



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for revocation and substitution

lodged by

Port Waratah Coal Services Ltd

in respect of

**a modified Medium Term Capacity Balancing System to address
the imbalance between the demand for coal loading services at
the Port of Newcastle and the capacity of the Hunter Valley coal chain**

Date: 4 April 2007

Authorisation No.: Revocation of
authorisations A30236 – A30238
and substitution of authorisations
A91033 – A91035.

Public Register No.: C2007/611

Commissioners: Samuel
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Summary

The ACCC proposes to revoke authorisations A30236 – A30238 and grant substitute authorisations A91033 – A91035 to Port Waratah Coal Services Ltd for the modified Medium Term Capacity Balancing System until 31 December 2007.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Background

In April 2005 the ACCC granted conditional authorisation (A30236 – A30238) to PWCS for the Medium Term Capacity Balancing System (CBS) until 31 December 2007.

Under the terms of the Medium Term CBS, the extension of the scheme from one calendar year to the next was dependent on, among other things, receiving industry support in September of the preceding year.

In September 2006, Hunter Valley coal producers voted to discontinue the Medium Term CBS for 2007. At that time, it was thought the capacity of the Hunter Valley coal chain would be sufficient to meet actual demand for coal loading services for 2007. Following the industry vote, a large queue of vessels re-formed at the Port of Newcastle. In February 2007 there were 69 vessels in the queue.

The applications for authorisation

PWCS has now sought revocation of the current authorisations (A30236 – A30238) so that they can be substituted with new authorisations to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle until 31 December 2007 (being the term of PWCS' original authorisation). The scheme is designed to address the current imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain.

The key amendments to the Medium Term CBS are to introduce monthly allocation for 'large producers' and to double the flexibility amounts for all producers.

In considering PWCS' new application, the ACCC has been assisted by its 2005 evaluation of the Medium Term CBS and its conclusion, at that time, that conditional authorisation of the scheme to the end of 2007 was likely to result in a net public benefit.

Public detriment

The ACCC considers that any public detriment arising from the amended Medium Term CBS is likely to be negligible. In particular, the ACCC is satisfied that the introduction of monthly loading allocation for large producers and increasing the flexibility limits for all producers is unlikely to result in a reduction in the total volume of coal moved through the port.

Further, given the recent and ongoing expansion initiatives along the coal chain, and particularly at the port, the ACCC considers reinstating the modified Medium Term CBS for the remainder of 2007 is unlikely to defer necessary investment.

Public benefit

The ACCC is satisfied that the modified Medium Term CBS is likely to result in a significant benefit to the public, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where the current queue persists. The ACCC considers that producers would face significantly higher demurrage costs for the remainder of 2007 without the reinstatement of the amended Medium Term CBS.

Balance of public benefit and detriment

Overall, the ACCC considers that in all the circumstances, the public benefit generated by the modified Medium Term CBS is likely to outweigh the public detriment.

Length of authorisation

The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

In this instance, the ACCC proposes to grant authorisation to the modified Medium Term CBS, as requested, until 31 December 2007 only.

Interim authorisation

At the time of lodging the application for revocation and substitution, PWCS requested interim authorisation to allow it to urgently reinstate the modified Medium Term CBS before April 2007.

On 14 March 2007 the ACCC granted interim authorisation to PWCS to reinstate the proposed amended Medium Term CBS at the Port of Newcastle.

Interim authorisation will continue to protect the arrangements until the ACCC releases a final determination, unless the ACCC decides to revoke interim authorisation.

The next steps

The ACCC will now seek further submissions from the applicant and interested parties in relation to this draft determination prior to making a final decision. The applicant and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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List of abbreviations

CBS	Capacity Balancing System
Protocols	Annexure 4F Medium Term Capacity Balancing System Objectives, Principles and Protocols
PWCS	Port Waratah Coal Services Ltd
The Act	<i>Trade Practices Act 1974</i>

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.
- 1.8 Parties to an authorisation may apply for what is known as ‘revocation and substitution’. Procedurally, the ACCC treats an application for revocation and substitution as if it was a fresh application and the processes above are followed.

The application for authorisation

- 1.9 On 27 February 2007 Port Waratah Coal Services Ltd lodged an application seeking to revoke authorisations A30236 – A30238 and to substitute authorisations A91033 – A91035 to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle.
- 1.10 PWCS' original authorisations (A30236 – A30238) were not due to expire until 31 December 2007. PWCS seeks authorisation of the modified Medium Term CBS until 31 December 2007 only.

Interim authorisation

- 1.11 On 14 March 2007 the ACCC granted interim authorisation to PWCS to reinstate the modified Medium Term CBS at the Port of Newcastle.
- 1.12 In granting interim authorisation, the ACCC had regard to the following:
- if the amended Medium Term CBS is not reinstated, the large queue of vessels currently at the Port of Newcastle is likely to persist at least in the short term, with the resultant high demurrage costs continuing to be incurred by Australian coal producers
 - there was a degree of urgency to implement the amended Medium Term CBS as soon as possible to start reducing the queue of over 60 vessels to a workable length
 - the amended Medium Term CBS is likely to result in significant demurrage savings for Australian coal producers in 2007
 - no information had been received to suggest that there is likely to be a reduction in the aggregate volume of coal exported through the Port of Newcastle
 - if authorisation is later denied, producers have the ability to re-schedule vessels and production timetables based on annual demand nominations for the balance of 2007
 - the ACCC has been assisted by its 2005 consideration of the scheme and its acceptance at that time - with the benefit of comprehensive consultation and assessment - that continuation of the scheme to the end of 2007 was likely to be in the public interest.

Chronology

1.13 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application to revoke authorisations (A30236 – A30238) and to substitute authorisations (A91033 – A91035)

DATE	ACTION
27 February 2007	Application for revocation and substitution lodged with the ACCC, including an application for interim authorisation.
9 March 2007	Closing date for submissions from interested parties in relation to the request for interim authorisation.
14 March 2007	The ACCC granted interim authorisation to PWCS to allow it to reinstate the modified Medium Term CBS at the Port of Newcastle.
19 March 2007	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
20 March 2007	PWCS advised that no additional submissions were received by the ACCC in relation to the substantive application for authorisation.
4 April 2007	Draft determination issued.

2. Background to the application

2.1 This chapter of the draft determination focuses on:

- the ACCC's 2005 evaluation of the Medium Term CBS
- the performance of the Hunter Valley coal chain and investment under the current authorisations
- the industry votes in 2006 and 2007 regarding the operation of the Medium Term CBS.

2.2 Further background information on the industry participants and the operation of the Hunter Valley coal chain is provided in Chapter 2 of the ACCC's determination of 9 July 2004 in relation to the short term Capacity Distribution System.

PWCS

2.3 PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle in New South Wales. PWCS provides coal handling services to Hunter Valley coal exporters, including the receiving and unloading of coal, the storage of coal and loading of coal onto vessels for export.

2.4 PWCS is owned by a number of coal producers and other participants in the Hunter Valley coal industry. Attachment A lists PWCS' shareholders. PWCS leases the land on which the terminals are situated from the NSW Government under an agreement which states that the port is to be maintained as a 'common user facility'.

2.5 Any party who wishes to use the port to load coal may do so, provided they sign a Coal Handling Service Agreement (CHSA). The CHSA sets out the terms on which PWCS will provide coal handling services to users.

The current authorisations (A30236 – A30238)

- 2.6 On 15 April 2005 the ACCC granted conditional authorisation to PWCS for the Medium Term CBS until 31 December 2007 (hereafter referred to as the ‘current authorisation’). Prior to this, the ACCC had granted interim authorisation to PWCS which effectively allowed PWCS to commence the operation of the scheme from 1 January 2005.
- 2.7 Public detriment concerns raised by interested parties focused on whether the Medium Term CBS would result in reduced coal exports through the port, remove pressure for and defer necessary investment to expand the capacity of the coal chain and result in other efficiency losses.
- 2.8 The ACCC considered that any reduction in aggregate coal exports due to under-use of allocation would result in a public detriment. However, the ACCC was satisfied that any public detriment arising from a reduction of the volume of coal moved through the coal chain was likely to be negligible, particularly due to the introduction of the five per cent conditional allocation provision and other flexibility measures under the Medium Term CBS.
- 2.9 In addition, given PWCS’ record of investment and its commitment to a scheduled program of investment in the Hunter Valley, the ACCC was also satisfied that the Medium Term CBS would not remove the pressure to invest in expanding the capacity of the Hunter Valley coal chain, including at the port, and was unlikely therefore to constrain export growth. Moreover, the ACCC noted that significant commercial incentives exist for producers (some with shareholding in PWCS) to increase exports, and therefore expand the capacity of the coal chain.
- 2.10 The ACCC also noted that absent the authorisation (and the Medium Term CBS), more efficient producers did not appear to have any greater advantage over less efficient producers as the port does not use a price mechanism to allocate capacity.
- 2.11 Regarding public benefits, the ACCC concluded that the Medium Term CBS was likely to result in significant public benefit, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where a queue persists.

- 2.12 Overall, the ACCC concluded that in all the circumstances, the public benefit was likely to outweigh the public detriment. Having said this, the ACCC also considered there was a greater likelihood of potential detriment eventuating the longer the authorisation ran and over time, there was a risk that the net public benefit could be reduced.
- 2.13 Therefore, to remove any uncertainty that the net public benefit would be maintained over the length of the authorisation, the ACCC granted authorisation subject to a condition which, broadly, required PWCS to report annually on the progress made in the Hunter Valley in relation to the coordinated program of investment and any impact of the Medium Term CBS on the volume of coal exports.
- 2.14 Specifically, the condition of authorisation required PWCS to report annually to the ACCC by 21 January of each year, commencing in 2006. This report was to provide at least the following information:
- rail, port and other capacity expansion projects completed during the preceding calendar year, including the volume of increased capacity delivered
 - the nature of ongoing rail, port and other capacity expansion projects in the preceding year, including an estimated date of completion and the volume of capacity to be delivered
 - the nature of any proposed capacity expansion investment along the coal chain for the following year(s)
 - the annual total volume of coal exported through the Port of Newcastle for the preceding year
 - the declared annual coal chain capacity, the volume of allocation utilised during each quarter of the preceding year and the total volume of available allocation for each quarter of the preceding year.

Investment and the performance of the Hunter Valley coal chain

- 2.15 The ACCC received two annual reports from PWCS in 2006 and 2007, in accordance with the condition of authorisation (A30236 – A30238). Copies of PWCS' annual reports are available on the ACCC website.

Volume of coal exports and vessel queues

- 2.16 PWCS reported an increase in aggregate coal exports in the first year of operation of the Medium Term CBS. In particular, 80.3 million tonnes of coal was exported through the port in 2005, representing a 3.2 per cent increase over coal exports in 2004.¹ New monthly records for throughput were established for the Hunter Valley coal chain on three occasions – 87 million tonnes per annum in January 2005, 88 million tonnes per annum September 2005 and 91 million tonnes per annum in October 2005.²
- 2.17 The average vessel queue for 2005 was 15 ships.³ The industry considers an optimal queue to be around 15 – 20 ships.
- 2.18 In 2006, a total of 79.8 million tonnes of coal was exported through the port. This was a 0.6 per cent decrease in coal throughput at the port from 2005.⁴ In the second half of 2006, PWCS was required to adjust the declared coal chain capacity downwards by approximately 1.3 million tonnes due to the rescheduling of planned maintenance and a 24 hour closure at PWCS for Christmas. As a consequence, coal loading allocations also required adjustment.⁵
- 2.19 The average vessel queue in 2006 was 23 ships.⁶ PWCS noted the use of quarterly loading allocations under the Medium Term CBS results in a cyclical pattern to the vessel queue. In particular, lower vessel arrival rates generally occurred in the first half of each quarter, resulting in a significantly higher arrival rate towards the end of each quarter as producers sought to minimise their under use of allocation.⁷

¹ Port Waratah Coal Services *Medium Term Capacity Distribution System, Australian Competition and Consumer Commission Report for 2005*, p2.

² Ibid, p6.

³ Ibid, p2.

⁴ Port Waratah Coal Services *Medium Term Capacity Distribution System Australian Competition and Consumer Commission Report for 2006*, p2.

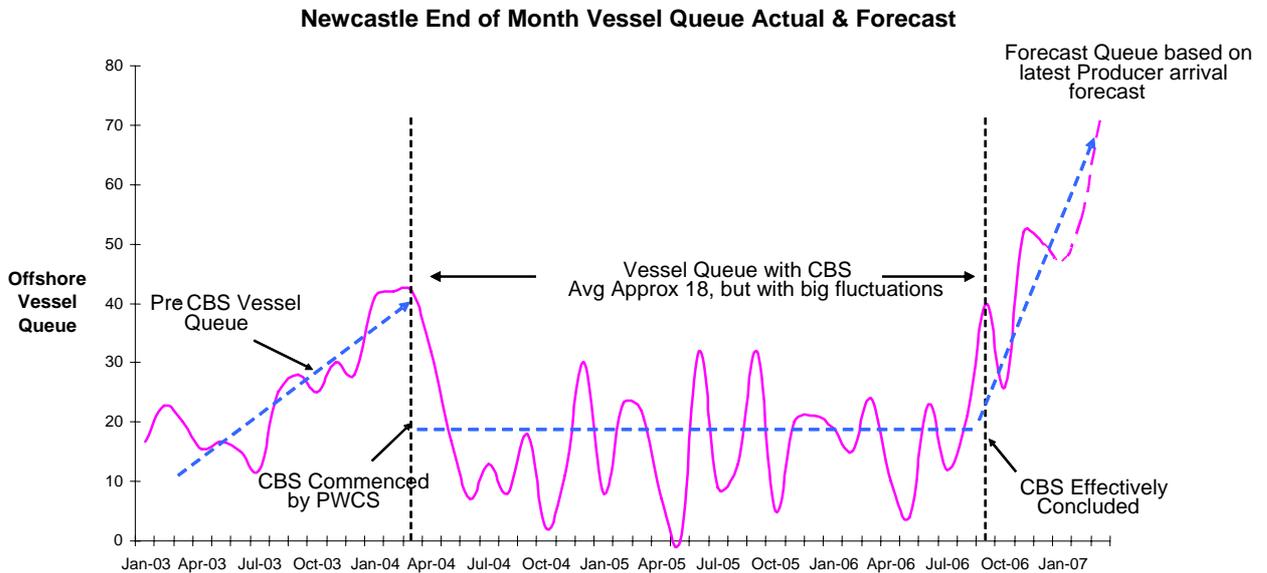
⁵ Ibid, pp5-6.

⁶ Ibid, p2.

⁷ Ibid, p9.

2.20 Figure 2.1 shows the fluctuations in end of month vessel queues at the Port of Newcastle from when the (short term) Medium Term CBS was introduced by PWCS in April 2004 to when the Medium Term CBS effectively concluded around October 2006.

Figure 2.1: Newcastle end of month vessel queues – actual and forecast⁸



2.21 PWCS submits that from September 2006 (around the time the industry voted to discontinue the Medium Term CBS, which is discussed in further detail later in this chapter) higher vessel queues began to reform. In particular, PWCS claims unplanned capacity losses across the coal chain contributed to an increase in the queue from 24 to 39 vessels during the third quarter of 2006. In quarter four, PWCS believes a combination of excess arrivals and unplanned capacity losses contributed to a further increase in the queue from 39 to 51 vessels.⁹

2.22 PWCS claims the biggest impact on the queue occurred in November 2006 when vessel arrivals exceeded coal chain capacity by more than 2 million tonnes. As a result, the vessel queue increased from 29 vessels to 53 vessels in November 2006 alone.¹⁰ During this period of growth in the queue, PWCS submits it was guided by the industry vote to discontinue the scheme in 2007. As such, operational allowances were not applied to the producers in quarter 4 of 2006 to reduce the queue.¹¹

⁸ PWCS' supporting submission to the application for revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035, 27 February 2006, p6.

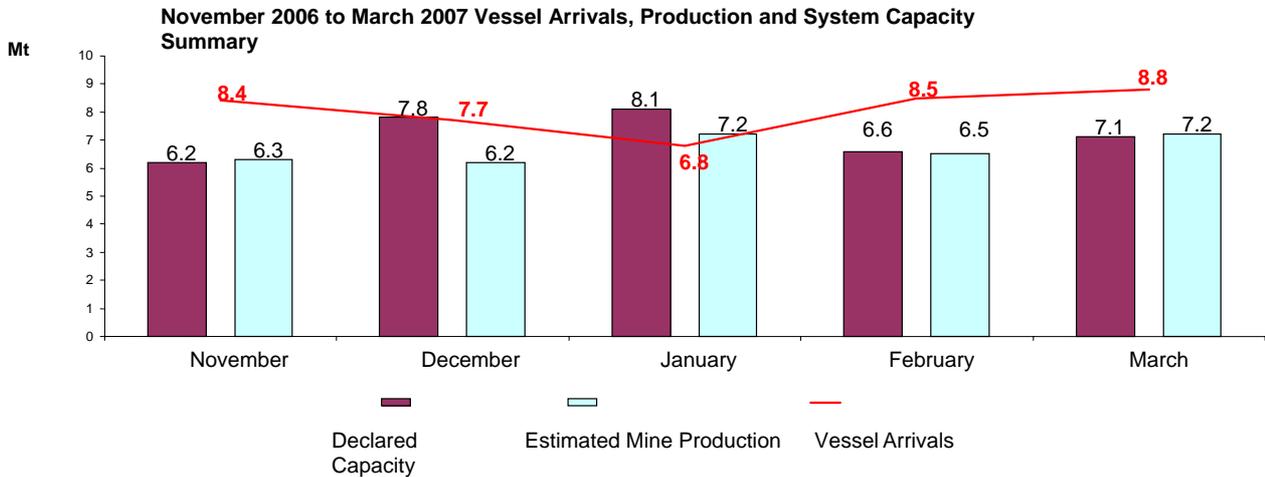
⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

2.23 Figure 2.2 compares vessel arrivals and coal chain capacity from November 2006 to March 2007.¹² It shows that vessel arrivals continue to significantly exceed coal chain capacity. For February and March 2007, producer forecast vessel arrivals were approximately 3 million tonnes in excess of declared coal chain capacity for these months.¹³

Figure 2.2



Expansion activities

2.24 PWCS reported that construction work for the expansion of its facilities to a capacity of 105 million tonnes per annum continued throughout 2006 and is forecast for completion nine months ahead of schedule by the end of March 2007.¹⁴

2.25 Further, the PWCS Board has approved \$18.3 million to date for engineering studies, associated regulatory approvals, early engineering and associated activity for the expansion of port facilities beyond a capacity of 105 million tonnes per annum.¹⁵

2.26 PWCS reports that the following key initiatives along the Hunter Valley coal chain were completed or commenced in 2006:

- a Capacity Maximisation Program commenced at PWCS in early 2006 with a focus on continuous improvement from current assets, asset integrity, further expansion and establishing a commercial framework for customers
- the Newcastle Coal Infrastructure Group is seeking consent from the NSW Department of Planning to construct and operate a coal export terminal in the Port of Newcastle with capacity up to 66 million tonnes per annum
- Australian Rail Track Corporation completed its Sandgate Grade Separation in November 2006
- Pacific National has ordered an additional 330 wagons

¹² Ibid, p7.

¹³ Ibid, p7.

¹⁴ Port Waratah Coal Services *Medium Term Capacity Distribution System, Australian Competition and Consumer Commission Report for 2006*, p3.

¹⁵ Ibid.

- ongoing alignment of maintenance across the coal chain
- ongoing improvements at coal load points.¹⁶

Industry votes in 2006 and 2007

- 2.27 Amongst other things, the operation of the Medium Term CBS from one year to the next was dependent on the scheme receiving majority industry support. In September 2006, Hunter Valley coal producers voted to discontinue the operation of the scheme in 2007.
- 2.28 PWCS submits that at that time, it was thought that the capacity of the Hunter Valley coal chain would be sufficient to meet actual producer demand for the 2007 calendar year, without causing excessive queuing offshore.
- 2.29 In October 2006, producers were given the opportunity to revise down their existing demand nominations for 2007. As a result, aggregate demand nominations reduced from 118 million tonnes to 106 million tonnes. This forecast demand still exceeds the declared coal chain capacity for 2007, which is approximately 90 million tonnes.¹⁷
- 2.30 As a result of this limitation in the coal chain and the high demand for coal, a large queue of vessels reformed at the Port of Newcastle. As at 25 February, PWCS advises there were 69 vessels waiting offshore.¹⁸
- 2.31 In early 2007, Hunter Valley coal producers formed a Working Group to consider options to reduce and manage the substantial vessel queue. The terms of the original Medium Term CBS did not provide for the scheme to simply be switched back on once it was discontinued. The Working Group recommendations included that PWCS seek authorisation from the ACCC to reinstate a modified Medium Term CBS for the remainder of 2007.
- 2.32 On 14 February 2007 producers voted in favour of the proposed modifications to the Medium Term CBS and its reinstatement at the port. In particular, PWCS advises that only one out of fifteen producers did not support PWCS lodging an application for revocation and substitution with the ACCC. Eleven out of fifteen producers unconditionally supported its reinstatement and there was conditional support from two producers. The remaining producer abstained from voting.¹⁹

Capacity constraints beyond 2007

- 2.33 PWCS advises that the industry Working Group proposes to continue to develop systems to address potential demand and capacity imbalances in 2008 and beyond.²⁰

¹⁶ Ibid.

¹⁷ PWCS' supporting submission to the application for revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035, 27 February 2006, p1

¹⁸ Ibid, p1.

¹⁹ Ibid, p9.

²⁰ Ibid, p4.

3. The application for authorisation

- 3.1 Under section 91C of the Act, PWCS lodged an application with the ACCC for the revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035 to permit it to reinstate a modified Medium Term CBS at the Port of Newcastle. Authorisations A30236 – A30238 were not due to expire until 31 December 2007. PWCS is seeking substitute authorisations for the remainder of 2007 only.
- 3.2 PWCS seeks authorisation of the modified Medium Term CBS to the extent that it may constitute:
- exclusionary provisions within the meaning of section 45 of the Act (A91033)
 - a provision having the effect of substantially lessening competition within the meaning of section 45 of the Act (A91034)
 - a provision to which sections 45D, 45DA or 45DB of the Act might apply (A91035).
- 3.3 Broadly, an exclusionary provision exists where the proposed contract, arrangement or understanding is made by businesses (at least two of whom are competitors) for the purpose preventing, restricting or limiting the supply of services to particular persons or classes of persons by all or any of the parties to the contract, arrangement or understanding.
- 3.4 Section 45D of the Act prohibits a person, in concert with other persons, from engaging in conduct that may hinder or prevent, a third person supplying goods or services to, or acquiring goods or services from, a fourth person for the purpose of causing substantial loss or damage. Section 45DA of the Act prohibits a person, in concert with a second person, from engaging in conduct that may hinder or prevent a third person supplying or acquiring goods or services to a fourth person for the purpose of causing a substantial lessening of competition. Section 45DB of the Act prohibits a person, in concert with another person, from engaging in conduct that prevents or substantially hinders, a third person from engaging in trade or commerce involving the movement of goods between Australian and places outside Australia.
- 3.5 The ACCC notes that PWCS has indicated that any producer of coal for export through the Port of Newcastle or exporter of coal from the Port of Newcastle may be a party to the conduct. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

4. The modified Medium Term CBS

4.1 The original Medium Term CBS had the following four key elements:

- quarterly demand nominations by producers
- capacity declaration by PWCS
- demand adjustment, by all producers accepting a pro-rata reduction of their demand nominations, and
- management of allocations by the Administrator of the CBS.

4.2 The amended Medium Term CBS still contains the same four key elements. The rules for the operation of the modified Medium Term CBS are set out in *Annexure 4F Medium Term Capacity Balancing System Objectives, Principles and Protocols* (the Protocols) – see Attachment B to this draft determination.

4.3 PWCS advises there are only two relatively minor changes to the Medium Term CBS. These are to:

- move ‘large producers’ to a monthly allocation system, rather than a quarterly system
- double the ‘buffer’ provided by the ‘flexibility amounts’ from 90 000 tonnes to 180 000 tonnes.²¹

4.4 This chapter provides an overview of the proposed amendments to the Medium Term CBS. Further detail in relation to the overall operation of the queue management scheme is provided in Chapter 4 of the ACCC’s determination of 15 April 2005, and should be read in conjunction with this draft determination.

Term of operation

4.5 PWCS seeks authorisation to reinstate the modified Medium Term CBS, to take effect as if it were implemented on 1 January 2007 and running until 31 December 2007. PWCS advises that the ‘backdating’ of the proposed amended Medium Term CBS to take effect from 1 January 2007 is intended to eliminate any potential stacking of the queue that could occur if a prospective implementation was adopted.²² Transitional arrangements include:

- the Administrator will calculate and notify each producer of its estimated monthly or quarterly loading allocation as soon as possible prior to receiving any interim authorisation from the ACCC

²¹ Ibid, p3.

²² Ibid.

- any over-use of loading allocation by a producer in quarter one will be deducted from the producer's quarterly loading allocation in quarter two.²³

Monthly allocation for large producers

- 4.6 PWCS, with assistance from the Hunter Valley Coal Chain Logistics Team, will calculate the coal chain capacity for each month. Coal chain capacity was previously calculated on a quarterly basis. The Administrator will then allocate a monthly loading allocation to each large producer 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).²⁴
- 4.7 Currently four out of PWCS' fifteen customers are listed as 'large producers' – namely, BHP Billiton, Coal and Allied, Peabody Pacific and Xstrata Coal Australia.²⁵
- 4.8 Like the original Medium Term CBS, all producers will still receive an additional loading allocation ('Conditional Allocation') for each calendar quarter equal to 5 per cent of the producer's quarterly loading allocation.²⁶ Conditional allocation will be calculated on a quarterly basis for both large and small producers.²⁷

Flexibility amounts

- 4.9 Subject to any force majeure events, producers who have unused allocation (beyond their flexibility limits) at the end of a month or quarter will be required to compensate other producers who do not have unused allocation in the relevant month or quarter. In particular:
- the producer will have an equivalent volume of unused tonnes (beyond their flexibility limits) deducted from their loading allocation in the following month or quarter – referred to as 'physical compensation'
 - where the producer is a Restricted Producer²⁸, it will also be subject to the financial compensation payment in relation to unused tonnes (beyond flexibility limits) at the end of the relevant month or quarter.

²³ Clause 9.3 of the Protocols.

²⁴ Clause 1A, Schedule 5 of the Protocols.

²⁵ Attachment A to Schedule 5 of the Protocols.

²⁶ Clause 2, Schedule 5 of the Protocols.

²⁷ Ibid.

²⁸ A Restricted Producer is a producer who has chosen to decline a demand audit or to reject the Arbitrator's determined quarterly coal demand.

4.10 Under the modified Medium Term CBS, the upper and lower flexibility limits have been doubled. In particular, the lower flexibility amount will be determined as follows:

- for producers with an annual loading allocation greater than 1 million tonnes, the lower flexibility amount will be a set volume – that is, 180 000 tonnes
- for producers with an annual loading allocation less than 1 million tonnes, the lower flexibility amount will be reduced proportionately. For example, if a producer’s annual loading allocation is 500 000 tonnes (that is, 50 per cent of 1 million tonnes), its lower flexibility amount will be 90 000 tonnes (that is, 50 per cent of 180 000 tonnes).²⁹

4.11 The upper flexibility amount will be determined as follows:

- for producers with an annual loading allocation greater than 1 million tonnes, the upper flexibility amount will be a set volume – that is, 180 000 tonnes
- for producers with an annual loading allocation less than 1 million tonnes, the upper flexibility amount will also be reduced proportionately (for example, if a producer’s loading allocation is 100 000 (or 10 per cent of 1 million tonnes), its upper flexibility amount will be 18 000 tonnes (or 10 per cent of 180 000 tonnes).

²⁹ Clause 1(a), Schedule 6 of the Protocols.

5. Submissions received by the ACCC

- 5.1 PWCS provided a supporting submission with its application for authorisation.
- 5.2 The ACCC also sought submissions from around 30 interested parties potentially affected by the application, including coal producers, government and rail operators. The ACCC received public submissions from:
- Bloomfield Collieries Pty Ltd
 - Pacific National
 - Idemitsu Australia Resources
 - Hunter Valley Coal Logistics Team
 - Coal and Allied
 - Xstrata Coal Pty Limited.
- 5.3 All submissions received from interested parties support PWCS' application to reinstate a modified Medium Term CBS at Newcastle.
- 5.4 The views of PWCS and interested parties are outlined where relevant in the ACCC's evaluation of the modified Medium Term CBS in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the 'Public Registers' and 'Authorisations Public Registers' links.

6. The net public benefit test

- 6.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted or another person on behalf of such a person.
- 6.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1 of this draft determination).
- 6.3 Under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that it would not be prevented under the relevant test in section 90 of the Act from granting the authorisation, if it were a new authorisation sought under section 88 of the Act.

Application A91033

- 6.4 PWCS lodged application for re-authorisation A91033 to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 6.5 The relevant test is found in section 90(8) of the Act.
- 6.6 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

Application A91034

- 6.7 PWCS lodged application for re-authorisation A91034 to make and give effect to a contract 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 the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 6.8 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application A91035

- 6.9 PWCS lodged application for re-authorisation A91035 to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply. The relevant test for this application is found in section 90(8) of the Act.
- 6.10 Section 90(8) states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

Application of the tests

- 6.11 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 6.12 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.³⁰
- 6.13 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.³¹
- 6.14 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 6.15 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

Definition of public benefit and public detriment

- 6.16 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.³²

³⁰ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

³¹ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

³² *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

6.17 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.³³

Future with-and-without test

6.18 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.³⁴

6.19 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

6.20 The ACCC can grant authorisation for a limited period of time.³⁵

Conditions

6.21 The Act also allows the ACCC to grant authorisation subject to conditions which the ACCC considers necessary in order to satisfy the net public benefit test.³⁶

Future and other parties

6.22 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future³⁷
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.³⁸

³³ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

³⁴ Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

³⁵ Section 91(1).

³⁶ Section 91(3).

³⁷ Section 88(10).

³⁸ Section 88(6).

7. ACCC evaluation

- 7.1 As previously mentioned, the ACCC considered the original Medium Term CBS designed to address the vessel queue at Newcastle in 2005. On 15 April 2005, the ACCC granted conditional authorisation to the Medium Term CBS until 31 December 2007.
- 7.2 In granting the current conditional authorisation of the Medium Term CBS (A30236-A3238), the ACCC has already concluded that the scheme is likely to result in a net public benefit until the end of 2007.
- 7.3 In September 2006, Hunter Valley coal producers voted to discontinue the operation of the Medium Term CBS in 2007. Following this decision, a large queue of over 60 vessels reformed offshore at Newcastle.
- 7.4 To address the ongoing imbalance between coal chain capacity and demand, PWCS seeks authorisation to reinstate the Medium Term CBS, with some modifications, for the term of the original authorisation (that is, until 31 December 2007). On 14 March 2007 the ACCC granted interim authorisation to PWCS to reinstate the modified Medium Term CBS at the Port of Newcastle.
- 7.5 The ACCC's evaluation of the modified Medium Term CBS is in accordance with the net public benefit test outlined in Chapter 6 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the modified Medium Term CBS.
- 7.6 Given the short period of time that has elapsed since the ACCC's consideration of the original Medium Term CBS, the ACCC's assessment of the likely benefits and detriments of the modifications to the Medium Term CBS builds upon its evaluation of the original scheme. In this regard, the ACCC's evaluation of the modified Medium Term CBS should be read in conjunction with its evaluation of the original Medium Term CBS in its determination of 15 April 2005.

The market

- 7.7 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 7.8 In the original authorisation of the Medium Term CBS, the ACCC concluded that there were two relevant markets – the global market for coal (or at least the Asian coal market) and the market for the provision of coal loading services for bulk coal carrying ships in the Newcastle area.
- 7.9 For the purpose of assessing this application, the ACCC's view on market definition is unchanged, noting that both markets may be potentially affected by the reintroduction of a modified Medium Term CBS.

The counterfactual

- 7.10 As noted in Chapter 6 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.
- 7.11 In its authorisation of the original Medium Term CBS, the ACCC 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 ACCC concluded, therefore, that absent authorisation of the Medium Term CBS, excessive vessel queues would be likely to form at the Port of Newcastle.
- 7.12 The ACCC notes that despite recent investment in expanding the capacity of the port and the Hunter Valley coal chain, there is still an imbalance between demand for coal loading services and the capacity of the coal chain. In particular, aggregate demand nominations at the port for 2007 are 106 million tonnes, while the overall capacity of the Hunter Valley coal chain for 2007 is approximately 90 million tonnes (representing an imbalance of 16 million tonnes).³⁹
- 7.13 The ACCC notes that following the industry’s decision to discontinue the Medium Term CBS towards the end of 2006, this imbalance resulted in an excessive queue reforming at the Port of Newcastle. As at 25 February 2007, there were 69 vessels in the queue.
- 7.14 PWCS believes that, having regard to the imbalance between demand and coal chain capacity, and in the absence of a mechanism for matching the imbalance, this queue would persist or grow throughout 2007.⁴⁰
- 7.15 Similarly, Xstrata submits that market forces alone have not managed to reduce the vessel queue that reformed at the port at the end of 2006. It believes that:
- ...demand will remain high in 2007, and that ship arrival rates will continue beyond capacity. If not managed by a reinstated CBS, the vessel queue will continue at high levels.⁴¹
- 7.16 Given the recent events at the Port of Newcastle when the queue management system was actually switched off, the ACCC believes it is clear that without authorisation, and therefore the reinstatement of the modified Medium Term CBS, a large queue of vessels is likely to persist for 2007. As a result, Australian coal producers would incur substantial demurrage costs. At the time of lodging the application for reauthorisation, PWCS advised that the industry was incurring demurrage costs of around A\$1 million per day (based on a vessel queue of 60 vessels).

³⁹ PWCS’ supporting submission to the application for revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035, 27 February 2006, p1

⁴⁰ Ibid, p2.

⁴¹ Xstrata submission dated 9 March 2007, p2.

Public detriment

7.17 PWCS advises that the majority of producers voted in favour of the proposed modifications to the Medium Term CBS and its reinstatement at the port. In particular, PWCS advises that only one out of fifteen producers did not support PWCS lodging an application for revocation and substitution with the ACCC.

7.18 The Hunter Valley Coal Chain Logistics Team also supports the reintroduction of the amended scheme and states that:

...it can see nothing in the proposed CBS that would be likely to reduce or inhibit the ability of the coal chain to maximise coal exports during the year.⁴²

7.19 The ACCC did not receive any submission from interested parties that expressed concerns about the proposed modifications to the Medium Term CBS.

7.20 As previously mentioned, the proposed changes to the Medium Term CBS are to:

- double the flexibility amounts available to producers
- introduce monthly coal loading allocation for 'large producers'.

7.21 An assessment of the public detriment generated by the modified Medium Term CBS follows.

Restricting aggregate coal exports from the Hunter Valley

7.22 PWCS believes that the reintroduction of the modified Medium Term CBS will not have a negative impact on the total volume of coal exported through the Port of Newcastle. In particular, it submits the following features of the Medium Term CBS are designed to ensure that any reduction of the volume of coal exported from the Hunter Valley is negligible:

- the audit process for the declared capacity of the coal chain and individual producer demand nominations
- the upper flexibility amount and conditional allocation
- the ability for producers to trade coal loading allocation.⁴³

7.23 PWCS submits the proposed move to monthly allocations for large producers is aimed at ensuring a more even coal loading allocation mechanism within quarters, which should reduce end of quarter vessel queue peaks occurring, as was experienced under the original Medium Term CBS.⁴⁴

⁴² Hunter Valley Coal Chain Logistics Team submission dated 9 March 2007, p1.

⁴³ PWCS' supporting submission to the application for revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035, 27 February 2006, p9

⁴⁴ Ibid, p3.

- 7.24 Further, PWCS claims the introduction of monthly allocations will not reduce the ability of producers to trade their coal loading allocation. It advises that under the amended Medium Term CBS, monthly allocation will be able to be traded for quarterly allocation (and vice versa) and take or pay will continue to provide an incentive to trade.
- 7.25 Xstrata supports this view. In particular, it submits that:
- ...the move to a monthly allocation system for 'large producers' and the increased flexibility to producers permits trading based on producer requirements for loading allocation in an equitable and transparent manner.⁴⁵
- 7.26 As outlined at paragraph 2.8 of this draft determination, the ACCC previously concluded that any reduction in aggregate coal exports due to an underuse of coal loading allocation under the Medium Term CBS would result in a public detriment. However, the ACCC was satisfied that any public detriment arising from a reduction of the volume of coal moved through the coal chain was likely to be negligible, particularly due to the introduction of the five per cent conditional allocation provision and other flexibility measures under the Medium Term CBS.
- 7.27 The ACCC notes the proposed amendments to the scheme do not inhibit producers' ability to trade allocations and will increase the flexibility measures available to producers. The ACCC considers that this inbuilt 'over allocation' of loading allocation provides flexibility to coal producers in managing production in order to maximise the capacity of the coal chain. This increased flexibility should also enable any producer's individual under-use of allocation to be taken up by other producers. Having said this, the ACCC also notes that increasing the flexibility amounts could also have the effect of marginally increasing the queue if all producers exercised flexibility measures upwards at the same time.
- 7.28 Further, the ACCC notes the introduction of monthly allocation for large producers should smooth out cyclical fluctuations in the vessel queue, as experienced under the original Medium Term CBS. The ACCC considers that reducing end of quarter queue peaks should also help to reduce any under-use of allocation.
- 7.29 The ACCC believes significant commercial incentive exists for producers to maximise throughput of the coal chain. The ACCC considers that any public detriment arising from an aggregate reduction in the volume of coal moved through the coal chain is likely to be negligible under the modified Medium Term CBS. Indeed, the ACCC is of the view that the possibility and quantum of detriment is reduced under the modified Medium Term CBS.

Deferring investment in capacity expansion in the Port

- 7.30 PWCS submits reinstating the amended Medium Term CBS for the remainder of 2007 will not have the effect of delaying investment in capacity of the Hunter Valley coal chain.

⁴⁵ Xstrata submission dated 9 March 2007, p2.

- 7.31 As outlined at paragraph 2.9 of this draft determination, the ACCC was satisfied that the original Medium Term CBS would not remove the pressure to invest in expanding the capacity of the Hunter Valley coal chain, including at the port, and was unlikely therefore to constrain export growth. Moreover, the ACCC noted that significant commercial incentives exist for producers (some with shareholding in PWCS) to increase exports, and therefore expand the capacity of the coal chain.
- 7.32 Since authorisation was granted to the original Medium Term CBS, the ACCC notes PWCS' ongoing commitment to investing in expanding the capacity of the port. In particular, construction work for the expansion of PWCS' facilities to a capacity of 105 million tonnes per annum is expected to be completed well ahead of schedule in the first quarter of 2007. The ACCC also notes that a number of other expansion activities have been completed along the coal chain – for example, the Australian Rail Track Corporation completed the Sandgate Rail Separation in November 2006.
- 7.33 Further, the ACCC is advised that PWCS and other industry participants are continuing to expand the capacity of the Hunter Valley coal chain in accordance with the Integrated Coal Chain Capacity Plan. Part of this plan includes the PWCS Board approving \$18.3 million to date for engineering studies, associated regulatory approvals and early engineering for the expansion of PWCS' facilities beyond a capacity of 105 million tonnes per annum.
- 7.34 The ACCC notes that PWCS' new application merely seeks to reinstate a CBS for the term of the ACCC's original authorisation. As such, authorisation is only sought for a relatively short period of 9 months. The ACCC considers reinstating the modified Medium Term CBS would not change the industry's investment expectations.
- 7.35 Given PWCS' continued commitment to the scheduled program of investment in the Hunter Valley, and the short time frames involved, the ACCC is satisfied that the reinstatement of the modified Medium Term CBS until the end of 2007 will not remove the pressure to invest in expanding the capacity of the Hunter Valley coal chain, including at the port.

Public benefit

- 7.36 PWCS submits that reinstating the amended Medium Term CBS will result in a public benefit in terms of avoiding, or at least substantially decreasing, the deadweight demurrage costs that would have otherwise been incurred for the remainder of 2007. In addition, it submits the amended Medium Term CBS will also deliver the following public benefits:
- improved international reputation and international competitiveness of the Port of Newcastle and the Hunter Valley coal industry
 - certainty to producers regarding the volume of coal they can ship, loading times and vessel schedules, which will enable producers to manage production more efficiently
 - allowing a transition to a long term solution for the Hunter Valley coal logistics operations.

Reduced demurrage

- 7.37 The ACCC previously concluded that the Medium Term CBS was likely to result in significant public benefit, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where a vessel queue persists.
- 7.38 The Hunter Valley Coal Chain Logistics Team submits that the original Medium Term CBS:
- ...acted to limit the level of excessive vessel queuing and thereby significantly reduced the costs associated with large vessel queues.⁴⁶
- 7.39 In the absence of authorisation to reinstate the modified Medium Term CBS, and assuming a level of approximately 60 vessels remains queued offshore for the rest of 2007, PWCS estimates that total demurrage costs incurred by the industry could be A\$460 million.
- 7.40 PWCS advises that if the amended Medium Term CBS is reinstated, it could take until July 2007 to reduce the queue to a working level of 20 vessels. It believes the resultant demurrage costs to the industry would be around A\$245 million.⁴⁷ Therefore the size of the demurrage savings for the remainder of 2007 under the amended Medium Term CBS could be around A\$215 million.
- 7.41 The ACCC is satisfied that reinstating the amended Medium Term CBS is likely to result in a significant public benefit by reducing the deadweight demurrage costs for the industry. Irrespective of the exact dollar value of the demurrage savings, the ACCC considers that producers would face significantly higher demurrage costs for 2007 without the reintroduction of the amended Medium Term CBS.

Other efficiencies and improved reputation of the Port of Newcastle

- 7.42 The ACCC previously concluded that any efficiency gains as a result of the Medium Term CBS would be a benefit to the public. The key saving identified in relation to both the original and modified Medium Term CBS is the demurrage savings from a reduction in the vessel queue. The ACCC notes that demurrage savings could flow on to be used by the industry to invest in capacity upgrades along the coal chain.
- 7.43 Further, the ACCC remains satisfied that to the extent that the existence of large vessel queues discourage overseas customers from purchasing coal from Hunter Valley producers, the modified Medium Term CBS, through the reduction of the current large queue, has the potential to improve the reputation of Port of Newcastle and Hunter Valley coal sales. The ACCC does not consider the size of any such benefit to be significant for the purposes of this application for reauthorisation.

⁴⁶ Hunter Valley Coal Chain Logistics Team submission dated 9 March 2007, p1.

⁴⁷ PWCS' supporting submission to the application for revocation of authorisations A30236 – A30238 and substitution of new authorisations A91033 – A91035, 27 February 2006, Schedule 2.

Balance of public benefit and detriment

- 7.44 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the amended Medium Term CBS is likely to result in a public benefit that will outweigh any public detriment.
- 7.45 In the context of applying the net public benefit test at section 90(8)⁴⁸ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁴⁹
- 7.46 In this instance, the ACCC has been assisted by its 2005 consideration of the Medium Term CBS and its conclusion at that time that conditional authorisation of the scheme to the end of 2007 was likely to result in a net public benefit.
- 7.47 The ACCC considers that any public detriment arising from the amended Medium Term CBS is likely to be negligible. In particular, the ACCC is satisfied that the introduction of monthly loading allocation for large producers and increasing the flexibility limits for all producers is unlikely to result in a reduction in the total volume of coal moved through the port. The ACCC considers that increasing the flexibility measures for producers actually reduces the risk that individual under-use of allocation will not be taken up by other producers, thereby reducing the size of any potential detriment. The introduction of monthly trading allocations is also unlikely to inhibit the ability of producers to trade loading allocation.
- 7.48 Further, given the recent and ongoing expansion initiatives along the coal chain, and particularly at the port, the ACCC considers reinstating the amended Medium Term CBS for the remainder of 2007 is unlikely to defer necessary investment.
- 7.49 The ACCC is satisfied that the amended Medium Term CBS is likely to result in a significant benefit to the public, particularly by reducing demurrage costs for the industry and hence improving economic efficiency relative to a situation where the current queue persists. Based on the level of the queue actually reached in the first quarter of 2007, the ACCC considers that PWCS' estimated demurrage savings of A\$215 million for the last three quarters of 2007 may not be unreasonable.
- 7.50 Irrespective of the exact dollar value of demurrage savings, the ACCC considers that producers would face significantly higher demurrage costs for the remainder of 2007 without the reinstatement of the amended Medium Term CBS.
- 7.51 On balance, the ACCC considers that in all the circumstances the public benefit generated by the amended Medium Term CBS is likely to outweigh the public detriment.

⁴⁸ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

⁴⁹ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

- 7.52 The ACCC previously granted authorisation for the original Medium Term CBS subject to the condition outlined at Chapter 2 of this draft determination. At that time, the ACCC considered it necessary to impose the condition to remove any uncertainty that the net public benefit would be maintained over the length of the authorisation. It also enabled the ACCC to review the progress made in the Hunter Valley in relation to the coordinated program of investment and any impact on the volume of exports as a result of the Medium Term CBS.
- 7.53 For the amended Medium Term CBS, the ACCC believes that a similar condition is not required. In particular, the ACCC is satisfied that the net public benefit will be maintained for the proposed period of authorisation (discussed below). Further, the ACCC notes that the proposed authorisation will expire on 31 December 2007 and that the Medium Term CBS did not defer investment at the port.

Length of authorisation

- 7.54 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 7.55 In this instance, PWCS seeks authorisation until 31 December 2007, being the term of the current authorisation of the original Medium Term CBS.
- 7.56 Two coal producers - Coal and Allied and Bloomfield Collieries Pty Limited - expressed support for the reinstatement of the modified Medium Term CBS for the 2007 calendar year only.
- 7.57 In contrast, Xstrata submits that:
- ..it is important to see the reinstatement of the CBS as offering an efficient and equitable option for 2007 and potentially beyond until a long term solution is determined by the industry working group so that the current problems do not occur.⁵⁰
- 7.58 The ACCC proposes to grant authorisation to the modified Medium Term CBS until 31 December 2007 only.

Variations to the modified Medium Term CBS

- 7.59 The ACCC notes that any changes to the modified Medium Term CBS during the proposed term of this authorisation would not be covered by the proposed authorisation.

⁵⁰ Xstrata submission dated 9 March 2007, p3.

8. Draft determination

The application

- 8.1 On 27 February 2007 the Australian Competition and Consumer Commission (ACCC) received an application from Port Waratah Coal Services Ltd (PWCS) seeking to revoke authorisations A30236 – A30238 and to substitute authorisations A91033 – A91035 to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle until 31 December 2007.
- 8.2 The applications for revocation and substitution were made under 91C of the Act using Form FC, Schedule 1, of the Trade Practices Regulations 1974.
- 8.3 The applications for re-authorisation were made to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act (A91033)
 - make and give effect to a contract 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 the Act (A91034)
 - engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply (A91035).

The net public benefit test

- 8.4 For the reasons outlined in Chapter 7 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 8.5 The ACCC is also satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 8.6 The ACCC therefore proposes to revoke authorisations A30236 – A30238 and grant authorisation to substitute applications A91033 – A91035.

Conduct for which the ACCC proposes to grant authorisation

- 8.7 The ACCC proposes to grant authorisation to PWCS to reinstate the modified Medium Term CBS, as set out in *Annexure 4F, Medium Term Capacity Balancing System Objectives, Principles and Protocols* (the Protocols), until 31 December 2007.
- 8.8 Further, the proposed authorisation is in respect of the modified Medium Term CBS as it stands at the time authorisation is granted. Any further changes to the modified Medium Term CBS during the term of the proposed authorisation would not be covered by the proposed authorisation.

8.9 This draft determination is made on 4 April 2007.

Interim authorisation

8.10 At the time of lodging the application, PWCS requested interim authorisation to allow it to reinstate the modified Medium Term CBS before April 2007. The ACCC granted interim authorisation on 14 March 2007.

8.11 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, unless the ACCC decides to revoke interim authorisation.

Further submissions

8.12 The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Appendixes

A — Shareholders in PWCS and Newcastle Coal Shippers Pty Limited

PORT WARATAH COAL SERVICES LIMITED SHAREHOLDERS

SHAREHOLDER NAME	%	NO. OF SHARES
Newcastle Coal Shippers Pty Limited	36.9491%	49,001,000
Coal & Allied Industries Limited	16.0018%	21,221,250
R W Miller (Holdings) Limited	13.9982%	18,564,000
Tomen Panama Asset Management S.A.	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%	3,827,500
Mitsubishi Corporation	1.9862%	2,634,100
Sojitz Corporation	1.1745%	1,557,592
JFE Steel Corporation	2.1874%	2,900,880
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.	0.2146%	284,580
Taiheiyō 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	0.0586%	77,750
Nippon Oil Corporation	0.0586%	77,750
Tokuyama Corporation	0.0293%	38,875
Total Capital	100.0000%	132,617,500

NEWCASTLE COAL SHIPPERS PTY LIMITED
SHAREHOLDERS

SHAREHOLDER NAME	%	NO. OF SHARES
Oakbridge Pty Limited	20.2321%	6,398,719
Anglo Coal (Drayton Management) Pty Limited	20.0000%	6,325,320
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 Coal 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
Oceanic Coal Australia Limited	0.0361%	11,410
Bengalla Coal Sales Company Pty Limited	0.0316%	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

B – Annexure 4F Medium Term Capacity Balancing System Objectives, Principles & Protocols

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PART A - GENERAL CONDITIONS OF CAPACITY BALANCING SYSTEM

1. Defined Terms & Interpretation

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

2. Scope

- 2.1 The Board will as soon as possible in its absolute discretion appoint the Administrator, who will be independent of any Producer or Customer.
- 2.2 The Administrator will administer the Scheme according to the objectives, principles and protocols set out in this Annexure.
- 2.3 The objectives of the Scheme are to:
- (a) achieve minimum vessel demurrage consistent with maximum export Coal throughput;
 - (b) comply with all relevant legal requirements;
 - (c) efficiently distribute the available Coal Chain Capacity, in so far as it relates to the Coal Handling Facility, among Producers in an equitable, transparent and accountable manner; and
 - (d) not adversely affect the efficient operation of the Coal Handling Facility.
- 2.4 The Scheme shall apply:
- (a) to all Coal that is the subject of an Application for Coal Handling Services which is delivered to the Terminal by rail and, subject to clause 3.17 of Annexure 4E, road from midnight on the day before the Commencement Date; and
 - (b) to all Coal Handling Services provided to each Customer by PWCS in respect of each such shipment of Coal.
- 2.5 The Scheme will not come into operation and this Annexure will have no force or effect until such time that authorisation or interim authorisation is granted under the *Trade Practices Act 1974*.

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.

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

variation.

8.8 PWCS will notify all Customers of any variation to this Annexure.

9. Commencement and Duration of Amendments to the Scheme

9.1 Subject to clauses 2.4 and 2.5 of this Part A, amendments to the Scheme made in February 2007 will be taken to have applied retrospectively from 1 January 2007 (except where the Administrator decides that it is only practical to implement them from the date authorised).

9.2 The Scheme, as amended, will continue until 31 December 2007.

9.3 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 Producer 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 onto 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 2007, as amended;

unless

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

- (i) the particular liability is not able to be excluded or limited pursuant to the provisions of the *Trade Practices Act 1974* and reciprocal State legislation.

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

PART B - THE SCHEDULES

SCHEDULE 1 - DICTIONARY

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

Capacity Profile	The distribution of annual Coal Chain Capacity across the Relevant Year expressed as quarterly percentages of the annual Coal Chain Capacity.
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 1(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 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 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.
- 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 loadpoint is restricting vessel loading.

In the event that the Administrator advises Producers that Conditional Allocation can no

longer be used, PWCS will not accept Applications that include any Conditional Allocation amount, however PWCS may not cancel any existing Shipment Contract that includes a Conditional Allocation amount, subject to the other provisions of the Coal Handling Services Agreement.

Conditional Allocations may not be exchanged or transferred between Producers.

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 Upper 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 Upper Flexibility Amount will be 18,000 tonnes (10% of 180,000).
2. If during the Relevant Period there is a change in the groupings of Producers from that described in Attachment A, the Administrator may, in order to achieve the Objectives, determine that the flexibility amounts referred to in the previous paragraphs of this Schedule be changed to a different amount.
3. If 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**"), 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 the Relevant Month or Relevant Quarter then the amount of that excess will be deducted from that Producer's Loading Allocation for the 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 ⁽¹⁾
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 Australia Pty Ltd	Drayton
Austar Coal Mine Pty Ltd	Austar
Bloomfield Collieries	Bloomfield Rix's Creek
Centennial Coal Company	Newstan
Donaldson Coal	Donaldson Tasman Abel ⁽¹⁾
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 ⁽¹⁾
Resource Pacific Ltd	Newpac
White Mining Limited	Ashton
Whitehaven Coal Mining Limited	Whitehaven Werris Creek Tarrawonga Sunnyside ⁽¹⁾

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