



THE UNITED MINeworkERS' FEDERATION OF AUSTRALIA

(Division of the Construction, Forestry, Mining and Energy Union)
(Incorporating the Federal & State Registered Unions)

Northern District Branch

67A Aberdare Road, Cessnock 2325
P.O. Box 364, Cessnock 2325
ABN 80 814 987 748
President: Ian Murray

Phone: (02) 4990 7600
Fax: (02) 4991 1595
Email: umw@unitedmineworkers.org.au
Secretary: Grahame Kelly

20 April 2007

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

Dear Scott,

**RE: PORT WARATAH COAL SERVICES LIMITED DRAFT DETERMINATION –
4 APRIL 2007**

On 4 April 2007, the Australian Competition & Consumer Commission (ACCC) made a Draft Determination Application for Revocation and Substitution lodged by Port Waratah Coal Services (PWCS) Limited Public Register [C2007/611] in respect of a modified Medium Term Capacity Balancing System (CBS) 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.

On the same date the ACCC invited parties that were interested to make written submissions in response to the ACCC's Draft Determination, which were required to be lodged by 20 April 2007.

The Union welcomes the opportunity to comment on the Port Waratah Coal Service Draft Determination.

The Mining and Energy Division is a Division of the CFMEU under the Federal Workplace Relations Act 1996, with over 120,000 members, one of the largest in Australia. The Division covers several industries including the coal industry, coal

ports, metalliferous mining industries, electrical power generation, oil and gas, and the Nation's small coking industry.

The Northern District Branch of the CFMEU Mining and Energy Division, being the Branch that, on behalf of the organisation, is making the submission, is the principal Union representing coal miners in the Northern District coalfields of New South Wales.

All of the nation's exported coal produced from the Northern District coal fields of New South Wales is exported through the ports at the Port of Newcastle, and are impacted upon by the Draft Determination revoking of Authorisations A30236-A30238 and substitution of Authorisations A91033-A91035.

The CFMEU opposes the Draft Determination in respect to introduction of the Medium Term CBS on the basis the public detriment does not out-weigh the public benefit without modification.

The public benefit for introduction of the substitution of the Medium Term CBS has had a real and immediate effect in its current form to the public detriment. The conclusions documented in the Draft Determination to the contrary are in error.

Page II under the title 'Public Detriment' conclusions in the determination are summarised as follows: -

The ACCC considers that any public detriment arising from the amended Medium Term CBS is likely to be negligible.

Within the body of the determination, the public detriment assessment is incorrectly and more expansively described at paragraph 2.8 as: -

"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."

And at 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."

And at 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".

And further described in the section of the Draft Determination entitled 'Balance of Public Benefit' in 7.47: -

"The ACCC considers that any public detriment arising from the amended Medium Term CBS is likely to be negligible."

And in 'Balancing and Benefit Detriment' the Draft Determination says at Paragraph 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."

With respect to this balancing, the conclusion drawn in the Draft Determination as an outcome of the balancing public benefit and public detriment required is to the effect that *"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."* [paragraph 7.51]

The conclusion and the assessment, specifically with respect to the public detriment, are in error. This error we submit is required to be acknowledged and considered in the final determination requiring, at the minimum, amendments to the Medium Term CBS to limit or mitigate the public detriment that will continue to be and has already been experienced since the Draft Determination of 4 April 2007.

In the Application for revocation of a non-merger authorisation and substitution of a new authorisation that was filed by Port Waratah Coal Services Pty Limited on the 27 February 2007, which gave rise to the Draft Determination, the Port Waratah Coal Services, identifies in its non confidential version submissions in support of the Application for Revocation and Substitution under Section 91C under the Trade Practices Act 1974 and Application for an Interim Authorisation dated 26 February 2007 was filed with the Application on 27 February 2007.

Port Waratah Coal Services is required to identify any public detriment as a result of the revocation and substitution of the Medium Term CBS however, the application is virtually silent in this regard in the main, submitting in paragraph 4.4 that *"PWCS submits that any public detriment from reinstating the Amended CBS is likely to be low for the reasons identified in the ACCC's final determination to grant authorisation on 15 April 2005"*.

Consequently, to identify what specific public detriment issues were taken into consideration, you need to consider those matters of public detriment determined in the ACCC's final determination to grant authorisation in April 2005, some two years ago, and to analyse what public detriment material was raised with the ACCC in the determination process for the 2005 final determination, that dealt with the then Capacity Balancing System that is now being revoked and in essence, modified after the industry voted to discontinue with that system in September 2006.

A review of this material shows that the impact upon employment directly and indirectly as a result of an introduction of a Capital Balancing System has never been considered. There is no precise definition of what is meant by public detriment, but it is trite to say that the state of words by the tribunal has given that term the widest possible meaning with wide ambit and is simply described in the following terms: -

"...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...."

And "...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",

There is no doubt loss of employment directly at coal mines in the Northern District is a matter of public detriment and is a matter to be considered and weighed up against the public benefit in any final determination.

Currently loss of employment has not been considered.

Since 4 April 2007, there has been a significant retrenchment of labor in the coal mining industry announced in the Northern District. Austar Coal Mine has announced the retrenchment of 79 full-time equivalent positions, 56 of which are full-time employees directly employed at the mine with an additional 23 contractors. A significant number of the remaining Austar employees will in addition have their wages reduced as a consequence of the restructuring required due to the introduction of the Medium Term CBS.

Roche Mining has informed the employees at their Wambo Open Cut operations that they do not wish to proceed with new roster changes that were in dispute because of the reintroduction of the Medium Term CBS. We understood the roster arrangements were to result in the employment of 20 additional employees.

There is a significant public detriment already proven as a result of the introduction of the Medium Term CBS which will no doubt be for small operators exasperated should any final determination operate in the same manner as the Draft Determination.

The Medium Term CBS in the form proposed gives a far greater capacity for larger players like Rio Tinto and Xstrata to move around production and balance ship allocations over a monthly period as opposed to the small operators, therefore any scheme operates disproportionately and unfairly on the small players. This is specifically important because it is the major players like Rio Tinto and Xstrata that control Port Waratah Coal Services.

Further, the larger players, because of the far higher proportion of casual transient and labor hire sourced employees making up their workforce, can easily and readily modify employee numbers to manipulate production, while the smaller players are entrenched with full time permanent employees as was with the Austar case. Minor fluctuations in allocation of capacity through the ports without a more flexible arrangement requires the haemorrhaging of full-time and direct employees.

To this end any final Medium Term CBS must provide a flexibility mechanism for small players in the coal industry, where the impacts of the introduction of any CBS will be harsh and unfair resulting in the reduction of employees. Built within the system must be a mechanism to accommodate greater capacity and allocation of the smaller players where the proposed Medium Term CBS will result in the reduction of employees and significant public detriment. Unless this is able to occur then the Application for Revocation and Substitution lodged by Port Waratah Coal Services (PWCS) Limited Public Register [C2007/611] must be rejected.

Please find attached media release from MP Joel Fitzbiggon and an article from International Longwall News.

We hope the ACCC strongly takes into consideration our submission when making any final determination with regard to this matter.

Yours sincerely,



**IAN MURRAY
DISTRICT PRESIDENT**

im.bm

enc.

Joel Fitzgibbon MP

Shadow Minister for Defence
Member for Hunter

13 April 2007

**NEWCASTLE PORT A NATIONAL DISGRACE AND AN
INTERNATIONAL EMBARRASSMENT**

The loss of 70 jobs at the *Austar* coal mine confirms the Hunter's coal port is a national disgrace and an international embarrassment. Australian Governments stand condemned for their lack of leadership in ensuring our coal port has sufficient capacity to meet demand and to protect jobs.

How much longer do we have to wait before we secure an expansion in the capacity of the coal port? The queue of ships off Newcastle will remain while ever the demand for coal outstrips our capacity to deliver coal through the port of Newcastle.

The Newcastle Coal Infrastructure Group has been attempting to build a third and separately owned coal loader at the port of Newcastle for at least three years. The monopoly Xtrata-Rio Tinto dominated *Port Waratah Coal Services* has been promising an expansion of its own facilities for at least as long. Why are we still waiting?

It appears that the coal companies which control PWCS have little interest in the economic expansion of the port beyond the point of full and permanent capacity utilisation.

And the quota system is a band aid solution which aids and abets those who seek to restrict the arrival of competition in the port. The quota system relies upon the ACCC to provide immunity from prosecution for anti-competitive and illegal practices. Those practices defer and discourage investment in additional port capacity.

Suggestions that a Federal Government takeover of the port would fix our problems are ludicrous. The ACCC is a Commonwealth regulator. What we need is less regulation not more. What we need is government encouragement of investment, not discouragement.

Someone needs to apologise to both the 70 *Austar* employees who are about to lose their jobs and others who are now worried about their job security.

Contact: Joel Fitzgibbon 0418 293 372

www.joelfitzgibbon.com



Austar mine cuts 79 jobs

Mika Thuijs

Friday, 13 April 2007

THE jobs of 56 full-time employees and 23 contractors will be cut at the Austar mine, near Cessnock in the New South Wales Hunter Valley, due to the rising costs related to ship queues off the Newcastle coast. Austar senior site executive Greig Duncan spoke to *International Longwall News* today.

Duncan said the recently reinstated capacity balancing system by Port Waratah Coal Services (PWCS) has limited the amount of coal Austar can send to the port of Newcastle, forcing it to scale back weekend production.

"With the existing infrastructure constraints in the coal chain system down at the ports, we have made a decision to change from a seven-day operation to a five-day operation, and we will reduce our workforce progressively from June to September," he said.

The move will nominally be for a two-year period, at which time the coal chain infrastructure is expected to have sufficient capacity to handle Austar's production from a seven-day operation.

"As a company we have invested \$250 million to put a new high-tech longwall system into Australia that has never been used here before, which is performing very well," Duncan said.

"All of a sudden we're faced with these external constraints and we've had to cut back - so yes, it's had a big impact on the business and that's why we've had to restructure."

The company has also investigated different options for maintaining operations at the higher level, but has been unable to find any alternatives.

"We are also considering the possibility of exporting some coal through Port Kembla, but there are many logistical hurdles to overcome to make that option a reality," Duncan said.

Austar's 260 workers were told of the job cuts at a meeting this morning.

"The workforce reductions will be across the board, from top management to the coalface," Duncan said.

"The only reason we are reducing operations is the lack of export capacity in the coal chain. If the capacity was available, we would be using it."

The mine began production in September last year, and is working towards producing 3 million tonnes per annum over its 15-year mine life using the Longwall Top Coal Caving technique.

Austar mine manager Phil McNamara told *International Longwall News* in January that the mine was still building up its workforce to full numbers after struggling to find enough skilled workers.

Duncan said today that it was very frustrating that a highly motivated and innovative team at Austar was being kept from achieving its objectives by limitations on vital export infrastructure.

Austar is owned by Yancoal Australia, a subsidiary of Yanzhou Coal Company, one of China's largest and most respected coal producers.



The Austar longwall crew completes the first full shear of an LTCC face in Australia.

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Aspermont Limited
Street Address 613-619 Wellington Street, Perth WA Australia 6000
Postal Address PO Box 78, Leederville, WA Australia 6902