

PUBLIC VERSION

Port Waratah Coal Services  
Limited  
and  
Newcastle Coal Infrastructure  
Group Pty Limited

Submission in support of the  
application for authorisation under  
sections 88(1) and 88(7) of the *Trade  
Practices Act 1974 (Cth)*

Dated 19 November 2008

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## 1 Introduction

### 1.1 Introduction and purpose of submission

This submission is made by:

- (a) Port Waratah Coal Services Limited (“PWCS”), in its capacity as operator of the Kooragang Island and Carrington export coal terminals; and
- (b) Newcastle Coal Infrastructure Group Pty Limited (“NCIG”), in its capacity as operator of the NCIG export coal terminal which is under construction on Kooragang Island<sup>1</sup>,

(collectively the “Terminal Operators”).

This submission supports the Terminal Operators’ application for authorisation of:

- (a) the PWCS Tonnage Allocation Stage 1 set out in Attachment 1 of this submission; and
- (b) any Long Term Terminal Access Protocols which are in the future developed and agreed by Producers, the Terminal Operators and/or any Hunter Valley Coal Chain participant and which are submitted to, and approved by, the ACCC in accordance with the process set out in this submission,

in each case, under sections 88(1) and 88(7) of the *Trade Practices Act 1974 (Cth)* (“TPA”).

The PWCS Tonnage Allocation Stage 1, together with the process and timetable set out in this submission, provide the necessary foundation for the Hunter Valley coal industry to develop and implement a long term solution. The key aspects for a potential long term solution are set out in Attachment 2.

If the PWCS Tonnage Allocation Stage 1 and long term solution are implemented, they will deliver substantial benefits to the NSW and Australian economies. In particular, they provide a route to enabling coal loading capacity at the Port of Newcastle to be increased from the current 102 million tonnes per annum (“mtpa”) to 211 mtpa and beyond to potentially 300 mtpa of coal exports from NSW. This will potentially involve incremental expansions of approximately \$1.5 billion at the PWCS terminals, \$2 billion at the NCIG terminal (to Stage 2) and approximately \$2-3 billion at subsequent terminal developments at the Port of Newcastle.

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<sup>1</sup> Centennial Coal Company Limited does not support this submission.

It would also see capacity expansions involving capital expenditure over the next 4 years of approximately \$950 million on track and \$502 million on additional train sets in the Hunter Valley. This is in addition to \$1.3 billion spent since 2004 on terminal, track and train infrastructure.

These non-government funded infrastructure upgrades due to the increased certainty arising from Long Term Terminal Access Protocols and associated long term contractual arrangements are a very substantial public benefit.

The PWCS Tonnage Allocation Stage 1 and the long term solution being developed by Producers and the Terminal Operators will also result in a substantial increase in export revenue for the State of NSW, together with substantial increases in both employment in NSW (particularly during the major construction phases) and export royalties payable to NSW.

Again, these are very significant public benefits funded by the private sector, particularly in the current economic environment.

## **1.2 Authorisation to be subject to conditions**

To provide confidence that the Producers and service providers in the Hunter Valley will work together to develop and finalise a long term solution in a timely manner (and, importantly, to enable that long term focus by removing imminent short term pressures and potential gaming associated with the vessel queue re-forming from 1 January 2009), the Terminal Operators propose that it will be *an express condition* of the authorisation that:

- (a) the Terminal Operators submit to the ACCC a Memorandum of Understanding and associated Terms Sheet (“MOU”) setting out the likely terms of any Long Term Terminal Access Protocols which will be an element of the potential long term solution described in Attachment 2 on or before 31 March 2009 (unless otherwise agreed with the ACCC having regard to the progress of ongoing discussions with the NSW Government to agree a long term access solution at the Terminals);

If, having regard to this matter, the Terminal Operators are not reasonably able to submit the MOU to the ACCC on or before 31 March 2009, it is intended that the ACCC and the Terminal Operators would work together (both acting reasonably and in good faith) to determine any later date that should apply.

- (b) between the date of this application and the date specified in paragraph (a) above, the Terminal Operators will report to the ACCC each month on progress by the Producers’ Steering Committee and Terminal Operators in developing the MOU;
- (c) the Terminal Operators will submit to the ACCC by 30 June 2009 the new Long Term Terminal Access Protocols which, subject to ACCC approval, will form part of the ACCC’s authorisation;
- (d) between the date specified in paragraph (a) and 30 June 2009, the Terminal Operators will report to the ACCC each month on progress

by the Producers' Steering Committee and Terminal Operators in developing Long Term Access Protocols to give effect to the long term solution being developed by Producers and the Terminal Operators;

- (e) the Terminal Operators will implement contractual arrangements which give effect to such Long Term Terminal Access Protocols as are submitted to the ACCC for approval by a date which is no later than 6 weeks after the date on which those Long Term Access Protocols are approved by the ACCC. If accepted by the ACCC, any Long Term Terminal Access Protocols will apply retrospectively from 1 July 2009, or such later date as agreed by the Terminal Operators and the ACCC.

In this regard, the Terminal Operators are mindful that, notwithstanding their genuine commitment to developing and implementing a long term solution, the ability of Producers (and Terminal Operators) to develop and agree a comprehensive long term solution is subject to a number of external factors. Accordingly, the purpose of the reporting arrangement is to ensure a clear incentive to finalise a long term solution (i.e. without taking pressure off all industry stakeholders), but at the same time provide an ability for the Terminal Operators consulting with the ACCC to extend this timeframe if the industry cannot meet the proposed timetable due to factors genuinely outside its control.

If any of the conditions are not satisfied, or the ACCC does not approve the Long Term Terminal Access Protocols submitted in accordance with paragraph (c) above, the authorisation will cease.

### **1.3 Why the PWCS Tonnage Allocation Stage 1 and this authorisation application are necessary**

The purpose of the PWCS Tonnage Allocation Stage 1, and the process and timetable set out in this submission for the development and implementation of Long Term Terminal Access Protocols, is to:

- manage access to coal loading services at the Port of Newcastle, given the imbalance between demand and the capacity of the Hunter Valley Coal Chain, while the terminal established by NCIG is developed; and
- provide the basis for a long term system of managing access to and expansion of coal terminal capacity at the Port of Newcastle for both existing users and new entrants.

Without the PWCS Tonnage Allocation Stage 1, there will be no system in place at the Port of Newcastle to align or manage vessel arrivals more efficiently with Coal Chain capacity from 1 January 2009 when the existing Capacity Balancing System ("CBS") expires. For the reasons set out in this submission, this counterfactual situation would result in significant public detriment.

In particular, the Terminal Operators believe that, in the absence of the PWCS Tonnage Allocation Stage 1 (and, subsequently, Long Term Terminal

Access Protocols), the extensive vessel queues previously experienced at the Port will begin to re-form from 1 January 2009. This would:

- create substantial uncertainty for Producers and service providers;
- result in increased demurrage and stockpiling costs;
- heighten the potential risks of environmental damage and/or safety incidents off the Port -- in this regard, in its report following the Pasha Bulker incident, the Australian Transport Safety Bureau ("ATSB") identified the large vessel queue as a factor which heightens the risk of collision, due to the increased likelihood of ships anchoring in close proximity to each other which, in turn, results in less time to take action if their anchors drag; and
- result in significant harm to the reputation of the Hunter Valley as a reliable and low demurrage supplier of coal.

Producers and service providers have devoted substantial resources to developing a long term solution. However, at this time, because of its complexity -- and despite demonstrated commitment by industry -- agreement has not yet been reached between the Producers and the NSW Government in relation to the precise form of a long term solution.

Acknowledging the concerns identified by the ACCC in previous authorisation Determinations, this application and submission expressly provide a process and timetable for the PWCS Tonnage Allocation Stage 1 to be superseded by Long Term Terminal Access Protocols to be developed and agreed by the industry.

This process includes a mechanism for entering into long term contracts with Producers to provide a basis for underwriting ongoing expansion of terminal infrastructure at the Port of Newcastle, as well as an appropriate Coal Chain interface with other service providers to facilitate contractual alignment.

As previously noted by the ACCC, alignment of Producers' contracted tonnes across the Coal Chain is a key requirement for facilitating the efficient allocation of resources and investment.

The key objective of any long term solution will be to provide certainty both to existing Producers and new entrants regarding access to existing and expanded coal terminal infrastructure over the long term (and therefore investment certainty for the Terminal Operators and other service providers in the Hunter Valley) and to avoid the need for any future authorisation applications involving short term solutions.

#### **1.4 Duration of authorisation and conditions**

The Terminal Operators request that the ACCC grants an authorisation for the proposed PWCS Tonnage Allocation Stage 1 and such Long Term Terminal Access Protocols as are developed and agreed in accordance with the process set out in this submission for a period of 10 years, *on the express conditions*

set out in paragraph 1.2 above. The 10 year period is proposed to facilitate the entry into long term contracts.

As part of this application, the Terminal Operators also propose that incentives and frameworks are established to encourage all participants to meet the relevant timetable, including that the Terminal Operators report monthly to the ACCC on the steps taken by the Producers' Steering Committee and Terminal Operators towards developing and implementing the long term solution.

## **1.5 Request for interim authorisation**

For the reasons set out in section 6 of this submission, the Terminal Operators request the ACCC to grant interim authorisation of the agreements and arrangements specified in paragraph 1.1 of this submission so that PWCS can begin the steps necessary to implement the PWCS Tonnage Allocation Stage 1 and industry participants can move forward with greater certainty in developing and finalising a long term solution.

The Terminal Operators believe that granting the interim authorisation would not in any way prevent the Hunter Valley coal industry from being able to return to its pre-authorisation state should the ACCC ultimately deny authorisation. Indeed, interim authorisation of the PWCS Tonnage Allocation Stage 1 and Long Term Terminal Access Protocols is likely to facilitate the urgent resolution of a long term solution that is needed by all stakeholders.

In these circumstances, the Terminal Operators submit that this is a matter which warrants interim authorisation so that immediate steps can be taken to implement the PWCS Tonnage Allocation Stage 1 and move forward with a long term solution.

## **1.6 Structure of submission**

This supporting submission is structured as follows:

- Section 2** - sets out an Executive Summary;
- Section 3** - sets out further information in relation to the Hunter Valley coal industry and the Honourable Nick Greiner AC's consultation on Hunter Valley export coal arrangements ("**Greiner Review**"). A copy of the Greiner Review is set out at Attachment 3;
- Section 4** - sets out further information in relation to the operation of the proposed PWCS Tonnage Allocation Stage 1, including the framework leading to the development and finalisation of Long Term Terminal Access Protocols;
- Section 5** sets out further information in relation to the public benefits which will arise from the implementation of the PWCS Tonnage Allocation Stage 1 and any Long Term Terminal Access Protocols, and why they outweigh any public detriment;

- Section 6** - sets out reasons supporting the Terminal Operators' request for urgent interim authorisation; and
- Section 7** - sets out a brief conclusion.

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## **2 Executive summary**

### **2.1 Existing authorisation for the CBS**

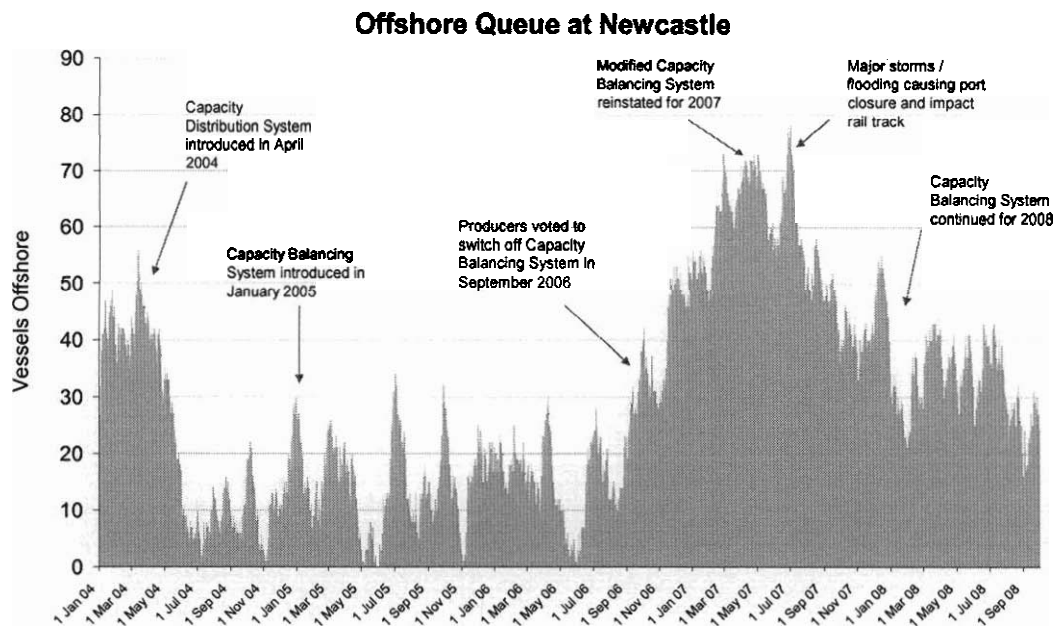
The ACCC will have considerable background on the Hunter Valley Coal Chain from its consideration of PWCS' previous applications for authorisation, being:

- Authorisation Nos A90906 - A90908) for a short term capacity distribution system ("**Short Term CDS**") which was lodged on 5 February 2004 and granted on 9 July 2004;
- Authorisation Nos A30236 - A30238 for a medium term capacity balancing system ("**Medium Term CBS**") which was lodged on 1 October 2004 and granted on 15 April 2005 and most recently was extended on 23 April 2008 by application by Newcastle Port Corporation and Donaldson Coal Pty Limited (Authorisation no A91072 - A91074 and A91075 - A91077); and
- Authorisation Nos A91068 - A91070 for the Vessel Queue Management System lodged on 16 November 2007 by Pacific National, Queensland Rail and PWCS and subsequently withdrawn on 22 January 2008 following the appointment of the Honourable Nick Greiner AC to undertake the Greiner Review.

These applications focused on providing short term solutions to the imbalance between demand for coal loading services and the capacity of the Hunter Valley Coal Chain until a long term solution was developed.

These short term systems have been successful in managing the vessel queue off the Port of Newcastle (see Figure 1 below).

**Figure 1 – Newcastle Vessel Queue from January 2004 to October 2008**



The management of the vessel queue and the reduction in turn-around times for vessels has also released a significant number of bulk carriers into the world fleet and, as a result, may have contributed to a reduction in sea freight costs and increased certainty in loading and delivery dates.

Given the information previously provided to the ACCC in the context of this application, this submission will not provide detailed background on the Hunter Valley Coal Chain. However, this submission provides the ACCC with updated information on recent developments in the Hunter Valley coal industry necessary to move to a long term solution.

## **2.2 PWCS and NCIG**

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle in NSW. Those terminals comprise the largest export coal handling facility in the world.

PWCS is owned by a number of coal Producers and other participants in the Hunter Valley coal industry. Attachment 4 lists the shareholders in PWCS, all of which are coal Producers or exporters in the Hunter Valley, or importers of coal from the Hunter Valley.

PWCS' current capacity is 102 mtpa with expansion underway to increase capacity to 113 mtpa by mid-2009. PWCS has development approval to complete construction of its Kooragang Terminal Master Plan and to operate at 145 mtpa.

The NCIG consortium is comprised of BHP Billiton (Hunter Valley Energy Coal), Centennial Coal Company Limited, Peabody Energy (Excel Coal Limited), Donaldson Coal, Whitehaven Coal and Felix Resources (see Attachment 5).



The first stage of the NCIG terminal, with a capacity to load approximately 30 mtpa, is expected to become operational in the first quarter of 2010. All capacity in this first stage has been contracted to NCIG shareholders. NCIG has approval to develop the NCIG terminal to 66 mtpa (“Stage 2”).

The NCIG terminal will consist of rail infrastructure, a coal storage area, wharf facilities and shiploaders. This would include three shipping berths. The first two berths will be constructed as part of stage one. The third berth will be built in the second stage of the NCIG terminal, and will be installed as the throughput capacity of the NCIG Terminal is increased up to 66 Mtpa.

There is also the potential at the Port of Newcastle for terminal capacity to be expanded beyond the currently proposed PWCS (145mtpa) and NCIG (66 mtpa).

### **2.3 Why immediate action is required**

The development and finalisation of a long term solution is a key priority for the Hunter Valley coal industry and substantial work has been undertaken to develop a long term solution (involving Producers, service providers, the NSW Government and an independent facilitator). However, development of a long term solution has taken longer than expected to be resolved.

As the ACCC is aware, the CBS expires on 31 December 2008. As a result, there will be no system in place to align or manage vessel arrivals more efficiently with Coal Chain capacity. The Terminal Operators consider it likely that, absent a capacity balancing system, a substantial vessel queue will re-form off the Port.

The Terminal Operators therefore consider that the PWCS Tonnage Allocation Stage 1 is needed as a means of:

- providing certainty of terminal access to coal Producers from 1 January 2009, so that Producers can plan their production, employment levels and sales with confidence; and
- managing the vessel queue at the Port. In this regard:
  - the Port faces continuing high vessel arrival rates which reflect high demand for Hunter Valley coal;
  - until capacity expansion takes place, the industry will continue to face capacity constraints across the whole Coal Chain. Coal Chain capacity for 2009 is expected to be in the order of 94 mt, with forecast demand for coal loading services in the order of 123 mt;
  - unless a system is implemented to manage the coal chain capacity limitations:
    - a significant queue of vessels will re-form at the Port, giving rise to substantial demurrage costs.

There are currently in the order of 28 vessels offshore. Absent the PWCS Tonnage Allocation Stage 1 or another solution, the Terminal Operators estimate that the vessel queue could increase to peak at levels in excess of 70 vessels (as seen prior to the reinstatement of the CBS for 2007). Based on demurrage rate estimates provided by Producers, the demurrage payable on an average vessel queue of 55 vessels during 2009 could exceed USD 400 million;

- there is an increased risk of an environmental or safety incident off the Port of Newcastle; and
- there is a substantial risk of damage to the reputation of the Port of Newcastle as a low demurrage and reliable coal supplier. This has a clearly detrimental effect on the global competitiveness of the Hunter Valley industry.

## **2.4 The evolution of a long term solution and the basis for the PWCS Tonnage Allocation Stage 1**

### *Introduction*

As the ACCC is aware, in January 2008, the Honourable Nick Greiner AC was appointed to consult on Hunter Valley export coal arrangements. During the period from January to July 2008, Mr Greiner consulted extensively with Producers and service providers on arrangements in the Hunter Valley.

In July 2008, Mr Greiner delivered his report to the NSW Government including a potential solution to issues regarding long term access and capacity expansion of terminal infrastructure.

In August 2008, as was reported in the media, the NSW Government requested that the Producers' proposed solution should be modified to account for new entrants and, in early September 2008, the Producers provided Government with a modified proposal which sought to address this issue.

On 18 September 2008, media reports suggested that the NSW Government considered that further steps should be taken to accommodate new entrants -- in particular, that PWCS should enter into long term contracts to underwrite future expansion which may be compressed to allow for new entrants under the common user provisions.<sup>2</sup>

Some Producers have indicated that they are unwilling to assume the risk of entering into long term contracts with an open-ended "compression" impact. This is because those Producers consider that such a "compression" impact would result in their access to terminal capacity being continually diluted.

PWCS notes its view that:

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<sup>2</sup> The Newcastle Herald, 18 September 2008, pg 1.

- whilst “compression” may facilitate entry in an immediate sense, it lessens certainty in relation to new Producers’ *future* volumes (when compared to non-compressible contracts); and
- when compared to non-compressible contracts, “compression” is likely to reduce the level of investment certainty for service providers and affect their ability to allocate resources and investment efficiently at the relevant terminal or within the relevant network. PWCS also considers that “compression” may limit the ability of Producers and rail providers to meet their respective contractual obligations to each other under long term contracts, result in the mis-allocation of investment, limit the ability of rail providers to recover investment in new expansion works, and therefore create a substantial disincentive for such investment in the first place.

NCIG does not agree with nor endorse PWCS’ view in bullet point 2 above nor that, under the current contractual arrangements, compressibility inhibits investment. However, NCIG considers that if a long terms solution were to provide greater future certainty of volumes, this would be a benefit.

Industry representatives met with the NSW Government again on 24 September 2008, and since that time have conducted further intensive industry consultation, including:

- an industry meeting involving all (except one) Hunter Valley Producers and all service providers (including PWCS, NCIG, Newcastle Ports Corporation, ARTC, Pacific National, Queensland Rail and the Hunter Valley Coal Chain Logistics Team (“HVCCLT”));
- the formation of a Producers’ Steering Committee which has met on a number of occasions since 24 September 2008 to progress a long term solution; and
- a number of discussions with the NSW Government, including discussions about a potential fourth terminal development at the Port of Newcastle to deliver increased capacity.

The Terminal Operators consider that industry discussions with the NSW Government are progressing and are hopeful that an agreement to facilitate entry into “bankable” long term coal loading contracts will be reached in the near future.

Given ongoing discussions between industry (and between industry and the NSW Government), the Terminal Operators are seeking authorisation in order to transition to a long term solution for the expansion of the Terminals to meet projected industry demand.

The objectives of any long term solution are to:

- provide further certainty to existing Producers and new entrants in the long term regarding access to terminal capacity;

- facilitate the alignment of contracted capacity positions across different aspects of the Coal Chain;
- maximise the volume of coal which can be exported through the Port by fast tracking and aligning expansion across the Coal Chain to meet demand;
- minimise deadweight demurrage costs to all Producers while maximising exports from the coal Terminals;
- minimise the environmental and safety issues caused by the significant number of vessels otherwise likely to congregate off the Port of Newcastle;
- address export infrastructure issues in Newcastle to improve Newcastle's competitive coal export position in relation to other countries; and
- maintain the reputation of the Port of Newcastle as a reliable supplier of coal and a low demurrage facility.

As set out in section 1.2 above, this application is subject to express conditions which, if not satisfied, will result in the authorisation ceasing.

## **2.5 Operation of the proposed PWCS Tonnage Allocation Stage 1**

Under the PWCS Tonnage Allocation Stage 1 (which will be superseded by Long Term Terminal Access Protocols in accordance with the timeframes specified in this submission), it is proposed that base tonnages be established for existing Producers that reflect the greater of each Producer's highest allocation usage between 2004 and 2007 or their binding demand nomination at PWCS for 2008 proportionally reduced to 95 Mt (being the initial declared Coal Chain Capacity for 2008). These base tonnages are then proportionally increased or decreased to match Coal Chain Capacity.

The PWCS Tonnage Allocation Stage 1 set out in Attachment 1 will apply in 2009 until superseded by the Long Term Terminal Access Protocols, which will provide a system to manage access to and expansion of terminal capacity at the Port of Newcastle on an ongoing basis. If accepted by the ACCC, any Long Term Terminal Access Protocols will apply retrospectively from 1 July 2009, or such later date as agreed by the Terminal Operators and the ACCC.

Further details in relation to the operation of the PWCS Tonnage Allocation Stage 1 are set out in Section 4 of this submission.

## **2.6 Proposed PWCS Tonnage Allocation Stage 1 - substantial public benefits and no discernible public detriments**

*The PWCS Tonnage Allocation Stage 1 as structured will not give rise to public detriments*

In considering the public benefits and detriments associated with the PWCS Tonnage Allocation Stage 1, the Terminal Operators consider that the

relevant counterfactual is one in which there is no queue management system in place.

Against this counterfactual, the Terminal Operators consider that the PWCS Tonnage Allocation Stage 1 will give rise to significant public benefits which will outweigh any public detriments both immediately and over the long term, particularly given the framework set out in this submission for the development of a longer term solution.

Further, the Terminal Operators believe that the PWCS Tonnage Allocation Stage 1, together with the process and timetable for developing and agreeing a long term solution, will largely address the concerns raised by the ACCC in its consideration of previous authorisation applications concerning the Medium Term CBS.

The PWCS Tonnage Allocation Stage 1 will have little impact on competition in any market, for the following reasons:

- the PWCS Tonnage Allocation Stage 1 will not have any impact on the total volume of coal shipped through the Port of Newcastle in the short term, as the Coal Chain will continue to operate at its maximum capacity;
- the structure of any authorisation for the PWCS Tonnage Allocation Stage 1 (including, in particular, the need for the PWCS Tonnage Allocation Stage 1 to be superseded by a long term solution to be agreed in accordance with the timeframes set out in this submission) ensures that, in the long term, provision will be made for capacity expansion to align with increases in demand, resulting in higher volumes of coal being shipped through the Port of Newcastle; and
- exporters will continue to compete against each other both in relation to production and sales to overseas customers.

***The PWCS Tonnage Allocation Stage 1 provides enhanced public benefits in both the short term and more importantly the long term***

As well as producing no significant public detriment, the PWCS Tonnage Allocation Stage 1 and the process for developing and implementing a long term solution as set out in this submission will also give rise to a number of substantial public benefits including:

- ***Incentives and conditions to develop and agree upon a meaningful long term solution:*** The Terminal Operators have put forward dates of 31 March 2009 (by which time, unless a later date is determined by the Terminal Operators and the ACCC, the MOU must have been submitted to the ACCC) and 30 June 2009 (by which time the Terminal Operators must submit the proposed Long Term Terminal Access Protocols to the ACCC) to encourage Producers and Coal Chain service providers to work constructively and in good faith to develop and agree the detail of the long term solution;
- ***Contractual alignment:*** The PWCS Tonnage Allocation Stage 1 would, and it is anticipated any Long Term Terminal Access

Protocols will, provide Producers with greater long term certainty as to the volume of coal they will be able to export through the Port of Newcastle which would, in turn, enable them to further align their requirements for above and below rail services in the Hunter Valley Coal Chain. Greater alignment of contracted capacity across the Coal Chain will further facilitate investment across the Coal Chain by all participants;

- ***Safety and environmental risks:*** the PWCS Tonnage Allocation Stage 1 and any long term solution will provide a number of environmental and safety benefits in reducing the vessel queue. This is particularly important in light of the ATSB Transport Safety Investigation Report, Marine Occurrence Investigation No 243 “*Independent investigation into the grounding of the Panamanian registered bulk carrier Pasha Bulker*” which found that capacity allocation systems are crucial in reducing the vessel queue, and thus reducing the risk to ships, the Port and the environment;
- ***Industry cost savings:*** industry cost savings are expected be achieved through minimising vessel queues and reducing demurrage fees that would otherwise be paid by exporters. Such savings are estimated to be in excess of USD 300 million. The PWCS Tonnage Allocation Stage 1 is expected to reduce inefficient stockpiling costs which would otherwise be incurred by Producers and facilitate the more efficient operation of mining operations;
- ***Increased export revenue and employment:*** As set out in section 5.10 below, any long term solution will provide very substantial benefits to the NSW and Australian economies in terms of major capacity expansions (and therefore increased coal exports, export revenue and government royalties) and increased employment in the Hunter Valley (particularly during the major construction phases). Given the current economic environment, the Terminal Operators consider this to be a very substantial public benefit;
- ***Certainty for coal exporters and buyers:*** The PWCS Tonnage Allocation Stage 1 will provide further certainty regarding the volume of coal that can be shipped and through which terminal, loading times and vessel schedules, which will enable exporters and buyers to plan and manage their operations more efficiently. This in turn will produce a number of “flow on” benefits to the Australian economy and the regional Hunter Valley economy including:
  - fostering efficiency which will improve the international competitiveness of Hunter Valley coal and Australian coal exports;
  - assisting to facilitate efficient investment decisions by participants in the Hunter Valley and Australian coal industry; and
  - increasing incentives for coal Producers to invest in the Hunter Valley coal production and handling industry; and

- ***Improving the international reputation of the Port of Newcastle and Hunter Valley:*** The Terminal Operators consider that the bottlenecks in the Hunter Valley Coal Chain and delays from vessel queues at the Port of Newcastle harm the international reputation of PWCS, the Port of Newcastle and the Hunter Valley and Australian coal industry in general. Accordingly, by eliminating the bottlenecks and managing the vessel queue, the proposed PWCS Tonnage Allocation Stage 1 will improve the Port of Newcastle's and the Australian coal industry's international reputation and competitiveness as against other coal exporting nations.

On this basis, The Terminal Operators submit that the proposed PWCS Tonnage Allocation Stage 1, particularly when taken with the timing requirements relating to the development and implementation of a long term solution, would not involve any discernible detriment to the public and that, in any event, any such detriment would be substantially outweighed by public benefits arising from the more efficient allocation of resources and investment across the Hunter Valley Coal Chain.

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### **3 Background information on the Greiner Review and progress made by industry in developing a long term solution**

#### **3.1 Introduction**

The purpose of the following section is to update the ACCC on developments in relation to Coal Chain infrastructure issues in the Hunter Valley and to provide background information which puts the PWCS Tonnage Allocation Stage 1 and development of Long Term Terminal Access Protocols in context.

As the ACCC is aware, the Hunter Valley Coal Chain has for many years been subject to significant infrastructure bottlenecks resulting in substantial losses for the coal industry arising from delays in loading of coal at the Terminals and associated foregone export volumes.

#### ***Key points***

- **In January 2008, the Honourable Nick Greiner AC was appointed by the NSW Government to conduct a review of Hunter Valley export coal arrangements.**
- **In July 2008, Mr Greiner provided to the Minister for Ports and Waterways, the Honourable Joe Tripodi MP his report into a long term framework for the Hunter Valley Coal Chain.**
- **In August 2008, the NSW Government raised certain issues in relation to the proposed solution and requested Producers to address the ability for new entrants to gain access to coal terminal infrastructure in the future.**

- In September 2008, Producers met with the NSW Government and proposed a modified solution which provided a number of avenues for new entrants.
- Discussions with the NSW Government are continuing to seek to address concerns on access for new entrants and to develop proposals for additional capacity expansions at the Port of Newcastle.

### **3.2 The Greiner Review**

In January 2008, Mr Greiner was appointed by the NSW Government to conduct a review of Hunter Valley export coal arrangements. His initial brief was to develop a solution for allocation of access to the Hunter Valley Coal Chain for 2009 so as to avoid the difficulties the industry faced at the end of 2007.

In February 2008, initial meetings were held with Mr Greiner, Producers and service providers and Mr Greiner's brief was expanded to develop a necessary long term framework for the expansion and management of the Hunter Valley Coal Chain. Between February and May 2008, Mr Greiner consulted with industry participants and developed a non-exhaustive list of options for allocation of terminal access.

The stated NSW Government principles for the review were to:

- maximise exports given the available infrastructure;
- ensure the industry is competitive in the short and long term;
- reduce the queue of vessels off the port of Newcastle;
- protect jobs in the Hunter Valley; and
- minimise costs to the coal industry from gaming.

In June 2008, the Producers developed a proposal for access to the coal terminals which was submitted to Mr Greiner. In July 2008, Mr Greiner provided to the Minister for Ports and Waterways his report on industry discussions on a long-term framework for the Hunter Valley Coal Chain. The report identified the following key requirements to achieve the major expansion of capacity in the Coal Chain:

- improve information sharing with the logistics co-ordinator;
- enhance co-ordination of the Coal Chain;
- develop a long term framework for export terminal access to ensure access of capacity; and
- develop a framework for track access to ensure expansion of track capacity.



In August 2008, the NSW Government indicated that it required the solution to contain a mechanism that catered more expressly for new entrants. In September 2008, industry representatives met with the NSW Government and proposed a modified solution which provided a number of avenues for new entrants. These discussions with the NSW Government are continuing, with substantial engagement between industry and Government in the past 2-3 months.

Against this background, the Terminal Operators have developed the proposed "terminal solution" as a two step approach, as it is apparent that the considerable amount of work required to detail all aspects of a long term solution and ongoing discussions with Government will not be finalised before the expiration of the CBS on 31 December 2008.

However, the Terminal Operators recognise that it is imperative that access arrangements be implemented from 1 January 2009 so as to avoid the situation which arose in December 2007 of there being no authorised vessel queue management system at that late stage resulting in a mere roll over of the CBS.

In these circumstances, the Terminal Operators are putting forward terminal access protocols in a two step process - allowing an initial system in accordance with the PWCS Tonnage Allocation Stage 1 set out in Attachment 1 to commence on 1 January 2009, and a process for developing and implementing modifications to the system that will result in Long Term Terminal Access Protocols (to supersede the PWCS Tonnage Allocation Stage 1) providing for access to and expansion of terminal capacity at the Port of Newcastle on an ongoing basis.

### **3.3 Information Sharing and Coal Chain Coordination**

In the course of the Greiner Review, it was identified that the HVCCLT requires greater access to information in order to perform effectively its functions of planning and co-ordinating the Hunter Valley Coal Chain.

A model is under development for the HVCCLT to be incorporated as an independent entity.

### **3.4 ARTC Draft Undertaking**

A further consideration arising in relation to the PWCS Tonnage Allocation Stage 1 and the development of Long Term Terminal Access Protocols is the interaction with the ARTC access undertaking for the Hunter Valley. A brief outline of recent developments in relation to the ARTC Hunter Valley access undertaking is set out below.

#### ***ARTC and Hunter Valley access***

The Hunter Valley rail network is managed and operated by the ARTC under a 60 year lease arrangement which it entered into with the Commonwealth and NSW Governments to manage and operate parts of the NSW interstate rail lines and the Hunter Valley rail network. The ARTC was created by the Commonwealth and State Governments in 1997 to manage and provide

access to the interstate rail network as part of the national rail freight network infrastructure.

The ARTC is responsible for maintenance, development and capital projects on the NSW interstate and Hunter Valley rail networks and assets, as well as in relation to train control. The ARTC is presently required to grant access to the Hunter Valley rail network according to the terms of the NSW Rail Access Undertaking (“**Undertaking**”).

### ***NSW Rail Access Undertaking***

Under its lease arrangements, the ARTC’s management of the Hunter Valley network is regulated under the Undertaking. The Undertaking is not an undertaking under Part IIIA of the TPA. Rather, it is an access regime, an earlier version of which was certified under the TPA in November 1999 as being effective. Certification lapsed in December 2000 and has not been renewed.

The Undertaking sets out an access regime for which an access agreement is to be negotiated between ARTC and an access seeker such as Pacific National or Queensland Rail. The Undertaking also sets out a number of compulsory terms and pricing principles for which the negotiation for access is to be based upon as well as a framework for the arbitration of access disputes between rail infrastructure owners and operators by IPART. Both Pacific National and Queensland Rail have access agreements with ARTC for access to the rail infrastructure in the Hunter Valley rail network.

### ***Proposed national access***

On 31 July 2008, the ACCC approved a new access undertaking under Part IIIA of the TPA in relation to ARTC’s leased tracks on the interstate network in NSW as well as to tracks on the interstate network in Victoria and South Australia. The new access undertaking does not include the Hunter Valley Coal Network.

The ARTC is also soon expected to submit a separate undertaking to the ACCC for its Hunter Valley coal services.

This proposed undertaking will apply to the Hunter Valley Coal Network and will replace the NSW Undertaking in relation to the Hunter Valley Coal Network. Until then, the NSW Undertaking will continue to apply to the Hunter Valley Coal Network.

Negotiations in relation to the new Hunter Valley Access Undertaking are ongoing. Importantly a proposal has been put forward that provides for:

- access to the rail network being conditional upon access seekers having secured 10 year coal terminal contracts;
- long term take or pay arrangements for train paths to underpin investment in track capacity; and
- Producers to contract with above rail operators.

### **3.5 Potential Newcastle Port Corporation developments**

The Terminal Operators note for completeness that the Newcastle Port Corporation (“NPC”) is also currently seeking to develop controls around port access in order to manage vessel queuing problems.

However, as NPC’s proposal is at an early stage of development (and, in any event, is likely to focus on a system for “calling” vessels, rather than on alignment with any other aspect of the Coal Chain), the Terminal Operators do not consider that the proposed developments by NPC have any impact on this application for authorisation.

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## **4 Operation of the PWCS Tonnage Allocation Stage 1**

### **4.1 Introduction**

The purpose of this section of the submission is to provide the ACCC with information about the operation of the proposed PWCS Tonnage Allocation Stage 1.

Terms used in this section have the meaning given in the PWCS Tonnage Allocation Stage 1 document set out in Attachment 1.

The PWCS Tonnage Allocation Stage 1 is intended to commence when interim authorisation is obtained, and if authorisation is not obtained until after 1 January 2009 then, subject to any contrary requirements of such authorisation, the PWCS Tonnage Allocation Stage 1 will be applied retrospectively as from 1 January 2009. The PWCS Tonnage Allocation Stage 1 will be superseded by Long Term Terminal Access Protocols to be developed and agreed in accordance with the timetable set out in this submission.

### **4.2 Operation of the PWCS Tonnage Allocation Stage 1 and proposed authorisation conditions**

The PWCS Tonnage Allocation Stage 1 is intended to provide for access to terminal capacity and manage the vessel queue while the detailed arrangements for access and capacity expansion of any coal terminal infrastructure are finalised.

Producers and other participants in the Hunter Valley Coal Chain have devoted a substantial amount of time and significant resources to addressing the current infrastructure capacity concerns in the Hunter Valley. However, when it became apparent that final agreement between Producers and with the NSW Government on the detailed way forward for a long term solution may not be reached before the CBS expires on 31 December 2008, the PWCS Tonnage Allocation Stage 1 was put forward together with a framework which provides a timetable and the relevant incentives which the Terminal Operators recognise are required in order to implement a long term solution in a timely manner.

The PWCS Tonnage Allocation Stage 1 will be implemented by amending the Coal Handling Services Agreement (“CHSA”) that PWCS has in place with its customers. Each Producer’s allocation, determined in accordance

with PWCS Tonnage Allocation Stage 1, will be subject to take or pay conditions pursuant to the CHSA.

#### **4.3 Step 1 - Administration and Objectives**

Under the PWCS Tonnage Allocation Stage 1, the Board of PWCS will appoint an Administrator who will be independent of any Producer. The Administrator will administer the PWCS Tonnage Allocation Stage 1 according to its objectives and provisions.

The objectives of the system are to:

- distribute the available Coal Chain capacity, in so far as it relates to the terminals efficiently, among Producers in an equitable, transparent and accountable manner;
- achieve minimum vessel demurrage, consistent with maximum export coal throughput;
- comply with relevant legal requirements; and
- not adversely affect the efficient operation of the terminals.

#### **4.4 Step 2 - Capacity declaration**

The PWCS Tonnage Allocation Stage 1 provides that the Administrator will determine the Available Capacity, taking into account the Coal Chain Capacity and any Queue Adjustment Amount.

HVCCLT will calculate the Coal Chain Capacity for each Calendar Month and Calendar Quarter in the Relevant Year.

PWCS, with assistance from the HVCCLT, will determine any Queue Adjustment Amount which may be necessary to adjust the queue of vessels off the Port of Newcastle.

#### **4.5 Step 3 - Aggregate and Producer Base Tonnages**

The PWCS Tonnage Allocation Stage 1 provides for aggregate base tonnages for 2009 to be 96.7 mtpa.

For each Producer, their Producer Base Tonnage will be determined by comparing their highest actual allocation usage pursuant to the capacity balancing systems in place for 2004 to 2007 or their PWCS binding demand nominations (inclusive of new mines) for 2008 proportionally reduced to 95 mt. The mechanics of this calculation are further set out in the PWCS Tonnage Allocation Stage 1.

The comparison to highest actual allocation usage provides a means of restoring capacity to those Producers where their access to terminal capacity has been diluted through the operation of the previous capacity balancing systems. For 2009, the volume uplifted to those 5 Producers totals 1.7 million tonnes.

#### **4.6 Step 4 – Capacity Distribution**

The Administrator will calculate the Annual Pro-rata Allocation for each Producer for the Relevant Year in accordance with the following formula:

$$\text{Annual Pro-rata Allocation} = \text{Pro-rata Factor} \times \text{Available Capacity}$$

$$\text{where the Pro-rata Factor} = \frac{\text{Producer Base Tonnage}}{\text{Aggregate Base Tonnage}}$$

The Annual Pro-rata Allocation will be distributed on a monthly basis to Large Producers (having regard to the monthly Available Capacity) and on a quarterly basis to Small Producers (having regard to the quarterly Available Capacity).

#### **4.7 Step 5 - Queue Management**

The Administrator and PWCS, with the assistance of HVCCLT, will continue to monitor the performance of the Hunter Valley Coal Chain throughout the relevant period and may revise the Available Capacity for the balance of the relevant year in order to achieve the objectives of the PWCS Tonnage Allocation Stage 1.

It is proposed that until system rules are defined and performance incentives are aligned as part of the development of Long Term Terminal Access Protocols, adjustments to Available Capacity will be applied to all Producers on a pro-rata basis.

#### **4.8 Step 6 - Terminal Operator to report to ACCC**

As set out in paragraph 1.2 above, the Terminal Operators and Producers' Steering Committee will report on a monthly basis to the ACCC in relation to progress in developing the MOU and, then, implementing the documentation for the long term solution developed by Producers and the Terminal Operators.

The members of the Producers' Steering Committee are set out at Attachment 6.

#### **4.9 Step 7 - The authorisation will lapse if the conditions to the authorisation are not met**

As set out above, the application has been specifically designed to ensure that a long term solution is developed and implemented expeditiously. To ensure this continued focus on the development and implementation of a long term solution, it is proposed that the authorisation will cease if any of the conditions set out in paragraph 1.2 are not met.

As set out above, once approved by the ACCC, the agreed Long Term Terminal Access Protocols will supersede and replace the PWCS Tonnage Allocation Stage 1.

## **5 The proposed PWCS Tonnage Allocation Stage 1 and long term solution will not have a significant impact on competition and will deliver substantial public benefits**

### **5.1 Introduction**

The Terminal Operators consider that the PWCS Tonnage Allocation Stage 1 and any Long Term Terminal Access Protocols will give rise to significant public benefits which substantially outweigh any public detriments in the short term and the long term. In particular, the PWCS Tonnage Allocation Stage 1 will substantially reduce the potential public detriments identified by the ACCC in its determinations in early 2008 in relation to the rollover of the Medium Term CBS.

#### ***Key points***

The PWCS Tonnage Allocation Stage 1 will:

- not have an adverse impact on competition in any market (see section 5.2);
- not reduce the total amount of coal that is able to be exported through the Port of Newcastle. Rather, the PWCS Tonnage Allocation Stage 1 enables the coal terminals to maximise exports given available infrastructure;
- together with the timetable set out in this submission, create the incentives for Producers to reach an agreement which embodies a long term commercially certain and transparent solution (see section 5.3);
- aid in reducing the environmental and safety risks associated with a large number of bulk cargo vessels (see section 5.4);
- operate so that a substantial vessel queue will not re-form with the cessation of the CBS on 31 December 2008 - resulting in industry savings in demurrage costs of approximately USD 300 million (see section 5.5);
- reduce inefficient stockpiling costs which would otherwise be incurred by Producers and facilitate the more efficient operation of mining operations (see section 5.6); and
- prevent the very real prospect of damage to the reputation of the Hunter Valley coal industry which would otherwise be likely to occur (see section 5.7).

In addition, the framework set up in this submission in relation to developing and agreeing a long term solution will have substantial public benefits including that it:

- creates further certainty for existing Producers and new entrants regarding access to and expansion of capacity available to Producers to sell coal through the Coal Chain (see section 5.8);
- will assist to underpin investment in and further facilitate alignment of Coal Chain infrastructure by creating certainty;
- assists long-term expansion of overall Hunter Valley Coal Chain capacity to occur in an expeditious and effective manner; and
- will result in a number of very substantial benefits to the Australian public and Australian and NSW economy, including increased capital expenditure, export coal revenue, export royalties and employment.

Further details in relation to the public benefits which will result from the implementation of the PWCS Tonnage Allocation Stage 1 and the development of Long Term Terminal Access Protocols are set out below. This information, so far as it relates to short term benefits, is based closely on that previously provided to the ACCC in PWCS' previous applications for authorisation.

However, as set out above, there are also a number of important differences between the proposed PWCS Tonnage Allocation Stage 1 and the Short Term CBS and Medium Term CBS. Most significantly, the PWCS Tonnage Allocation Stage 1, in conjunction with the proposed authorisation conditions, provides the incentive to ensure that a long term solution is finalised in an expeditious manner.

## **5.2 No significant impact on competition**

The Terminal Operators consider that the PWCS Tonnage Allocation Stage 1 and any Long Term Terminal Access Protocols that are developed and agreed will have very limited, if any, impact on competition in any relevant market for the following reasons:

- as with the Medium Term CBS, the PWCS Tonnage Allocation Stage 1 and long term solution will not limit the total volume of coal actually shipped through the Port. The Coal Chain will continue to operate at its full capacity. In the short term, the PWCS Tonnage Allocation Stage 1 will simply involve the equitable allocation of Available Capacity based on the greater of the Producers' 2008 demand nomination (proportionally reduced to 95mt) or their highest actual allocation usage between 2004 - 2007. The PWCS Tonnage Allocation Stage 1 does not change the amount of capacity available in the Coal Chain. Capacity will only increase if investments are undertaken to upgrade and/or expand all aspects of the Coal Chain; and
- coal exporters will continue to compete against each other in relation to the production of coal and sales to overseas customers - as they do now and did before the previous authorisations in respect of the terminal.

### 5.3 Short Term Benefit: Incentives to reach an agreement

The ACCC has previously concluded that the public benefits associated with the existing CBS would outweigh any public detriments. However, the ACCC also expressed concerns that, if the existing CBS were to continue beyond a 12 month period, the extent of any public detriments would increase. In particular, the ACCC identified the following potential public detriments:

- the operation of the CBS for an extended period may reduce incentives to develop a long term solution to the capacity constraints facing the Hunter Valley Coal Chain; and
- extending the CBS will result in an inefficient utilisation of employees and infrastructure by individual mines.

The Terminal Operators appreciate the ACCC's concern and have therefore submitted a system which employs a timetable and incentives in order for a long term solution to be put in place by industry.

In addition, the Terminal Operators submit that the CBS has not in fact given rise to these public detriments. In 2008, industry participants have made significant progress in relation to developing the platform for an enduring long term solution the details of which remain to be agreed in consultation with the NSW Government and other stakeholders. Importantly, the CBS did not reduce the total amount of coal exported through the terminal and the PWCS Tonnage Allocation Stage 1 will have the same result.

### 5.4 Short term benefit: environment and safety

The PWCS Tonnage Allocation Stage 1 will aid in reducing the environmental and safety risks associated with a large number of bulk cargo vessels off the Port of Newcastle and assist in protecting the unique reefs and historic ship wrecks surrounding Newcastle Harbour.

In its report following the Pasha Bulker incident, the ATSB identified the large vessel queue as a factor which heightens the risk of collision, due to the increased likelihood of ships anchoring in close proximity to each other which, in turn, results in less time to take action if their anchors drag. In particular, the report stated that:

*“the queue of 57 ships off Newcastle on 7 June 2007 increased the risks of collisions, groundings and other difficulties in the subsequent heavy weather. Capacity allocation systems have proved effective in reducing the queue in the past and, consequently, reduced the risk of ships, the port and the environment. The significant public benefit of enhanced safety that results from a reduced queue had not been identified or recognised during the application process for the authorisation of these allocation systems.*

*The Australian Transport Safety Bureau recommends that Port Waratah Coal Services, individually and as a member of the Hunter Valley Coal Chain Logistics Team, take action to address this safety issue”.*



Of the recommendations, this was the only one directed to PWCS.

In addition, the ATSB specifically identified a “*potential for major pollution or the blockage of the port resulting in enormous financial costs*”<sup>3</sup>.

### **5.5 Short term benefits - reduction of vessel queues and industry savings in reduced demurrage costs**

As demand for coal loading services is forecast to remain high, the Terminal Operators in the Hunter Valley believe a significant imbalance between demand and capacity will re-emerge on 1 January 2009 once the CBS ceases to operate. Unless another mechanism is implemented upon the cessation of the CBS, extensive vessel queues and high demurrage costs will return from 1 January 2009. The Terminal Operators understand this is widely accepted by participants within the Hunter Valley Coal Chain.

If no system is in place (the counterfactual), the Terminal Operators estimate that the vessel queue could increase to peak at levels in excess of 70 vessels (as seen prior to the reinstatement of the CBS for 2007), with an average vessel queue of 55 vessels generating an estimated USD 400 million in demurrage costs at current vessel demurrage rates for Producers in 2009.

Implementing the proposed PWCS Tonnage Allocation Stage 1 on 1 January 2009 after the CBS ceases to operate (the factual) will ensure that the vessel queue can be managed to a level of around 20-25 vessels. The Terminal Operators estimate that this will represent a saving of over USD 300 million in demurrage costs over 2009. Demurrage charges are economically inefficient dead-weight losses. They involve coal Producers paying very substantial sums to shipping companies to have empty ships sit idle off the coast of Australia.

The ACCC can therefore be confident that implementing the PWCS Tonnage Allocation Stage 1 will result in substantial savings of demurrage compared to the counterfactual of an increasing vessel queue if there is no queue management system in place. As the ACCC has acknowledged previously, this is a substantial benefit<sup>4</sup>. It is also a clear public benefit because, despite the immediate benefit being a cost saving to coal Producers, it has a flow-on benefit in that this deadweight cost can be invested in a more productive manner.

Furthermore, the ACCC has in the past indicated that an application for authorisation that relates solely to exports inherently involves benefits and detriments that are public in nature<sup>5</sup>.

<sup>3</sup> ATSB Transport Safety Investigation Report, Marine Occurrence Investigation No 243 “Independent investigation into the grounding of the Panamanian registered bulk carrier Pasha Bulker” [www.atsb.gov.au/publications/investigation\\_reports/2007/MAIR/pdf/mair243\\_001.pdf](http://www.atsb.gov.au/publications/investigation_reports/2007/MAIR/pdf/mair243_001.pdf)

<sup>4</sup> ACCC Final Determination, Applications for Authorisation A90906, A90907, A90908 lodged by PWCS (9 July 2004), p 60

<sup>5</sup> ACCC Final Determination, Applications for Authorisation A90906, A90907, A90908 lodged by PWCS (9 July 2004), p 62

## **5.6 Short term benefit: reducing stockpile costs**

Preventing an increase in the vessel queue will give exporters and buyers of coal greater certainty as to when a particular shipment of coal will be loaded and how much they will be able to load in each period. Producers can then use this greater certainty to manage more effectively their production and stockpiling of coal. This, in turn, will allow them to reduce stockpiling costs below what would be the case in the event of uncertainty of vessel queues.

The public benefits from the reduction of economic inefficiency caused by stockpiling costs in the same way as it benefits from the reduction of inefficient demurrage charges.

## **5.7 Long term benefit: improving the Hunter Valley's international reputation**

While the likely substantial increase in the vessel queue (absent the operation of a queue management system beyond 31 December 2008) is a result of strong continuing demand for Hunter Valley coal, any such increase in the vessel queue and delays in delivery to international customers is likely to have a negative impact on the reputation nationally and internationally of the coal Producers and the Hunter Valley Coal Chain, including the Port of Newcastle.

International coal buyers, faced with uncertainty about how long it will take for their coal to be loaded at the Port of Newcastle because of a long vessel queue, may lose confidence in the Hunter Valley's coal Producers and be more likely to consider alternative sources of supply, including from other countries (e.g. Indonesia and Russia).

By way of example, on 31 October 2007, the Argus Coal Daily reported that:

*“As traditional suppliers struggle to meet demand, Japan is diversifying supply by taking 77pc more Russian coal, rising to 705,916mn t, compared with September last year...”*

*To meet strong demand and counter tight export availability in Indonesia and Australia, Japan's supply from Russia is climbing. . . . For some Japanese buyers this means making allowances for quality issues surrounding Russian coal, which has a higher proportion of debris...”*

There is therefore a very real prospect of international substitution by buyers in response to uncertain supply conditions in Australia. Accordingly, the Terminal Operators submit that there is a very clear public benefit from the Hunter Valley Coal Chain and the Hunter Valley coal Producers having a strong international reputation as efficient, timely and low-demurrage exporters.

## **5.8 Long term benefit: provides increased certainty for new entrants and existing Producers**

The proposed PWCS Tonnage Allocation Stage 1 will, together with Long Term Terminal Access Protocols, provide further certainty to existing Producers and new entrants in the long term regarding access to Terminal

capacity regardless of their size or whether they are members of, or have board representation at PWCS or NCIG.

The Terminal Operators recognise that security of Coal Chain capacity (both rail and port) are a key Board and investor requirement. Financial close of projects may be jeopardised by any lack of certainty. Accordingly, the Long Term Terminal Access Protocols being developed by Producers and the Terminal Operators will give rise to significant public benefits by providing additional certainty and assisting to foster further investment in the Hunter Valley Coal Industry.

#### **5.9 Long term benefit: more efficient investment and re-investment**

With a greater ability to predict annual costs and coal revenue through a long term solution, Producers and new entrants are better placed to make long-term plans and decisions, particularly with respect to production and investment. This in turn will allow Producers to operate more efficiently and invest in appropriate system upgrades.

In particular, a long term solution would be a route to savings in demurrage and stockpiling charges, which would then be available to be re-invested in the Hunter Valley coal industry.

A further long term benefit of Long Term Terminal Access Protocols being developed by Producers and the Terminal Operators is that it is a route that will assist PWCS to enter guaranteed long term contracts to underpin investment in coal terminal and coal production infrastructure.

#### **5.10 Long Term Benefit: increased export coal revenue and employment**

Long Term Terminal Access Protocols will also give rise to increased capital expenditure, increased export coal revenue, increased export royalties and higher levels of employment in the Hunter Valley by facilitating the expansion of Coal Chain capacity and increasing the volume of coal which can be exported through the Terminals.

Expansion of the Terminals would involve a large construction phase where investment and employment will increase substantially, followed by a phase of increased operation where exports will increase as well as employment (although to a lesser extent than during construction). These are substantial public benefits.

#### **5.11 Conclusion**

In summary, compared with the counterfactual, the Terminal Operators believe that the proposed PWCS Tonnage Allocation Stage 1 and Long Term Terminal Access Protocols developed as set out in this submission will:

- not have a significant impact on competition in any relevant market or create any public detriment that is not *de minimis*;
- result in industry savings in decreased demurrage (estimated to be at least USD 300 million in 2009);

- facilitate the alignment of contracted volume and infrastructure development between coal terminals, track and trains;
- reduce the risk of environmental damage and safety incidents associated with a large vessel queue;
- involve a number of very substantial benefits to the Australian public and the competitiveness of the Australian economy that greatly outweighs any detriment;
- provide further certainty to Producers and new entrants regarding access to terminal infrastructure; and
- give rise to increased expenditure in the Hunter Valley and increased export coal revenue, royalties and employment.

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## **6 Request for interim authorisation**

### **6.1 Introduction and request for interim authorisation**

The purpose of this section is to provide additional details on an urgent request for interim authorisation of the conduct and arrangements specified in section 1.1 of this submission commencing on 1 January 2009.

Pending the ACCC's consideration of the Terminal Operators' request for authorisation, the Terminal Operators request that the ACCC grant interim authorisation of the conduct and arrangements specified in section 1.1 of this submission as soon as practicable so that PWCS can begin the steps necessary to implement the PWCS Tonnage Allocation Stage 1 and industry participants can move forward with greater certainty in developing a long term solution.

### **6.2 The urgent need for an interim measure from 1 January 2009**

There is an urgent need for a system to limit vessel arrivals to Coal Chain capacity and manage the queue to be in place on 1 January 2009 when the existing CBS expires. The key contributor to the vessel queue problem that existed prior to the CBS being implemented was the mis-match between demand and Coal Chain capacity.

Upon expiry of the CBS on 31 December 2008, no measure will be in place to prevent the demand/capacity imbalance from returning at the Coal Chain and the Port.

The forecast demand for coal loading services in 2009 will remain well above the available Coal Chain capacity, ensuring a large number of vessels will again arrive off the Port from 1 January 2009.

The Terminal Operators request urgent interim authorisation of the conduct and arrangements specified in section 1.1 of this submission in order to provide Producers with certainty as to the amount of coal that they will be able to load during 2009 so that Producers can effectively plan sales and production.

### **6.3 The Counterfactual - what will occur absent the proposed PWCS Tonnage Allocation Stage 1**

The counterfactual is the situation without the PWCS Tonnage Allocation Stage 1 or any queue management system in place. As noted earlier, once the CBS ceases operation, the Terminal Operators believe long vessel queues will begin to re-form off the Port from January 2009. Coal exporters and the Hunter Valley coal industry will again incur substantial demurrage costs arising from these extensive vessel queues unless a new mechanism for efficiently managing the vessel queues is implemented.

For these reasons, the Terminal Operators submit that the interim authorisation is necessary to ensure that the PWCS Tonnage Allocation Stage 1 can be implemented once the CBS expires.

### **6.4 The effects of any interim authorisation**

The Terminal Operators believe that granting the interim authorisation would not, because of the way the PWCS Tonnage Allocation Stage 1 and the application for authorisation is structured, in any way prevent the Hunter Valley coal industry from being able to return to its pre-authorisation state if the ACCC were ultimately to deny authorisation. Indeed, interim authorisation of the PWCS Tonnage Allocation Stage 1 and any Long Term Terminal Access Protocols developed in accordance with this submission is likely to facilitate the urgent resolution of a meaningful long term solution that is needed by all stakeholders rather than an additional short term band-aid solution.

However, it is envisaged that the vessel queue would grow when the CBS expires at the end of 2008, impacting on Coal Chain efficiency and costs to the industry.

It is imperative that it can be confirmed, as soon as possible, that the PWCS Tonnage Allocation Stage 1 will take over at the conclusion of the CBS to provide coal Producers with certainty of terminal access for 2009. In these circumstances the Terminal Operators submit that this is an urgent matter being of a kind with respect to which it is appropriate for the ACCC to grant interim authorisation, particularly where the factual basis and the short term economic impact of the PWCS Tonnage Allocation Stage 1 is relatively well known to the ACCC.

Importantly, the proposed PWCS Tonnage Allocation Stage 1 will not affect the amount of coal that is actually exported through the Port. The Hunter Valley Coal Chain will continue to operate at full capacity. It will also not “take the pressure off” industry to develop and implement a meaningful long term solution.

## **6.5 Procedure and incentives to finalise a long term solution**

At this time, because of its complexity -- and despite demonstrated commitment by industry -- agreement has not been able to be reached between Producers, service providers and the NSW Government in relation to the precise form of a long term solution. However, acknowledging the concerns identified by the ACCC in previous authorisation Determinations, this application and submission expressly provide for a process and timetable for the PWCS Tonnage Allocation Stage 1 set out in Attachment 1 of this submission to be superseded by Long Term Terminal Access Protocols to be developed and agreed by the industry.

The process set out in this submission includes a procedure and incentives to develop and finalise Long Term Terminal Access Protocols, including a mechanism for entering into long term contracts with Producers to assist to underwrite ongoing expansion of terminal infrastructure at the Port of Newcastle, as well as an appropriate Coal Chain interface with other service providers to facilitate contractual alignment. As previously identified by the ACCC, the alignment of Producers' contracted tonnes across the Coal Chain is a key requirement for facilitating the efficient allocation of resources and investment.

The process outlined in this submission also seeks to ensure incentives to finalise a long term solution without taking pressure off all stakeholders by a short term solution which dilutes, distorts or alters incentives.

Therefore, as part of this application, the Terminal Operators propose that the authorisation is sought subject to the conditions set out in Section 1.2.

## **6.6 Conclusion - limited impact on competition and substantial public benefits**

For the reasons set out in this application, the Terminal Operators believe that the proposed PWCS Tonnage Allocation Stage 1 will not have a significant impact in any market in Australia and that the proposed PWCS Tonnage Allocation Stage 1 and any long term solution developed in accordance with the process set out in this submission will give rise to a significant number of substantial public benefits.

Accordingly, the Terminal Operators request the ACCC to grant an interim authorisation of the conduct and arrangements described in this application so that PWCS can begin implementing the solution in order for it to be operational upon the expiry of the CBS on 1 January 2009.

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## **7 Conclusion**

For the reasons set out above, the Terminal Operators submit that the substantial public benefits of the PWCS Tonnage Allocation Stage 1 and Long Term Terminal Access Protocols outweigh any public detriments.

The Terminal Operators therefore submit that the conduct and arrangements specified in this submission (and which are the subject of the application for authorisation) meet the statutory test for authorisation under the TPA and request that the ACCC grant the authorisations requested under section 88(a)

and 88(7) of the TPA to allow the realisation of the significant public benefits anticipated.

### **7.1 Request for interim authorisation**

Having regard to the factors set out in section 6 above, the Terminal Operators request the ACCC to grant an interim authorisation so that PWCS can begin the tasks necessary to implement the PWCS Tonnage Allocation Stage 1 at 1 January 2009.

### **7.2 Duration of authorisation**

The Terminal Operators request that the ACCC grants an authorisation for the proposed PWCS Tonnage Allocation Stage 1 and any Long Term Terminal Access Protocols for a period of 10 years, *on the express condition that:*

- (a) the Terminal Operators submit to the ACCC a Memorandum of Understanding and associated Terms Sheet (“MOU”) setting out the likely terms of any Long Term Terminal Access Protocols which will be an element of the potential long term solution described in Attachment 2 on or before 31 March 2009 (unless otherwise agreed with the ACCC having regard to the progress of ongoing discussions with the NSW Government to agree a long term access solution at the Terminals);

If, having regard to this matter, the Terminal Operators are not reasonably able to submit the MOU to the ACCC on or before 31 March 2009, it is intended that the ACCC and the Terminal Operators would work together (both acting reasonably and in good faith) to determine any later date that should apply.

- (b) between the date of this application and the date specified in paragraph (a) above, the Terminal Operators will report to the ACCC each month on progress by the Producers’ Steering Committee and Terminal Operators in developing the MOU;
- (c) the Terminal Operators will submit to the ACCC by 30 June 2009 the new Long Term Terminal Access Protocols which, subject to ACCC approval, will form part of the ACCC’s authorisation;
- (d) between the date specified in paragraph (a) and 30 June 2009, the Terminal Operators will report to the ACCC each month on progress by the Producers’ Steering Committee and Terminal Operators in developing Long Term Access Protocols to give effect to the long term solution being developed by Producers and the Terminal Operators;
- (e) the Terminal Operators will implement contractual arrangements which give effect to such Long Term Terminal Access Protocols as are submitted to the ACCC for approval by a date which is no later than 6 weeks after the date on which those Long Term Access Protocols are approved by the ACCC. If accepted by the ACCC, any Long Term Terminal Access Protocols will apply retrospectively

from 1 July 2009, or such later date as agreed by the Terminal Operators and the ACCC.

The 10 year period is proposed to facilitate the entry into long term contracts.

**7.3 Further assistance**

If the ACCC has any questions or would like any further information, the Terminal Operators would be pleased to assist.

**Port Waratah Coal Services Limited  
Newcastle Coal Infrastructure Group Pty Limited  
19 November 2008**



# Attachment 1 - PWCS Tonnage Allocation Stage 1

**HUNTER VALLEY COAL CHAIN**

**PWCS TONNAGE  
ALLOCATION**

**STAGE 1**

## **PART A – GENERAL**

### **1. Introduction**

- 1.1 PWCS and all Producers recognise that there is an unprecedented level of demand for the export of Coal utilising the existing Coal Handling Facility at the Port of Newcastle in the foreseeable future.
- 1.2 During 2008 PWCS, in conjunction with Producers and other coal industry stakeholders, participated in a consultation process to develop the long term arrangements for the export of Coal through the Port of Newcastle.
- 1.3 The consultation led to the development of a methodology for access to the Coal Handling Facility by Producers from the commencement of 2009. This Tonnage Allocation Document is based on that methodology.
- 1.4 The Tonnage Allocation Document will be stage 1 of a transition process to the long term solution for access and it will be replaced and superseded by the Access Protocols to be developed and agreed by the Hunter Valley Coal industry on or before 30 June 2009.
- 1.5 Once the Access Protocols have received authorisation from, the Australian Competition and Consumer Commission (“ACCC”), it is intended that the Access Protocols will take effect retrospectively from 1 July 2009 subject to any requirements of the ACCC.
- 1.6 The implementation of the provisions of this Tonnage Allocation Document will be as an Annexure to the Coal Handling Services Agreement.
- 1.7 Any terms that are defined in the Dictionary in Part D of this Tonnage Allocation Document or the Dictionary at Annexure 4E of the Coal Handling Services Agreement will, when used in this Tonnage Allocation Document, 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 of this Tonnage Allocation Document will apply.

### **2. Administration**

- 2.1 The board of PWCS will as soon as possible in its absolute discretion appoint an Administrator. The Administrator will be independent of any Producer.
- 2.2 The Administrator will administer the allocation of tonnages to Producers in 2009 according to the following objectives :
  - (a) to 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;
  - (b) to achieve minimum vessel demurrage consistent with maximum export Coal throughput;
  - (c) to comply with all relevant legal requirements; and

- (d) to not adversely affect the efficient operation of the Coal Handling Facility.

### **3. Commencement and Duration**

- 3.1 The provisions of this Tonnage Allocation Document will have no force or effect until such time that authorisation or interim authorisation is granted under the *Trade Practices Act 1974*. If such authorisation is not obtained until after 1 January 2009 then, subject to any contrary requirements of such authorisation, once authorisation is obtained the provisions of this Tonnage Allocation Document will be applied retrospectively from 1 January 2009.
- 3.2 The provisions of this Tonnage Allocation Document will continue until and have no force or effect after the earlier of
  - (a) the expiry of any authorisation granted under the *Trade Practices Act 1974*, or
  - (b) the commencement of the Access Protocols.
- 3.3 If the Australian Competition and Consumer Commission imposes any authorisation conditions in respect to or affecting any provision of the Tonnage Allocation Document, a variation must be made to this Tonnage Allocation Document to the extent required to accommodate those conditions.

### **4. Dispute Resolution**

- 4.1 In the event that there are any disputes or issues in relation to the provisions of this Tonnage Allocation Document, other than in relation to any determination, declaration or calculation by the Administrator, PWCS or HVCCLT, the dispute resolution provisions contained in section 2.15 of the Coal Handling Services Agreement will apply.
- 4.2 Any determination, declaration or calculation by the Administrator in accordance with any provision of this Tonnage Allocation Document will in the absence of manifest error be final and binding on PWCS and each Producer and may not be the subject of the dispute resolution procedures contained in section 2.15 of the Coal Handling Services Agreement.

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## **PART B – ACCESS**

### **5. Capacity Declaration**

- 5.1 The Administrator will determine the Available Capacity for the Relevant Period taking into account the Coal Chain Capacity and any Queue Adjustment Amount.
- 5.2 PWCS, will procure that HVCCLT calculates the Coal Chain Capacity for each Calendar Month and Calendar Quarter in 2009.
- 5.3 PWCS, with assistance from HVCCLT, will declare the volume of the Queue Adjustment Amount, consistent with meeting the Objectives, specifically to minimise vessel demurrage consistent with maximum coal chain throughput.

### **6. Aggregate Base Tonnages**

- 6.1 The Aggregate Base Tonnage is 96.7 million tonnes.

### **7. Producer Base Tonnages**

- 7.1 Each Producer's Base Tonnage will be determined by a comparison of each Producer's 2008 Tonnage and its Highest Actual Usage in accordance with this paragraph 7.
- 7.2 If a Producer's 2008 Tonnage is equal to or greater than its Highest Actual Usage, the Producer's Base Tonnage will be its 2008 Tonnage.
- 7.3 If a Producer's 2008 Tonnage is less than its Highest Actual Usage then if:
- (a) the difference is less than 500,000 tonnes the Producer's Base Tonnage will be its Highest Actual Usage; or
  - (b) the difference is greater than 500,000 tonnes the Producer's Base Tonnage will be:
    - (A) its 2008 Tonnage; and
    - (B) the Aggregate Base Tonnage less:
      - (I) its 2008 Tonnage; and
      - (II) the aggregate of all other Producer's Base Tonnages calculated in accordance with this paragraph 7.

### **8. Capacity Distribution**

- 8.1 The Administrator will calculate the Pro-Rata Factor for each Producer for 2009 in accordance with the following formula:

$$\frac{\text{Producer Base Tonnage}}{\text{Aggregate Base Tonnage}}$$

- 8.2 The Administrator will calculate the Annual Pro-rata Allocation for each Producer for 2009 in accordance with the following formula:

$$\text{Annual Pro-rata Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity}$$

- 8.3 The Administrator will determine the Monthly Loading Allocations of a Large Producer in the following manner:

$$\text{Monthly Loading Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity for the Calendar Month}$$

- 8.4 The Administrator will determine the Quarterly Loading Allocations of a Small Producer in the following manner:

$$\text{Quarterly Loading Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity for the Calendar Quarter}$$

- 8.5 The Monthly Loading Allocation and Quarterly Loading Allocation calculated in accordance with this paragraph 8 are subject to adjustment in accordance with paragraph 9.

## **PART C – QUEUE MANAGEMENT**

### **9. Coal Chain Performance and Adjustment**

- 9.1 The Administrator and PWCS, with the assistance of HVCCLT, will continue to monitor the performance of the Hunter Valley Coal Chain throughout the Relevant Period. Subject to clause 3, following advice from PWCS, the Administrator may from time to time revise the Available Capacity for the balance of 2009 in order to achieve the objectives.
- 9.2 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 pro-rata 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.

## PART D - DICTIONARY

<b>2009</b>	The calendar year commencing 1 January 2009.
<b>2008 Tonnage</b>	<p>Each Producer's revised binding demand nomination for the Calendar Year 2008 submitted to PWCS in October 2006 in accordance with the provisions of the Coal Handling Services Agreement in force at that time, proportionally reduced on a pro-rata basis to give an aggregate tonnage for all Producers in 2008 of 95 million tonnes.</p> <p>For the avoidance of doubt, the binding demand nominations of 2008 include the demand nominations submitted for new mines.</p>
<b>Access Protocols</b>	The long term provisions for access to the Coal Handling Facility and other coal terminals in the Port of Newcastle to be developed and which are intended to take effect during 2009.
<b>Administrator</b>	The person appointed to manage the Tonnage Allocations in accordance with paragraph 2.1.
<b>Aggregate Base Tonnage</b>	The aggregate base tonnage for 2009 stated in paragraph 6.1.
<b>Annual Pro-Rata Allocation</b>	The annual allocation for each Producer determined in accordance with paragraph 8.1.
<b>Available Capacity</b>	The forecast amount of Coal, expressed in tonnes, to be transported to PWCS and loaded onto vessels at the Coal Handling Facility in the Relevant Period such that an operational queue is maintained as determined in accordance with paragraph 5.1.
<b>Calendar Month</b>	Any of the calendar months of January to December, whichever is relevant in the context.
<b>Calendar Quarter</b>	A period of three months commencing on 1 January, 1 April, 1 July or 1 October, whichever is relevant in the context.
<b>Coal Chain Capacity</b>	The forecast capacity of the Hunter Valley Coal Chain in the Relevant Period to transport Coal to the Coal Handling Facility and load the Coal onto vessels, expressed in tonnes.
<b>Coal Handling Facility</b>	Carrington Coal Terminal and Kooragang Coal Terminal including all plant, equipment, buildings and other structures owned or used by PWCS to provide coal handling services.
<b>Coal Handling Services Agreement</b>	The agreement so titled between PWCS and each of its Customers for the provision of coal handling and other services by PWCS to the Customer.
<b>Customer</b>	A party to a Coal Handling Services Agreement, other than PWCS, who receives Coal Handling Services from PWCS.

<b>Highest Actual Usage</b>	Each Producer's highest actual usage of coal handling services expressed in tonnes in a Calendar Year for any of the Calendar Years 2004, 2005, 2006 or 2007 as determined by PWCS in accordance with the usage provisions of the Coal Handling Services Agreement in force during each relevant year.
<b>Hunter Valley Coal Chain</b>	The system of moving coal from a Producer's loading point in the Hunter and surrounding areas of New South Wales to the Coal Handling Facility and loading coal onto vessels for export using the Coal Handling Facility.
<b>HVCCLT</b>	The Hunter Valley Coal Chain Logistics Team or any other entity that provides planning and logistics services to PWCS.
<b>Large Producer</b>	A Producer listed as a Large Producer in Attachment A
<b>Loading Allocation</b>	The volume of Coal Handling Services to be provided by PWCS, expressed in tonnes, allocated to a Producer during the Relevant Period, determined in accordance with this Protocols Document.
<b>Monthly Loading Allocation</b>	The Loading Allocation that is allocated to a Large Producer accordance with paragraph 8.3.
<b>Producer</b>	A Customer producing coal from one or more mines as identified in Attachment A and who has all necessary authorisations to operate each such mine. This definition does not imply management or ownership of a particular mine but merely provides groupings for the purposes of determining Loading Allocation.
<b>Producer Base Tonnage</b>	The base tonnage for each Producer for the year 2009 determined in accordance with clause 7.
<b>PWCS</b>	Port Waratah Coal Services Limited ACN: 001 363 828.
<b>Quarterly Loading Allocation</b>	The Loading Allocation that is allocated to a Small Producer for the relevant Calendar Quarter in accordance with paragraph 8.4.
<b>Queue Adjustment Amount</b>	An amount in tonnes, that is reserved for use by PWCS to adjust the queue of vessels at the Port of Newcastle.
<b>Relevant Period</b>	The relevant length of time which is applicable in the context.
<b>Small Producer</b>	A Producer listed as a Small Producer in Attachment A.
<b>Tonnage Allocation Document</b>	This document that determines the tonnage allocations for each Producer in 2009 and will form an annexure to the Coal Handling Services Agreement.



## ATTACHMENT A

### LIST OF PRODUCERS AND ASSOCIATED MINES

Producer	Mine
<b>Large Producer:</b>	
BHP Billiton	Mt. Arthur Complex
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 Newpac Ravensworth Glendell
<b>Small Producer:</b>	
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
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
White Mining Limited	Ashton Moolarben
Whitehaven Coal Mining Limited	Whitehaven Werris Creek Tarrawonga Sunnyside

# Attachment 2 - Long term solution

## 1.1 Introduction

The purpose of this Attachment is to provide an outline of the key aspects of the long term solution that is being developed and will be agreed to manage access and capacity expansion for coal terminals at the Port of Newcastle.

The ACCC has previously noted that capacity expansions alone will not solve the underlying Coal Chain issues in the longer term. The underlying issues include the compressibility impacts and service providers contracting without reference to the Coal Chain as a whole<sup>6</sup>.

The long term solution in relation to coal terminal access must necessarily comprise:

- Long Term Terminal Access Protocols, with clearly defined triggers for expansion and access provisions for existing Producers and new entrants;
- Long term contracts between Producers and the respective Terminal Operator;
- A Coal Chain interface with other service providers to achieve contractual alignment;
- Coal Chain system rules to provide operational efficiencies and alignment of performance incentives; and
- Amendments to PWCS and NCIG leases to facilitate implementation of the solution.

The Greiner Review provided a platform to move forward on establishing an appropriate long term commercial framework for the Hunter Valley Coal Chain. It was acknowledged, however, that there was clearly more work to be done in finalising arrangements to the satisfaction of Government, ACCC and industry.

Subsequent to the Greiner Review, Producers and the Terminal Operators have engaged in a process of consultation with industry and Government in order to refine aspects of the framework, including triggers for expansion, timing and accommodating new entrants. However, the detailed documentation and discussions with the NSW Government have taken longer than expected to be resolved.

The long term solution will be developed and implemented in accordance with the process and timeframe set out in this submission.

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<sup>6</sup> ACCC Media Release MR 107/08, 24 April 2008.

## **1.2 Long Term Terminal Access Protocols**

The purpose of the Long Term Terminal Access Protocols is to manage long term access and capacity expansion for coal terminals at the Port of Newcastle.

The overarching principle developed by Producers with respect to terminal access is that Producers need certainty over future capacity available to them to sell through the Coal Chain. Any long term coal industry solution needs to encompass the key principles that:

- there will not be a continued rationing back of long term ship or pay port contracts; and
- there should be no hoarding of capacity.

There has been extensive discussion with the NSW Government in relation to adequately providing access for new entrants. Possible avenues identified for new entrants include:

- Uncontracted capacity at PWCS and NCIG;
- Further expansion - the Hunter Valley Producers are pursuing an initiative to ensure continued terminal expansion opportunities at Newcastle up to 300 mtpa. This would substantially increase capacity in the Hunter Valley and provide access for new entrants to terminal capacity, as well as growth opportunities for existing Producers; and
- Producers are considering a way for long term contracts at PWCS to be compressible in order to further facilitate new entry in circumstances of non-use. Producers have indicated that any open ended compression of long term contracts for Producers necessarily results in their access to capacity being diluted. This puts their investment and jobs in jeopardy. Compressibility contracts would also be problematic for new entrants themselves, when subsequent new entrants are seeking access to capacity. From a Coal Chain perspective, compressibility also leads to mis-alignment and potential stranding of track and train infrastructure, limiting the ability of rail providers to recover investment in new expansion and therefore creating a substantial disincentive for such investment in the first place.

Discussions with the NSW Government are continuing in this regard.

## **1.3 Long Term Contracts**

It is intended that, if accepted by the ACCC, the Long Term Terminal Access Protocols will be implemented by the Terminal Operators under long term take or pay contracts with their respective customers. These long term contracts will underpin the expansion of coal terminal and mine production infrastructure.

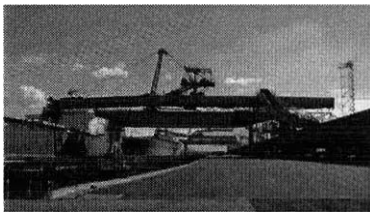
The long term contracts will supersede the PWCS Tonnage Allocation Stage 1 and apply retrospectively from 1 July 2009, or such later date as agreed by the Terminal Operators and the ACCC.

## 1.4 Contractual Alignment

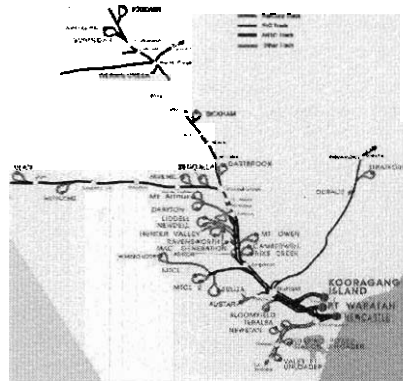
In association with entry into long term take or pay contracts for terminal access, Producers may commit to long term track access with ARTC and long term contracts with a rail operator for each of their respective load points. An interface between all Coal Chain service providers will provide for common definitions, assumptions and infrastructure requirements necessary to meet Coal Chain capacity targets.

This will facilitate contractual alignment across the Coal Chain and provides greater certainty for all participants to commit resources with a greater degree of confidence and consistency.

### Coal Terminal



### Track



### Trains



## **1.5 Coal Chain System Rules**

System rules will be developed to provide for operational efficiencies and performance incentives across the Coal Chain. It has been recognised that:

- inefficiencies in operations at the coal terminals can have upstream impacts on rail providers. For example, bunching of vessel arrivals, transfers of allocation and flexibility provisions have led to congestion and constraints in parts of the rail network; and
- changes or actions by Coal Chain participants can have both positive and negative impacts on Coal Chain capacity and that currently there are no incentives to drive improved behaviours and efficiencies.

## **1.6 Lease Amendments**

Amendments are contemplated to the PWCS and NCIG Terminal leases with the NSW Government to facilitate the implementation of Long Term Terminal Access Protocols.

# Confidential Attachment 3 - Greiner Review

[Confidential]

# Attachment 4 - Shareholders in PWCS

## PORT WARATAH COAL SERVICES LIMITED

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
Taiheiyo Cement Corporation	0.1759%	233,250
Kanematsu Corporation	0.1173%	155,500
Marubeni Corporation	0.1173%	155,500
Sumitomo Corporation	0.1173%	155,500
Tokyo Boeki Steel & Materials 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
<b>Total Capital</b>	<b>100.000%</b>	<b>132,617,500</b>

## NEWCASTLE COAL SHIPPERS PTY LIMITED

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
<b>Total Issued Capital</b>	<b>100.0000%</b>	<b>31,626,600</b>



## Attachment 5 - NCIG shareholders

<b>Shareholder</b>	<b>Percentage</b>
Hunter Valley Energy Coal Limited	35.47%
Peabody Pacific Pty Ltd	17.68%
Felix Resources Ltd	15.40%
Donaldson Coal Pty Ltd	11.61%
Whitehaven Coal Ltd	11.06%
Centennial Coal Company Ltd	8.79%

*Based on ordinary shares held in NCIG Holdings Pty Ltd,  
which owns 100% of the shares in NCIG*

In addition, ANZ Specialist Asset Management Limited holds all of the A Class Series A Hunter Infrastructure Preference Securities issued in NCIG Holdings Pty Ltd and BHP Billiton Finance Limited holds all of the S Class Series A Hunter Infrastructure Preference Securities issues in NCIG Holdings Pty Ltd.

# Confidential Attachment 6 - Members of Producers' Steering Committee

[Confidential]

# Confidential Attachment 7 - Newcastle Coal Producers - contact details

<b>Producer / Service Provider</b>	<b>Contact</b>	<b>Title</b>	<b>Email</b>
Anglo Coal Australia Pty Limited			
Austar Coal Mine Pty Limited			
BHP Billiton - Energy Coal			
Bloomfield Collieries Pty Limited			
Centennial Coal Company Limited			
Coal & Allied (Rio Tinto Coal Australia Pty Ltd)			
		[Confidential]	
Donaldson Coal Pty Ltd			
Gloucester Coal Limited			
Idemitsu Australia Resources Pty Limited			
Integra Coal Operations Pty Ltd			
Peabody Pacific Pty Limited			
White Mining limited			
Whitehaven Coal Mining Pty Ltd			
Xstrata Coal Australia Pty Ltd			