

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

Supplementary submission in  
support of the applications for  
authorisation A9110 - A9112

Dated 10 December 2008

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

## Supplementary submission in support of the applications for authorisation A9110 - A9112

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### **1 Introduction**

This submission sets out PWCS' and NCIG's response to the submissions received by the ACCC in relation to their applications for authorisation dated 19 November 2008<sup>1</sup>.

PWCS and NCIG note that the submissions received by the ACCC in accordance with its published timetable (5 December 2008) involve:

- clear support for the granting of an interim authorisation by all but one respondent;
- unanimous support for the development and implementation of a long term solution;
- unanimous agreement as to the likely counterfactual if a capacity management system were not put in place from 1 January 2008; and
- very substantial agreement as to the public benefits likely to arise if the authorisation were to be granted.

PWCS and NCIG also note that Centennial Coal supports the authorisation of an industry solution to manage access to coal loading services at the Port of Newcastle. However, Centennial Coal advocates a different method of allocation to apply from 1 January 2009 as a condition of the authorisation.

Given the widespread industry support for the granting of an interim authorisation - in particular from coal producers themselves - this submission focuses primarily on a number of issues raised by Asciano in its submission. This submission also includes PWCS' and NCIG's brief comments on the issues raised by Centennial Coal and on the trial Vessel Arrival System announced by the NSW Government on 9 December 2008.

PWCS and NCIG may provide further comments in response to any other issues that might be raised, either in relation to their application for interim authorisation or the ACCC's consideration of substantive application.

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### **2 Comments on issues raised in the submission by Asciano**

#### **2.1 The arrangements the subject of the application for authorisation**

PWCS and NCIG note at the outset that many of the submissions made by Asciano appear to relate to an alternate (but unspecified) system that is not the subject of the application for authorisation. In particular, Asciano appears to rely on an unspecified

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

alternative “port and rail” system (similar to the previously proposed VQMS) to suggest that the arrangements proposed in PWCS’ and NCIG’s application will not result in significant public benefits.

PWCS and NCIG submit that consideration of benefits which may or may not arise from an alternative (and unspecified) system are not relevant to the question of whether or not the arrangements which are the subject of the current application meet the statutory test for authorisation.

## **2.2 Asciano concern - Authorisation will hinder the development of a long term solution**

Asciano’s key objection to the authorisation application appears to be based on a concern that the *“application fails to address the fundamental issues facing the HVCC and ... will hinder rather than assist in the timely achievement of”* a long term solution for the coal chain.

In this regard, Asciano appears to consider that removing any vessel queue management system and therefore creating an environment in which producers urgently need to shift their focus to addressing short term commercial pressures associated with the likely vessel queue (e.g. escalating demurrage costs and shipping uncertainty), would result in the implementation of a long term solution more quickly than is proposed under the already aggressive timetable set out in the application for authorisation.

PWCS and NCIG do not agree with this view. As set out in the application for authorisation, progress has been made towards the development of a long term solution. However, there are a number of genuine and important issues that need to be resolved before a long term solution relating to the Terminals can be finalised and implemented. The application sets out a clear (and aggressive) timetable for the resolution of those issues.

Given this proposed timetable, it is by no means clear to PWCS or NCIG that a decision not to grant interim authorisation would result in a faster transition for all coal producers to the desired long term solution (i.e. 6 months). This view is also shared by others who have made submissions to the ACCC, including Coal & Allied who has expressed the view that:

*“If negotiations had to occur in an environment where there was no authorised interim arrangement then, in C&A’s view, this is less likely to result in a speedy resolution of outstanding issues as the parties may be distracted by the financial and other implications of queues reforming rather than focussing on the implementation of a long term solution.”*

Rather than merely mitigating *“the most obvious symptom of the underlying problem”* and therefore undermining the urgency that would otherwise prevail to find a workable solution, PWCS and NCIG consider that the authorisation sought, including the PWCS Stage 1 Tonnage Allocation and the timetable, will enable the Hunter Valley coal industry to move forward and maintain the momentum to develop and finalise a long term industry solution. Again, this is consistent with other submissions to the ACCC by producers.

Both the progress to date and the timetable set out in the application for authorisation should also provide the ACCC with comfort that the application does not involve a mere claim of *“indefinite progress towards a solution”* or a *“leap of faith”*. The

consequences of not meeting the timetable specified in the application are clear. Submissions made to the ACCC also demonstrate a clear recognition by producers of the importance of developing a long term solution and a clear commitment to developing a solution in accordance with the timetable specified in the application.

### **2.3 Asciano concern - It is unclear how the approval process for the Long Term Terminal Access Protocols will operate**

In its submission, Asciano appears to suggest that the ACCC cannot grant the authorisation sought as the long term solution is still being developed. PWCS and NCIG submit that this concern is misconceived. The application sets out a clear process for the ACCC to review and approve the Long Term Terminal Access Protocols which are developed by producers, PWCS and NCIG, and for the interim authorisation to apply to a clearly defined allocation mechanism. If the applicants fail to submit Long Term Terminal Access Protocols in accordance with the proposed timetable, or the ACCC does not approve them, then the authorisation will cease.

These are conditions which are capable of being satisfied and which can be objectively measured. The basis of Asciano's concern is therefore unclear.

In addition, by simply dismissing the long term aspects of the application and instead focusing on the Stage 1 Allocation and the interim authorisation, Asciano's submission presents a distorted view of the arrangements proposed for authorisation and ignores the fundamental point that the PWCS Stage 1 Tonnage Allocation and timetable provide a clear transition to the development and implementation of a long term solution. Given the proposed timetable and conditions, the PWCS Stage 1 Tonnage Allocation cannot be viewed in isolation from the broader arrangements.

### **2.4 Asciano concern - Authorisation will result in public detriments**

Asciano's submission suggests that the arrangements proposed for authorisation will restrict the aggregate level of exports from the Hunter Valley, have a negative impact on operational efficiency and defer investment in capacity expansion. However, these concerns appear to ignore the fact that the application involves a defined process for moving towards a long term solution, and that specific issues relating to efficiencies and appropriate expansion will be discussed as part of the development of any long term solution.

PWCS and NCIG also consider that some of the detriments identified by Asciano are not directly related to the current CBS. PWCS and NCIG also note that these issues identified by Asciano are likely to be exacerbated with higher vessel arrivals under the counterfactual.

### **2.5 Asciano concern - Authorisation will not result in substantial public benefits**

In its submission, Asciano appears to question the significance or measure of a number of the public benefits which PWCS and NCIG have put forward in support of their application for authorisation. However, these public benefits have been accepted by the Commission previously, and Asciano provides no evidence that any calculations or information provided by PWCS and NCIG are incorrect. In particular:

- both Xstrata and Coal & Allied have indicated in their submissions that they support the vessel queue assumptions and estimate of demurrage charges set

out in the authorisation application. As producers who pay demurrage charges, the ACCC should attach substantial weight to these views;

- Asciano appears to question the environmental and safety benefits and benefits associated with reduced stockpiling costs. However, it does not provide an alternative view or evidence to the contrary; and
- Asciano appears to suggest that the PWCS Stage 1 Tonnage Allocation will not result in benefits relating to the improvement to the Hunter Valley's international reputation and increased certainty for new entrants and existing producers in relation to timing of shipping and volumes. However, PWCS and NCIG consider that these are both important public benefits which are also recognised in the submissions made by various producers, such as Bloomfield Collieries, Ashton Coal Mines and Xstrata Coal, and by the ACCC in previous authorisation determinations.

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### **3 Comments on issues raised in the submission by Centennial Coal**

As set out above, Centennial Coal's submission appears to support the authorisation of an industry solution to manage access to coal loading services at the Port of Newcastle. However, Centennial Coal advocates a different method of allocation to apply from 1 January 2009 as a condition of the authorisation. This different method of allocation appears to be based on a technical interpretation of one aspect of the Greiner Review principles that differs from the interpretation adopted by other coal industry participants.

The PWCS Stage 1 Tonnage Allocation involves an initial allocation which is supported by all participants other than Centennial Coal. Given this broad level of support from PWCS' customers (which, no doubt, involves commercial compromises by many customers/producers), this is the initial stage of the solution which has been put forward for authorisation.

PWCS and NCIG acknowledge that the ACCC has the ability to issue authorisations which are subject to conditions (and, indeed, the application itself envisages certain conditions). However, PWCS and NCIG have put forward a specific method of initial allocation for authorisation by the ACCC. It is not appropriate to seek a condition which would have the effect of changing one input into the allocation methodology and assumptions relating to coal chain capacity. This is particularly the case, when the existing proposal has widespread industry support and PWCS and NCIG consider that the proposal currently before the ACCC satisfies the statutory test for authorisation.

The alternative solution proposed by Centennial Coal may also raise issues of equal treatment of producers and have broader ramifications in relation to the functioning of the coal chain. It is therefore not appropriate that it be implemented as a condition of an authorisation.

PWCS and NCIG do not agree that the granting of an interim authorisation would amount to an inappropriate exercise of the ACCC's powers. The basis of this assertion by Centennial Coal is, in any event, unclear.

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## **4 The trial Vessel Arrival System**

PWCS and NCIG consider that the trial Vessel Arrival System announced by the NSW Government on 9 December 2008 should not have any impact on the ACCC's consideration of the current application for authorisation.

As set out in the Minister's media release dated 9 December 2008, the Vessel Arrival System will initially be implemented only as a trial to track vessel movements. In addition, while potentially dealing with the arrival of vessels at the Port of Newcastle, it is unclear that the proposed Vessel Arrival System, once implemented, would reduce the demurrage amounts payable by producers. It would also not address any under-lying supply-side coal chain issues.

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## **5 Conclusion**

PWCS and NCIG consider that:

- the implementation of the PWCS Tonnage Allocation Stage 1 and associated timetable will provide industry with the necessary incentive in order to develop and finalise a long term solution. PWCS and NCIG consider that the agreed counterfactual of no system in place to manage the vessel queue at the Port of Newcastle would in fact hinder the development and finalisation of a long term solution and risk losing the benefit of the substantial work undertaken by industry to date; and
- the arrangements set out in the application for authorisation meet the test for authorisation, both interim and final.

If the Commission has any further questions, PWCS and NCIG would be pleased to assist.

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10 December 2008**