customer's binding port nomination.

To ensure that a capacity management system is in place from 1 January 2008, The VQMS Applicants have sought interim authorisation of the VQMS.

Both the proposed VQMS and the CBS are designed to allocate the limited capacity in the PWCS facilities. However, the VQMS fundamentally differs from the CBS in that the former will limit port capacity allocations to those producers with valid rail contracts only. That is, the VQMS will effectively allocate capacity at the PWCS facilities on the basis of an extraneous factor – whether the producer is party to a valid rail contract.

As a consequence of this requirement for a valid rail contract, Newcastle Port Corporation understands that:

- the VMQS may have the effect of reducing the capacity allocations of certain coal shippers relative to those that are available to those shippers under the CBS;
- the VQMS appears to be inconsistent with the obligations on PWCS to operate the Kooragang Island terminal as a 'common user facility'; and
- the VQMS may create implementation issues in early 2008, given that coal shippers have made advance orders for vessels based on their entitlements under the CBS.

As such, this counterfactual provides for a world where the status quo is shifted in favour of those producers that have rail contracts for 2008, to the detriment of those producers that have been unable to secure rail contracts.

As the market position will be altered significantly if the VQMS is accepted on an interim basis, Newcastle Port Corporation submits that it is preferable to leave the current system in place while a final determination is made on the newly proposed VQMS.

In addition, notwithstanding the application for authorisation of the VQMS, the VQMS remains subject to an independent process of approval by the Newcastle Port Corporation (as the delegate of the NSW Government under the Lease). As stated above if the implementation of the VQMS is inconsistent with the Common User Provision PWCS, acting prudently, will seek the consent of the Newcastle Port Corporation. The Newcastle Port Corporation cannot say at this time that it will consent to the VQMS.

Further, Newcastle Port Corporation considers that the VQMS supporting application needs to be thoroughly evaluated.¹⁴ In particular, the following matters need to be the subject of further inquiry and analysis:

- The basis on which the VQMS Applicants have stated that rail capacity will amount to 105 mtpa is unclear.¹⁵ No details of these rail contracts have been provided (including on a 'no name', aggregated basis) to allow for independent verification. In any case, Newcastle Port Corporation understands that rail haulage contracts do not generally provide for fixed tonne haulage, but rather provide a minimum and maximum volume with the obligation on the rail provider in relation to the maximum volume being one of "best endeavours". It is therefore unclear as to how the VQMS applicants have estimated the demand for rail capacity in light of the nature of such contracts.
- The VQMS Applicants have stated that vessel queues will reduce to around 15-20 ships under the VQMS,¹⁶ but have not provided any details to support this proposition. More importantly, the VQMS Applicants have not established how the VQMS would increase capacity in the coal chain over the medium to long term to enable such a reduction in vessel queues, particularly in light of the small number of capacity expansion projects for the coal chain that will be completed in 2008.
- It is not clear how rail contracts have been allocated for 2008. For example, it is unclear whether the consultation process undertaken by the VQMS Applicants has allowed certain coal producers to secure preferential allocations.¹⁷ Further information is required to enable a better understanding of the allocations that were made.
- The "lesser of port or rail" contracts approach is stated to be a "default" position adopted by the VQMS Applicants,¹⁸ however it appears to the Newcastle Port Corporation that the position taken by coal producers remains unclear.
- It is unclear how the VQMS will create investment at all levels of the coal chain.¹⁹
- The Common User Provision in the Lease is stated as the reason why the industry did not support a CBS or port-based solution,²⁰ although the position taken by coal producers remains unclear. It is also unclear how the VQMS would be consistent with the Common User Provision.
- The VQMS Applicants state that there is general agreement within the industry that a capacity management system based on a whole of system capacity approach is required.²¹ It is unclear what the term "a whole of system capacity approach" means and what practical issues are associated with such an approach.

¹⁴ PWCS, Pacific National and QR Limited, *Proposed vessel queue management systems for 2008 to address the imbalance between the demand for coal haulage and loading services at the Port of Newcastle and the capacity of the Hunter Valley Coal Chain: Submission in support of application for authorisation under sections 88(1) and 88(7) of the Trade Practices Act 1974 (Cth) and application for interim authorisation*, Public Version, 16 November 2007.

¹⁵ Ibid, page 8.

¹⁶ Ibid, page 14.

¹⁷ Ibid, page 7.

¹⁸ Ibid, pages 2, 7, 8, 28.

¹⁹ Ibid, page 2.

²⁰ Ibid, pages 5-6.

²¹ Ibid, page 3.

- The Rail Providers state that it is necessary for producers to enter into “firm contracts” in order to provide the “right” incentives to invest, and that the VQMS is therefore necessary.²² Long term contracts between suppliers and customers generally operate to allocate legal and commercial risks between the parties. It is not clear what risks the rail operators face in investing in capacity, beyond the normal risks faced by businesses operating in a competitive environment. It is also not clear that, absent “firm” contracts, the rail providers will not undertake investments in rolling stock particularly given the scalable nature of the investment.
- It is stated that the VQMS will facilitate the correct prioritisation and delivery of new track capacity,²³ although it is unclear how this would occur.
- It is stated that the VQMS will not have a significant impact on competition in any market given that it is designed to be a short term measure only.²⁴ However, given the methodology for capacity allocation under the VQMS curtails the entitlements of several coal producers, there may be certain competition issues that flow from the introduction of the VQMS. These matters would need to be thoroughly considered by the Commission before it grants an authorisation of the VQMS and would suggest that an interim authorisation should be not granted.
- The VQMS Applicants state that the VQMS does not present an impediment to a new entrant seeking rail haulage services.²⁵ However, this statement appears inconsistent with the view that rail capacity is constrained. It is unclear how new entrants can obtain access to rail haulage services where supply is insufficient to satisfy existing demand for such services.

On the basis of the above, Newcastle Port Corporation considers that the authorisation of the VQMS on an interim basis would be premature and that greater consideration of this proposal is required.

Newcastle Port Corporation’s preference therefore is for the Proposed System to become effective on 1 January 2008 as an interim measure. In practice, this would ensure the effective continuation of the current CBS and will provide the Commission and interested parties with sufficient time to properly consider and evaluate the VQMS.

Indeed, unlike the VQMS, the Commission has already assessed and approved the CBS under the authorisation process, which included extensive public consultation and consideration of the public benefits and detriments.

5 Public benefits of the Proposed System

5.1 Public benefits outweigh public detriments

By granting this application for authorisation, the Commission will be giving effect to the Proposed System, which is in all respects consistent with the existing CBS.

The basis for the Commission’s authorisation of the Proposed System is the same as that for the CBS. In particular:

²² Ibid, pages 8, 15, 17.

²³ Ibid, page 9.

²⁴ Ibid, page 36.

²⁵ Ibid, page 37.

- the Hunter Valley coal chain continues to remain subject to significant capacity constraints;
- as at 26 November 2007, there is a queue of 40 vessels at the Port of Newcastle²⁶ and this queue is expected to increase in 2008 in the absence of the Proposed System; and
- the adoption of the Proposed System will minimise the capacity constraints in the Hunter Valley coal chain and accordingly reduce the demurrage charges paid to queuing vessels at the Port of Newcastle.

The above stated benefits are likely to strongly outweigh any public detriments.

Further details of the public benefits and detriments are provided below.

5.2 Public benefits

The primary public benefit flowing from the authorisation of the Proposed System is a reduction in demurrage charges that would otherwise be payable by the coal shippers in the absence of the Proposed System.

In addition, the Proposed System will deliver the following substantial public benefits:

- reduced coal stockpiling costs for most producers compared to a situation where the queue persists;
- permit Newcastle Port Corporation to better manage safety and environmental issues arising from the existence of large queues at the Port of Newcastle
- improved international reputation and international competitiveness of the Port of Newcastle and the Hunter Valley coal industry, to the extent that the existence of large vessel queues would discourage overseas customers from purchasing coal from Hunter Valley producers;
- allows current arrangements (which are understood by the industry) to continue as a means of minimising demurrage costs, while the Commission considers other proposals for the allocation of capacity;²⁷
- provides certainty to producers regarding the coal they can ship, loading times and vessel schedules, thereby enabling better allocation of production;
- ensures the vessel queue operates at a more efficient level;
- increases incentives for coal producers to invest in the Hunter Valley coal production and handling facilities; and
- ensures that existing capacity allocations continue, thereby ensuring that existing entitlements of producers are not curtailed or subject to significant reductions without any analysis.

These public benefits are essentially the same as those cited (and accepted by the Commission) in the authorisation application for the CBS.

²⁶ Source: Newcastle Port Corporation.

²⁷ Application by PWCS, Pacific National and QR Limited for a proposed Vessel Queue Management System, authorisation numbers A91068 – A91070.

5.3 No public detriments

The Newcastle Port Corporation considers that any public detriment is likely to be low for the reasons set out by the Commission in its final determination granting authorisation of the CBS in 15 April 2005.

Newcastle Port Corporation submits, in fact, that the public benefits identified above will significantly outweigh any detriments.

6 Interim authorisation

As the operator of the Port of Newcastle and an entity that is required to take account of broader economic objectives, Newcastle Port Corporation considers that vessel queues and associated demurrage charges need to be minimised through the authorisation of the Proposed System on an interim basis.

As the Proposed System is in all respects consistent with the existing CBS and possesses the same likely benefits and detriments, Newcastle Port Corporation considers that it can be authorised by the Commission on an expedited basis.

**Attachment 1 —
Proposed System**

**ANNEXURE 4F
MEDIUM TERM CAPACITY BALANCING SYSTEM
OBJECTIVES, PRINCIPLES & PROTOCOLS**



Please note

Newcastle Port Corporation has marked up the differences between the Proposed System and the current CBS.

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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*.

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 Monthly Loading Allocation or Quarterly Loading Allocation, whichever is appropriate in the context, 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.
- 8.5 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.
- 8.6 PWCS will notify all Customers of any variation to this Annexure.

9. Commencement and Duration of the Scheme

- 9.1 [Subject to clauses 2.4 and 2.5 of this Part A, the Scheme will commence on 1](#)

January 2008 and continue until 31 December 2008, or until the Australian Competition and Consumer Commission approves the applications for authorisation numbered A91068 – A91070, whichever is earlier. ~~amendments to the Scheme made in February 2007 (except where the Administrator decides that it is only practical to implement them from the date authorized).~~

- 9.2 Any extension of the Scheme beyond the 2008 calendar year will require Industry Support. ~~The Scheme, as amended, will continue until 31 December 2007.~~
- 9.3 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. ~~In respect of the period from 1 January 2007 until the time of authorisation of the Scheme in 2007 in accordance with clause 2.5 ("transitional period"), the Administrator will make decisions regarding the transitional operational arrangements to give effect to the Scheme consistent with the Objectives. This will include the following transitional arrangements.~~
- ~~(a) So as to enable each Produce to manage use of Loading Allocation in the transitional period as soon as reasonably possible and prior to interim authorisation being granted by the Commission, the Administrator will calculate and notify each Producer of its estimated Monthly Loading Allocation or Quarterly Loading Allocation, whichever is appropriate in the context.~~
- ~~(b) Subject to this clause 9.3, in respect of the first Calendar Quarter 2007 each Producer's maximum usage of Loading Allocation in accordance with clause 3.8 of Annexure 4E is limited to the amount of Loading Allocation that the Producer would otherwise have held, as determined under Annexure 4E, if a Scheme did not apply.~~
- ~~(c) Once a Producer's Final Loading Allocation is determined in accordance with Schedule 5 of this Annexure 4F, that Loading Allocation shall apply retrospectively from 1 January 2007.~~
- ~~(d) For the avoidance of doubt, in respect of first Calendar Quarter of 2007 any over-use of Loading Allocation by a Producer arising from the application of the interim arrangement in clause 9.3(b) will be deducted from the Quarterly Loading Allocation of the Producer in the second Calendar Quarter of 2007.~~

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;
- (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; or
- (h) subject to authorisation by the Commission, the re-introduction of the Scheme in [20072008](#), as amended;

unless

- (i) the event giving rise to the loss or damage is caused by the willful misconduct or fraudulent act on the part of the party against whom the claim is made; or
 - (j) 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, willful 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* \ 974 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

2008 Year	The calendar year commencing 1 January 2008.
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.
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.
Capacity 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 is deemed to commence as set out in clause 9.1 of Part A of this Annexure.
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.
Forecast Requirement	The total amount of Coal, expressed in tonnes, that the Producer forecast in its revised Demand Nomination submitted to PWCS in respect of the calendar year 2007 in October 2006 or any lesser amount submitted to and accepted by PWCS in 2007.
HVCC Logistics	Hunter Valley Coal Chain Logistics Team.
Large Producer	A Producer listed as a Large Producer in Attachment A.
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 I(a) of Schedule 6.
Lower Flexibility Limit	The Monthly Loading Allocation or Quarterly Loading Allocation of a Producer, whichever is appropriate in the context, minus its Lower Flexibility Amount.
Monthly Loading Allocation	The Loading Allocation that is allocated to the Allocation Holder for the relevant Calendar Month in accordance with paragraph 1A of Schedule 5.
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 in accordance with paragraph 1 of Schedule 5.
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.

Small Producer	A Producer listed as a Small Producer in Attachment A.
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 Month or Calendar Quarter, whichever is appropriate in the context, 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-Month 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 Quartet- Month 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 fulfill 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 Month or Calendar Quarter, whichever is appropriate in the context, 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

- I. 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.
- 1A. The Administrator will allocate the Loading Allocation of a Producer in the following manner:

(a) where the Producer is a Large Producer (as listed in Attachment A)	on a monthly basis by converting the Producer's Quarterly Loading Allocation to a Monthly Loading Allocation (by a pro-rata distribution based on monthly declared Coal Chain Capacity); and
(b) where the Producer is a Small Producer (as listed in Attachment A)	on a quarterly basis equal to the Producer's Quarterly Loading Allocation

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 load point 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.

For the avoidance of doubt Conditional Allocations will be determined on a quarterly basis for both Large Producers and Small Producers in the manner described above.

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 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 180,000 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 90,000 tonnes (50% of 180,000); and

(a) the Upper 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 Flexibility Amount will be 180,000 tonnes; and
- £ for Producers with a Loading Allocation for the Relevant Year less than 1,000,000 tonnes, the Upper 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 Lower Flexibility Amount will be 18,000 tonnes (10% of 180,000); and

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 a Producer ("**Relevant Producer**") with:

- (a) a Monthly Loading Allocation has, at midnight on the 5th day after the conclusion of any Calendar Month ("**Relevant Month**"), an Unused Portion for that Relevant Month; or
- (b) a Quarterly Loading Allocation has, at midnight on the 5th day after the conclusion of any Calendar Quarter ("**Relevant Quarter**"), fees-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 Month or Relevant Quarter as the case may be (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.

Physical compensation if the Relevant Producer is an Unrestricted Producer

4. If the Relevant Producer is an Unrestricted Producer and has not, prior to the start of the Relevant Month or 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 Month or 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 Month or 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 Month or Relevant Quarter.

6. If the Calendar Month or Calendar Quarter immediately following the Relevant Month or Relevant Quarter, whichever is appropriate in the context 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 Month or Calendar Quarter, whichever is appropriate in the context.

Financial compensation if the Relevant Producer is a Restricted Producer

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 Month or 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 Month or Relevant Quarter.
 - (f) Subject to the following subparagraph, should the Unused Portion exceed the Arbiter's Adjustment for Relevant Month or Relevant Quarter then the amount of that excess will be deducted from that Producer's Loading Allocation for the next-Calendar Month or Calendar Quarter immediately following the Relevant Month or Relevant Quarter, whichever is appropriate in the context, 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 Month or Relevant Quarter, even if the Administrator is unable to redistribute the Unused Portion during the Relevant Month or 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

Producer	Mine
Large Producer:	
BHP Billiton	Mt Arthur Mt Arthur Underground(†)
Coal & Allied	Hunter Valley Mount Thorley Warkworth Bengalla
Peabody Pacific	Wambo Wilpinjong Open Cut
XStrata Coal Australia	Cumnock United Liddell Bulga West Wallsend Mt Owen Ulan
Small Producer:	
Anglo Coal	Drayton
Austar Coal Mine Pty Ltd	Austar
Bloomfield Collieries	Bloomfield Rix's Creek
Centennial Coal Company	Newstan
Donaldson Coal	Donaldson Tasman Abel(†)
Gloucester Coal	Stratford Mine
Idemitsu Australia Resources	Boggabri Muswellbrook Coal Co No. 1 & No. 2
Integra Coal	Camberwell Open Cut Glennies Creek Underground Glennies Creek Open Cut
Resource Pacific Ltd	Newpac
White Mining Limited	Ashton
Whitehaven Coal Mining Limited	Whitehaven Werris Creek Tarrawonga Sunnyside(†)

(†) Indicates a New Mine with an estimated commencement quarter in 2007.

Attachment 2 –Shareholders in PWCS and Newcastle Coal Shippers Pty Limited

Part A Newcastle Coal Shippers Pty Limited

Shareholder Name	Percentage %	No. of Shares
Oakbridge Pty Limited	20.2321%	6,398,719
Drayton Coal Pty Limited	20.0000%	6,326,320
Ulan Coal Mines Limited	15.9742%	5,052,110
Coal & Allied Industries Limited	11.4102%	3,608,650
Warkworth Coal Sales Limited	11.2681%	3,563,705
Port Waratah Coal Services Limited	8.9640%	2,835,000
Bloomfield Collieries Pty Limited	2.8170%	890,926
Camberwell Coal Pty Limited	2.1306%	673,850
Mt Arthur Coal Pty Limited	1.7479%	552,800
Muswellbrook Coal Company Limited	1.6902%	534,556
Powercoal Pty Limited	1.5809%	500,000
Wambo Mining Corporation Pty Limited	1.1268%	356,371
United Collieries Pty Limited	0.6429%	203,313
Liddell Coal Marketing Pty Limited	0.1804%	57,050
Cumnock No. 1 Colliery Pty Limited	0.0361%	11,410
Hunter Valley Coal Corporation Pty Limited	0.0361%	11,410
Ocean Coal Australia Limited	0.0361%	11,410
Bengalla Coal Sales Company Pty Limited	0.0361%	10,000
Centennial Coal Company Limited	0.0316%	10,000
Gloucester Coal Ltd	0.0316%	10,000
Namoi Mining Pty Ltd	0.0316%	10,000
Total Issued Capital	100.0000%	31,626,600

Part B Port Waratah Coal Services Limited

Shareholder Name	Percentage %	No. of Shares
Newcastle Coal Shippers Pty Limited	36.9491%	49,001,000
Coal & Allied Industries Limited	16.0018%	21,221,250
RW Miller (Holdings) Limited	13.9982%	18,564,000
Tomen Corporation	10.0000%	13,261,750
Japan Coal Development Co. Ltd	4.1039%	5,442,500
Bloomfield Collieries Pty Limited	3.4611%	4,590,000
Nippon Steel Australia Pty Ltd	3.3171%	4,399,108
Mitsui & Co. Ltd	2.8861%	4,827,500
Mitsubishi Corporation	1.9862%	2,634,100
Nissho Iwai Corporation	1.1745%	1,557,592
JFE Engineering Corporation	1.1006%	1,459,620
JFE Steel Corporation	1.0868%	1,441,260
Sumitomo Metal Australia Pty Ltd	1.0452%	1,386,180
Itochu Coal Resources Australia Pty Limited	1.0171%	1,348,900
Kobe Steel, Ltd	0.6022%	798,660
Nisshin Steel Co. Ltd	0.21.46%	284,580
Taiheiyo Cement Corporation	0.1759%	233,250
Kanematsu Corporation	0.1173%	155,500
Marubeni Corporation	0.1173%	155,500
Sumitomo Corporation	0.1173%	155,500
Tokyo Boeki Ltd	0.1173%	155,500
Ube Industries Ltd	0.1173%	155,500
Sumitomo Osaka Cement Co. Ltd	0.0879%	116,625

Idemitsu Kosan Co. Ltd	0.0586%	77,750
Mitsubishi Materials Corporation	0.586%	77,750
Nippon Oil Corporation	0.0586%	77,750
Tokuyama Corporation	0.0293%	38,875
Total Capital	100.0000%	132,617,500