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LAWYERS

17 December 2007

**By email**

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Dear Mr Gregson

**Newcastle Port Corporation - Applications for authorisation (A91072-A91074)**

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

I refer to the application for authorisation lodged by NPC on 3 December 2007 (applications numbers A91072-A91074).

It has come to our attention that the Proposed System, as set out in Attachment 1 of the supporting submission of the NPC application, contains some provisions that require amendment.

The requested amendments are transitional in nature and seek to ensure the effective implementation of NPC's proposed capacity allocation system in the event that the Commission decides to provide an interim authorisation of that system from 1 January 2008 onwards.

The requested amendments are set out below and have also been set out in a marked up version of the Proposed System, which is attached.

**1 Definition of "Forecast Requirement"**

The definition of "Forecast Requirement" in Schedule 1 (Dictionary) currently refers to the Demand Nominations submitted by Producers in October 2006 for the 2007 calendar year. As part of the Demand Nominations submitted in October 2006, binding Demand Nominations were also provided for the 2008 calendar year.

The definition of "Forecast Requirement" is intended to refer to the Demand Nominations provided for the 2008 calendar year and should be amended as follows:

*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 **2008 calendar year** ~~2007~~ in October 2006 or any lesser amount submitted to and accepted by PWCS ~~in 2007~~.*

**2 Lodgement of demand profiles**

Due to the pending expiry of the current Capacity Balancing System on 31 December 2007, coal producers have not provided demand profiles to enable the system administrator to determine Quarterly Loading Allocations for 2008.

The requested amendment to Clause 1 of Schedule 5 (Capacity Distribution) of the Proposed System below provides for Producers to lodge demand profiles for 2008 no later than 31 December 2007:

*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. Each Producer must, as soon as possible following the date that the ACCC grants the ACCC Authorisation (but in any event, no later than 31 December 2007), provide the Administrator with its demand profile for the 2008 Year (broken down by Calendar Quarter) to enable the calculation of the Quarterly Loading Allocations for each Producer.*

NPC does not consider the requested amendments to be substantive in nature, but appreciate that the Commission may wish to notify interested parties of the above noted changes.

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

Yours sincerely



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



Please note

NPC's requested amendments to the Proposed System are set out in red mark-up.  
The differences between the Proposed System and the current CBS remain set out in blue mark-up.

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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

|                                    |   |
|------------------------------------|---|
| <b>2008 Year</b>                   | The calendar year commencing 1 January 2008.  |
| <b>Allocation Holder</b>           | A Producer who has allocated to it a Loading Allocation for the Relevant Period.  |
| <b>ACCC Authorisation</b>          | Any authorisation or interim authorisation granted by the Commission under the <i>Trade Practices Act 1974</i> in relation to applications to the Commission in relation to the Scheme.   |
| <b>Annual Capacity Factor</b>      | The multiplier defined in accordance with paragraph 4 of Schedule.  |
| <b>Annual Pro-Rata Allocation</b>  | The capacity allocation of each Producer after the Forecast Requirement has been adjusted in accordance with Schedule 2 and after the application of the Annual Capacity Factor in accordance with Schedule 4.  |
| <b>Arbiter</b>                     | The person or entity appointed to determine the Arbiter's Determined Amount in accordance with paragraph 4 of Schedule 3.   |
| <b>Arbiter's Adjustment</b>        | The difference between the Producer's Forecast Requirement for the relevant Calendar Quarter and the Arbiter's Determined Amount for that quarter.  |
| <b>Arbiter's Determined Amount</b> | This term is defined in paragraph 4 of Schedule 3, subject to paragraph 2 of that Schedule.   |
| <b>Auction Clearing Price</b>      | The auction price at which the cumulative tonnage reduction bid into the Demand Reduction Auction is equal to the required reduction amount.  |
| <b>Auditors</b>                    | The Capacity Auditor (if required) and the Demand Auditor.  |
| <b>Authorisation Conditions</b>    | Any conditions imposed by the Commission on the Scheme and contained within the ACCC Authorisation.   |
| <b>Authorisation Date</b>          | The first date that the ACCC Authorisation is effective, as determined by the Commission.   |
| <b>Available Capacity</b>          | The forecast amount of Coal, expressed in tonnes, less the Carryover Tonnage, to be loaded onto vessels at the Terminal in the Relevant Period such that an operational queue is maintained as determined in accordance with paragraph 4 of Schedule 2. |
| <b>Board</b>                       | The board of directors of PWCS.   |

|   |  |
|---|--|
| <b>Capacity Auditor</b>                 | The professional audit firm(s) appointed (if required) to conduct an audit of PWCS's calculation of the Coal Chain Capacity in accordance with Schedule 2.   |
| <b>Capacity Profile</b>                 | The distribution of annual Coal Chain Capacity across the Relevant Year expressed as quarterly percentages of the annual Coal Chain Capacity.                |
| <b>Capacity Tonnage</b>                 | 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.   |
| <b>Coal Chain Capacity</b>              | 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. |
| <b>Coal Handling Services Agreement</b> | The agreement so titled between PWCS and each Customer for the provision by PWCS to the Customer of coal handling and other services.                        |
| <b>Commencement Date</b>                | The date that the Scheme is deemed to commence as set out in clause 9.1 of Part A of this Annexure.  |
| <b>Commission</b>                       | The Australian Competition and Consumer Commission.  |
| <b>Conditional Allocation</b>           | This term is defined in paragraph 2 of Schedule 5.   |
| <b>Customer</b>                         | A party to a Coal Handling Services Agreement, other than PWCS, who receives Coal Handling Services from PWCS.   |
| <b>Days</b>                             | Calendar days unless stated otherwise.   |
| <b>Demand Auditor</b>                   | The professional audit firm(s) appointed to conduct an audit of a Producer's Demand Nomination in accordance with Schedule 3.                                |
| <b>Demand Profile</b>                   | The percentage of the Final Demand Amount for each Calendar Quarter of the Relevant Year.  |
| <b>Demand Reduction Auction</b>         | The demand reduction auction facilitated by the Administrator in accordance with paragraph 6 of Schedule 4.  |
| <b>Excess Demand</b>                    | The amount by which the Forecast System Demand for the Relevant Year exceeds the Available Capacity.   |
| <b>Final Demand Amount</b>              | The total demand of a Producer for Coal Handling Services for the Relevant Period, determined in accordance with paragraph 8 of Schedule 3.                  |
| <b>Final Notice</b>                     | A notice identifying each Producer's final Quarterly Loading Allocation for the Relevant Year.   |

|                                     |  |
|-------------------------------------|--|
| <b>Forecast System Demand</b>       | The aggregate forecast demand for Coal Handling Services during the Relevant Period, determined in accordance with paragraph 1 of Schedule 4.  |
| <b>Forecast Requirement</b>         | The total amount of Coal, expressed in tonnes, that the Producer forecast in its revised Demand Nomination submitted to PWCS in respect of the <del>2008 Year calendar year 2007</del> in October 2006 or any lesser amount submitted to and accepted by PWCS <del>in 2007</del> . |
| <b>HVCC Logistics</b>               | Hunter Valley Coal Chain Logistics Team.   |
| <b>Large Producer</b>               | A Producer listed as a Large Producer in Attachment A.   |
| <b>Loading Allocation</b>           | The volume of Coal Handling Services, expressed in tonnes, allocated to a Producer during the Relevant Period, determined in accordance with paragraph 1 of Schedule 5 and adjusted in accordance with other provisions of this Annexure.  |
| <b>Lower Flexibility Amount</b>     | The Lower Flexibility Amount as determined in accordance with subparagraph I(a) of Schedule 6.   |
| <b>Lower Flexibility Limit</b>      | The Monthly Loading Allocation or Quarterly Loading Allocation of a Producer, whichever is appropriate in the context, minus its Lower Flexibility Amount.   |
| <b>Monthly Loading Allocation</b>   | The Loading Allocation that is allocated to the Allocation Holder for the relevant Calendar Month in accordance with paragraph 1A of Schedule 5.   |
| <b>the Objectives</b>               | The objectives stated in paragraph 2.3 of Part A.  |
| <b>Operational Allowance</b>        | A queue of vessels at the Port of Newcastle determined in accordance with paragraph 2 of Schedule 2.   |
| <b>Quarterly Loading Allocation</b> | The Loading Allocation that is allocated to the Allocation Holder for the relevant Calendar Quarter in accordance with paragraph 1 of Schedule 5.  |
| <b>Railed Tonnes</b>                | The actual amount of Coal, expressed in tonnes as measured by the transport provider, that is received by rail by PWCS from a Producer to be loaded on behalf of a Customer onto a vessel by PWCS under a Coal Handling Services Agreement.  |
| <b>Restricted Producer</b>          | This term is defined in paragraph 7 of Schedule 3.   |
| <b>Schedule</b>                     | A schedule to this Annexure.   |
| <b>Scheme</b>                       | The Capacity Balancing System described in this Annexure.  |

|                                 |  |
|---------------------------------|--|
| <b>Small Producer</b>           | A Producer listed as a Small Producer in Attachment A.   |
| <b>Total Demand</b>             | The aggregate of all Forecast Requirements for the Relevant Year.  |
| <b>Unrestricted Producer</b>    | A Producer who is not a Restricted Producer.   |
| <b>Unused Portion</b>           | 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. |
| <b>Upper Flexibility Amount</b> | The Upper Flexibility Amount as determined in accordance with subparagraph 1(b) of Schedule 6.   |

## SCHEDULE 2

### CAPACITY DECLARATION

1. PWCS, with assistance from HVCC Logistics, will calculate the Coal Chain Capacity for each Calendar Quarter-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

1. The Administrator will in respect to the Relevant Year determine Quarterly Loading Allocations for each Producer in a manner which seeks to match both the capacity profile and individual Producers' demand profiles as closely as possible. Each Producer must, as soon as possible following the date that the ACCC grants the ACCC Authorisation (but in any event, no later than 31 December 2007), provide the Administrator with its demand profile for the 2008 Year (broken down by Calendar Quarter) to enable the calculation of the Quarterly Loading Allocations for each Producer.

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**

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

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