



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Newcastle Port Corporation and Donaldson Coal Pty Limited**

**in respect of**

**a capacity balancing system to address the imbalance between  
the demand for coal loading services at the Port of Newcastle  
and the capacity of the Hunter Valley coal chain in 2008**

**Date: 23 April 2008**

**Commissioners:** Samuel  
Sylvan  
King  
Martin  
Walker

**Authorisation no.:** A91072-A91074  
A91075-A91077

**Public Register no.:** C2007/2250  
C2007/2261

# Summary

The ACCC grants authorisation to Newcastle Port Corporation and Donaldson Coal Pty Limited in respect of a capacity balancing system for operation at the Port of Newcastle until 31 December 2008.

## **The authorisation process**

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

## **The applications for authorisation**

### *Newcastle Port Corporation*

On 4 December 2007, Newcastle Port Corporation (NPC) lodged applications for authorisation A91072-A91074 with the ACCC. NPC is seeking authorisation for a proposed system which is designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008. NPC's proposed system is, in all material respects, consistent with the Medium Term Capacity Balancing System (Medium Term CBS) the subject of authorisations A91033-A91035, which expired on 31 December 2007.

On 17 December 2007, NPC amended its applications for authorisation in several respects. On 19 December 2007, following discussions with Port Waratah Coal Services Limited (PWCS), NPC advised the ACCC that it is willing to make one further amendment to its applications in order to address certain transitional and implementation issues that would arise for PWCS in implementing NPC's proposal.

### *Donaldson*

On 7 December 2007, Donaldson Coal Pty Limited (Donaldson) lodged applications for authorisation A91075-A91077 with the ACCC. Like NPC, Donaldson is seeking authorisation for a system which is, in all material respects, the same as the Medium Term CBS.

On 10 December 2007, Donaldson amended its applications for authorisation in several respects.

## **Background**

In April 2005, the ACCC granted conditional authorisation (A30236-A30238) to PWCS for the Medium Term CBS until 31 December 2007. In September 2006, Hunter Valley coal producers voted to discontinue the Medium Term CBS for 2007. At that time, it was thought that the capacity of the Hunter Valley coal chain would be sufficient to meet actual demand for coal loading services for 2007. Following the industry vote, a large queue of vessels re-formed at the Port of Newcastle.

On 27 February 2007, PWCS lodged an application seeking to revoke authorisations A30236-A30238 and to substitute authorisations A91033-A91035 to allow a modified Medium Term

CBS to be reinstated at the Port of Newcastle. PWCS sought authorisation of the modified Medium Term CBS until 31 December 2007 only.

On 23 May 2007, the ACCC decided to revoke authorisations A30236-A30238 and to substitute authorisations A91033-A91035 for the modified Medium Term CBS until 31 December 2007.

Between May and October 2007, a Producer Working Group met regularly to discuss ongoing capacity constraints in the Hunter Valley coal chain, and to develop a proposed vessel queue management solution for 2008. Following a meeting of the Producer Working Group on 10 October 2007, it became apparent that an agreed solution would not be achieved.

On 16 November 2007, PWCS, Pacific National (NSW) Pty Limited (PN) and QR Limited (QR) lodged applications for authorisation A91068-A91070 for a proposed Vessel Queue Management System (VQMS) which was intended to replace the Medium Term CBS operating at the Port of Newcastle. PWCS, PN and QR withdrew their applications for authorisation on 22 January 2008.

In December 2007, NPC and Donaldson lodged their applications for authorisation to effectively allow for the continuation of the Medium Term CBS at the Port of Newcastle for 2008. This determination considers the applications for authorisation lodged by NPC and Donaldson.

The ACCC understands that industry participants are engaged in ongoing discussions regarding the development of a new system to deal with ongoing capacity constraints in the Hunter Valley coal chain. In early January 2008, the NSW Government appointed the Hon Nick Greiner to facilitate discussions between government and industry to develop a new system to manage coal export allocations in the Hunter Valley.

### **Public detriment**

The ACCC considers that the Proposed System is likely to generate some public detriment, in the form of:

- reduced incentives to develop a long term solution to the capacity constraints facing the Hunter Valley coal chain;
- reduced incentive to invest; and
- inefficient utilisation of infrastructure by individual mines impacted adversely by the proposed system and potential for job losses.

### **Public benefit**

The ACCC is satisfied that the Proposed System is likely to result in the following public benefits:

- reduced vessel queues and associated deadweight demurrage costs;
- reduced coal stockpiling and increased certainty for producers regarding the coal they are able to ship;
- reduced environmental risk to the area around the Port of Newcastle; and
- the facilitation of investment in coal chain infrastructure.

## **Balance of public benefit and detriment**

Overall, the ACCC considers that, in all the circumstances, the public benefit is likely to outweigh the public detriment.

## **Length of authorisation**

The ACCC grants authorisation until 31 December 2008, to provide a transition period that would allow for the development of a longer term solution to address the ongoing capacity constraints within the Hunter Valley coal chain.

The ACCC has significant doubts about whether the Proposed System is likely to result in a net public benefit beyond December 2008. In particular, in the event that there is no evidence of the development of a long term solution by this time, the ACCC considers that a continuation of the medium term CBS would be likely to generate significant public detriment. This detriment is likely to involve several billion dollars in lost export revenue, resulting from the failure by industry and governments to develop a long term solution and undertake appropriate investment.

## **Developing a long term solution to ongoing capacity constraints**

The ACCC considers that proposed solutions to queuing problems have, until now, focused on minimising the queue until capacity expansions come on line. The ACCC has always considered that queue management systems are appropriate as short term transitional measures only.

The ACCC has become increasingly concerned that the underlying coal chain issues are not being addressed and that foreshadowed capacity expansions alone will not solve the problem.

There are a number of structural, regulatory and contractual issues in the Hunter Valley that appear to be contributing to the ongoing capacity imbalance, including:

- common user provisions of PWCS's Kooragang Lease which, in effect, has required PWCS to accommodate every shipper of coal, restricting its ability to enter into long term, binding contracts to underpin investment; and
- service providers contracting based on assessments of individual capacity without reference to the coal chain as a whole.

The ACCC considers that the current industry discussions facilitated by Mr Greiner provide the opportunity for the development of a coordinated approach to address these underlying issues in the Hunter Valley, rather than just focusing on developing a new method to allocate current scarce capacity in the short term.

## **Interim authorisation**

At the time of lodging their applications for authorisation, NPC and Donaldson requested urgent interim authorisation due to the pending expiration of the authorisation of the Medium Term CBS. On 20 December 2007, the ACCC granted interim authorisation to NPC and Donaldson.

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## List of abbreviations

ARTC	Australian Rail Track Corporation
C&A	Coal & Allied
CBS	Capacity Balancing System
CHSA	Coal Handling Services Agreement
Donaldson	Donaldson Coal Pty Limited
HVCCLT	Hunter Valley Coal Chain Logistics Team
NCIG	National Coal Infrastructure Group
NPC	Newcastle Port Corporation
PN	Pacific National (NSW) Pty Limited
PWCS	Port Waratah Coal Services Limited
QR	QR Limited
The Act	<i>Trade Practices Act 1974</i>
UMFA	United Mineworkers' Federation of Australia
VQMS	Vessel Queue Management System

# 1. Introduction

## Authorisation

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

## The applications for authorisation

- 1.8 In December 2007, NPC and Donaldson lodged separate applications for authorisation for a capacity balancing system to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008. This determination considers the applications for authorisation lodged by NPC and Donaldson.

## Newcastle Port Corporation

- 1.9 On 4 December 2007, Newcastle Port Corporation (NPC) lodged applications for authorisation A91072-A91074 with the ACCC. NPC is seeking authorisation for a proposed system designed to address the imbalance between the demand for coal

loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.

- 1.10 NPC has advised the ACCC that its proposed system is, in all material respects, consistent with the Medium Term Capacity Balancing System (Medium Term CBS) which was in operation at the Port of Newcastle during 2007, and expired on 31 December 2007.
- 1.11 On 17 December 2007, NPC amended its applications for authorisation in several respects.<sup>1</sup>
- 1.12 On 19 December 2007, following discussions with Port Waratah Coal Services Limited (PWCS), NPC advised the ACCC that it is willing to make one further amendment to its applications in order to address certain transitional and implementation issues that would arise for PWCS in implementing NPC's proposal, should authorisation be granted by the ACCC.<sup>2</sup>
- 1.13 NPC requested authorisation from 1 January 2008 to 31 December 2008, or until the ACCC grants authorisation to the Vessel Queue Management System proposed by PWCS, Pacific National (NSW) Pty Limited and QR Limited, whichever is earlier.

### **Donaldson Coal Pty Limited**

- 1.14 On 7 December 2007, Donaldson Coal Pty Limited (Donaldson) lodged applications for authorisation A91075-A91077 with the ACCC. Like NPC, Donaldson is seeking authorisation for a system which aims to address the problem of constrained coal chain capacity in the Hunter Valley in 2008.
- 1.15 Donaldson's proposed system is, in all material respects, the same as the Medium Term CBS which was in operation at the Port of Newcastle in 2007.
- 1.16 On 10 December 2007, Donaldson amended its applications for authorisation in two respects.<sup>3</sup>
- 1.17 Donaldson sought authorisation from 1 January 2008 to 31 December 2008, or until the ACCC grants authorisation to the VQMS, whichever is earlier.

### **Similarities between the systems proposed by NPC and Donaldson**

- 1.18 The systems proposed by NPC and Donaldson are the same as one another and are discussed in greater detail in Chapter 3 of this determination.
- 1.19 The systems proposed by NPC and Donaldson will be referred to as the 'Proposed System' for the remainder of this determination.

### **Interim authorisation**

- 1.20 On 20 December 2007, the ACCC granted interim authorisation to NPC and Donaldson in respect of the Proposed System.

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<sup>1</sup> This is discussed in more detail in Chapter 3 of this draft determination.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

- 1.21 In deciding to grant interim authorisation, the ACCC had regard to the following:
- the grant of interim authorisation may facilitate the continuation of the Medium Term CBS in the short term – in essence, maintaining the status quo – while the ACCC considers the applications for authorisation currently before it;
  - if implemented, the Proposed System may help to limit the size of the vessel queue at the Port of Newcastle, thereby limiting the demurrage costs payable by producers;
  - the grant of interim authorisation removes any barriers posed by the Act in relation to the implementation of the Proposed System. However, the question of whether the Proposed System is implemented from 1 January 2008 remains an issue for industry to determine.
- 1.22 The grant of interim authorisation was expressed to extend to any revisions of the Proposed System which are consistent with Gilbert and Tobin’s letter to the ACCC dated 19 December 2007 (sent on behalf of NPC) providing for transitional provisions relating to the implementation of the Proposed System.
- 1.23 Interim authorisation will continue to apply until this determination comes into force.

## Chronology

1.24 Table 1.1 provides a chronology of significant dates in the consideration of these applications.

**Table 1.1: Chronology of applications for authorisation A91072-A91074 and A91075-A91077**

DATE	ACTION
4 December 2007	Applications for authorisation lodged by NPC with the ACCC, including an application for interim authorisation.
7 December 2007	Applications for authorisation lodged by Donaldson with the ACCC, including an application for interim authorisation.
10 December 2007	Donaldson amended its applications for authorisation.
11 December 2007	Closing date for submissions from interested parties in relation to the requests for interim authorisation.
17 December 2007	NPC amended its applications for authorisation.
19 December 2007	NPC advised the ACCC of a possible additional amendment to its applications for authorisation.
20 December 2007	The ACCC granted interim authorisation to NPC and Donaldson in respect of the Proposed System.
7 January 2008	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
25 January 2008	Donaldson responds to interested party submissions.
18 February 2008	NPC responds to interested party submissions.
29 February 2008	Draft determination issued.
17 March 2008	Closing date for submissions from interested parties in relation to the draft determination.
23 April 2008	Determination issued.

## 2. Background to the application

- 2.1 This chapter of the determination provides relevant background information regarding the ACCC's consideration of the applications for authorisation lodged by NPC and Donaldson.
- 2.2 Further background information regarding the operation of the Hunter Valley coal chain is provided in:
- Chapter 2 of the ACCC's determination of 9 July 2004 in relation to the short-term Capacity Distribution System (A90906-A90908);
  - Chapter 2 of the ACCC's determination of 15 April 2005 in relation to the Medium Term CBS (A30236-A30238);
  - Chapter 2 of the ACCC's determination of 23 May 2007 in relation to the modified Medium Term CBS (A91033-A91035).

### The applicants

#### Newcastle Port Corporation

- 2.3 NPC is a statutory state-owned corporation with responsibility for the management and operation of the Port of Newcastle.
- 2.4 The Port of Newcastle is Australia's oldest port, and is one of the largest tonnage throughput ports. Coal exports represent more than 90% of total throughput tonnage.<sup>4</sup>
- 2.5 NPC's principal objectives under the *State Owned Corporations Act 1989* and the *Ports and Maritime Administration Act 1995* are<sup>5</sup>:
- to be a successful business;
  - to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates;
  - where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6(2) of the *Protection of the Environment Administration Act 1991*;
  - to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates;
  - to promote and facilitate trade through its port facilities;
  - to ensure its port safety functions are carried out properly.

#### Donaldson

- 2.6 Donaldson is an operator of coal mines in the Hunter Valley region. It exports coal through the Port of Newcastle export coal terminal operated by PWCS.

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<sup>4</sup> See NPC's website at: <[http://www.newportcorp.com/page\\_default.aspx?pageID=3](http://www.newportcorp.com/page_default.aspx?pageID=3)>

<sup>5</sup> NPC, *Annual Report 2006-07*, page 4.

## Relevant industry participants

### Port Waratah Coal Services Limited

- 2.7 Port Waratah Coal Services Limited (PWCS) is owned by a number of coal producers and other participants in the Hunter Valley coal industry.
- 2.8 PWCS owns and operates the Carrington coal terminal and the Kooragang Island coal terminal at the Port of Newcastle and effectively runs them as a single terminal.
- 2.9 PWCS provides coal handling services to the Hunter Valley coal exporters, including the receiving and unloading of coal, the storage of coal and the loading of coal onto vessels for export.
- 2.10 Part of the land on which the terminals are situated is owned by the NSW Government and leased to PWCS. The lease regarding the Kooragang Island terminal requires PWCS to operate the terminal as a ‘common user facility’ – in short, PWCS must provide access to the Kooragang Island terminal on a non-discriminatory basis to all producers who wish to ship coal. The Carrington lease does not currently contain common user provisions.<sup>6</sup>
- 2.11 The NSW Government has delegated its responsibilities to the Chief Executive Officer of NPC in relation to the administration of the Kooragang Island terminal.<sup>7</sup>

### Pacific National (NSW) Pty Limited and QR Limited

- 2.12 Pacific National (NSW) Pty Limited (PN) and QR Limited (QR) are rail haulage operators who rail coal in NSW to the Port of Newcastle from the Hunter Valley and adjacent regions for coal producers.

### Hunter Valley Coal Chain Logistics Team

- 2.13 The Hunter Valley Coal Chain Logistics Team (HVCCLT) is responsible for planning all coal exports from the Hunter Valley coal industry.<sup>8</sup> Membership of the HVCCLT includes:
- PN and QR as train operators;
  - Australian Rail Track Corporation, Rail Infrastructure Corporation and Railcorp as the track owners;
  - PWCS as the operator of the cargo assembly and ship loading terminals; and
  - NPC, who manages all vessel movements.<sup>9</sup>
- 2.14 Membership of the HVCCLT is open to any future operators of transport and port infrastructure in the Hunter Valley coal chain.<sup>10</sup>

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<sup>6</sup> PWCS media release, *New Regime and site expansion will create certainty for PWCS and its customers*, 20 June 2007.

<sup>7</sup> NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 6; *Delegation by the NSW Minister for Public Works and Services*, 1 September 1999.

<sup>8</sup> HVCCLT website: <<http://www.hvcclt.com.au/pages/about.php>>

<sup>9</sup> Ibid.

## The Hunter Valley coal chain

- 2.15 The Hunter Valley coal chain is the largest coal export operation in the world. It consists of 30 coal mines owned by 17 individual coal producers, 23 points for loading coal onto trains and approximately 28 trains to transport the coal to the Port of Newcastle. The port currently has five coal berths and ship loaders, and approximately 1.5 million tonnes of useable stockpile space.<sup>11</sup>
- 2.16 The coal chain currently operates in the following way<sup>12</sup>:
- mined coal is transported through a loading point located at the mine or to a coal loading facility;
  - PWCS, through HVCCLT, advises PN and QR of the transport requirements for the shipment;
  - the coal is then transported to the Port of Newcastle, almost exclusively by rail<sup>13</sup>;
  - at the port, the coal is offloaded onto stockpiles where it may be blended with other coal;
  - once a vessel arrives at the port, coal is reclaimed from the stockpile and loaded onto the vessel;
  - the coal is transported from the port to its destination.
- 2.17 Any party who wishes to use the Port of Newcastle to load coal may do so, provided they sign a Coal Handling Services Agreement (CHSA) with PWCS. The CHSA sets out the terms on which PWCS will provide coal handling services to users.<sup>14</sup>
- 2.18 A flat (per tonne) coal handling charge applies.<sup>15</sup>

### Coal chain capacity

- 2.19 The capacity of the Hunter Valley coal chain is determined by the capacity of the individual components making up the chain, including port and rail system capacity. However, it is important to note that **total system capacity** will always be less than the capacity of the individual components of the chain, due to imperfect integration of individual system components.<sup>16</sup>
- 2.20 PWCS estimates that its capacity is 102 million tonnes per annum, while PN and QR estimate that their aggregate level of rail capacity is 105 million tonnes per annum.<sup>17</sup>
- 2.21 HVCCLT estimates that total system capacity for the Hunter Valley coal chain for 2008 will be approximately 95 million tonnes.<sup>18</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, page 22.

<sup>13</sup> The ACCC understands that alternatives to using rail to bring coal to port, such as the use of trucks, are generally unviable due to economic and environmental considerations.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, page 8.

<sup>17</sup> Ibid.

## Imbalances between demand and capacity

- 2.22 Currently, the demand for coal loading services at the Port of Newcastle exceeds the capacity of the Hunter Valley coal chain. According to NPC, this imbalance is being driven by:
- *continuing high levels of demand for export coal*: ABARE has estimated that demand for export coal will continue to grow at an average rate of 4.4 per cent per year. Coal exports are expected to reach 300 million tonnes by 2010-11, and are projected to increase to 438 million tonnes in 2029-30; and
  - *the continued existence of port-side capacity constraints at the Kooragang Island terminal and further down the supply chain*: NPC submits that, while some increases in capacity have been completed, planned or will be coming ‘online’ in 2008, these increases will not be sufficient to meet demand for export coal.<sup>19</sup>
- 2.23 As noted above, HVCCLT estimates that the capacity of the Hunter Valley coal chain in 2008 will be 95 million tonnes. By contrast, aggregate producer demand for port capacity in 2008 is 116 million tonnes.<sup>20</sup> Therefore, the demand for coal loading services at the Port of Newcastle will exceed the capacity of the Hunter Valley coal chain in 2008 by approximately 21 million tonnes.

## Coal mine approvals

- 2.24 Despite ongoing capacity constraints within the Hunter Valley coal chain, a number of new mines have received approval from the NSW Government in recent years.
- 2.25 Some of the recent mine approvals in the Hunter Valley include:
- the Anvil Hill coal mine, which will produce up to 10.5 million tonnes of coal per year over 21 years<sup>21</sup>;
  - the Abel coal mine, which will produce up to 4.5 million tonnes of coal per year for 21 years<sup>22</sup>; and
  - the Moolarben coal mine, which will provide 10 million tonnes of coal per year for up to 21 years.<sup>23</sup>
- 2.26 The NSW Government has also approved a number of coal mine extensions, including an \$11 million extension to the Duralie coal mine, which will extract an additional 3.4 million tonnes of coal over the next decade.<sup>24</sup>

## Expansion activities

- 2.27 A number of expansion activities have been completed or commenced in the Hunter Valley coal chain in the past three years.<sup>25</sup> For example:

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<sup>18</sup> Ibid; NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 10.

<sup>19</sup> NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 10.

<sup>20</sup> Ibid.

<sup>21</sup> NSW Department of Planning, Media Release, *Anvil Hill Proposal Approved*, 7 June 2007.

<sup>22</sup> Ibid.

<sup>23</sup> NSW Department of Planning, Media Release, *Moolarben Coal Mine Approved, Subject to Monitoring*, 6 September 2007.

<sup>24</sup> NSW Department of Planning, Media Release, *More Jobs and Investment For Great Lakes*, 1 August 2006.

- construction work to expand PWCS' facilities was completed in March 2007, nine months ahead of schedule, increasing port capacity to 102 million tonnes per annum;
- on 13 April 2007, the NSW Government granted approval to PWCS for further expansion at its Kooragang Island terminal (up to 120 million tonnes per annum);
- the Newcastle Coal Infrastructure Group (NCIG) received approval from the NSW Government to construct and operate an export coal terminal at the Port of Newcastle to a capacity of 66 million tonnes per annum;
- the Australian Rail Track Corporation (ARTC) completed its Muswellbrook yard duplication and the first of five Gunnedah basin loop extensions;
- the phased delivery of an additional 330 wagons for PN was commenced in 2007; and
- on 8 April 2008, PWCS announced a \$1 billion investment project to begin after 2010 to lift coal exports to 140 million tonnes per annum and boosting output by 40%.<sup>26</sup>

2.28 A number of additional expansion activities are planned for 2008-2011 to increase port, track and train capacity. These are summarised in Appendix A to this determination.

## Previous authorisations

- 2.29 The imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain has existed for a number of years.
- 2.30 Since 2004, the ACCC has granted a number of authorisations for systems designed to address the ongoing capacity constraints within the Hunter Valley coal chain.
- 2.31 Most recently, the ACCC granted authorisation to a Medium Term CBS designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain by giving individual producers a proportionate allocation of the available coal chain capacity based on the producers' individual port nominations.

### Authorisation of the Medium Term CBS: A30236-A30238 and A91033-A91035

- 2.32 On 15 April 2005, the ACCC granted conditional authorisation (A30236-A30238) to PWCS for the Medium Term CBS until 31 December 2007.
- 2.33 In September 2006, Hunter Valley coal producers voted to discontinue the Medium Term CBS for 2007. At that time, it was thought that the capacity of the Hunter Valley coal chain would be sufficient to meet actual demand for coal loading services for 2007. Following the industry vote, a large queue of vessels re-formed at the Port of Newcastle.

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<sup>25</sup> PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, Attachment E; ACCC, Final determination in respect of applications for authorisation A91033-A91035, 23 May 2007, page 9.

<sup>26</sup> PWCS media release, *Further expansion at PWCS*, 8 April 2008.

- 2.34 On 27 February 2007, PWCS lodged an application seeking to revoke authorisations A30236-A30238 and to substitute authorisations A91033-A91035 to allow a modified Medium Term CBS to be reinstated at the Port of Newcastle.<sup>27</sup> PWCS sought authorisation of the modified Medium Term CBS until 31 December 2007 only.
- 2.35 On 23 May 2007, the ACCC decided to revoke authorisations A30236-A30238 and to substitute authorisations A91033-A91035 for the modified Medium Term CBS until 31 December 2007.
- 2.36 In granting authorisations A91033-A91035, the ACCC indicated that it was satisfied that the modified Medium Term CBS was likely to result in significant public benefit by reducing demurrage costs for the industry, thereby improving economic efficiency relative to a situation where the queue persists.
- 2.37 The ACCC considered that any public detriment arising from the modified Medium Term CBS was likely to be negligible. In particular, the ACCC considered that any limits on the production levels of individual producers were likely to be attributable to the limited capacity of the Hunter Valley coal chain, rather than the introduction of the modified Medium Term CBS. The ACCC emphasised that the purpose of the modified Medium Term CBS was to provide producers with a proportionate allocation of the available capacity of the Hunter Valley coal chain, and that in the absence of the scheme, it is likely that producers would have been required to reduce production due to vessels waiting even longer in the queue and to avoid excess stockpiling at mines.
- 2.38 The ACCC considered that reinstating the modified Medium Term CBS for the remainder of 2007 was unlikely to defer necessary investment in relevant infrastructure.
- 2.39 On balance, the ACCC considered that the public benefit generated by the modified Medium Term CBS was likely to outweigh the public detriment. The ACCC granted authorisation to the modified Medium Term CBS until 31 December 2007.
- 2.40 It should be noted that the ACCC has previously expressed the view that there is a greater likelihood for potential detriments to arise the longer the CBS remains in place. In particular, the ACCC has expressed concern that the continued operation of the CBS on an extended basis may hinder the development of a long term solution to address the underlying issues behind constrained coal chain capacity in the Hunter Valley.

## **Performance of the Medium Term CBS**

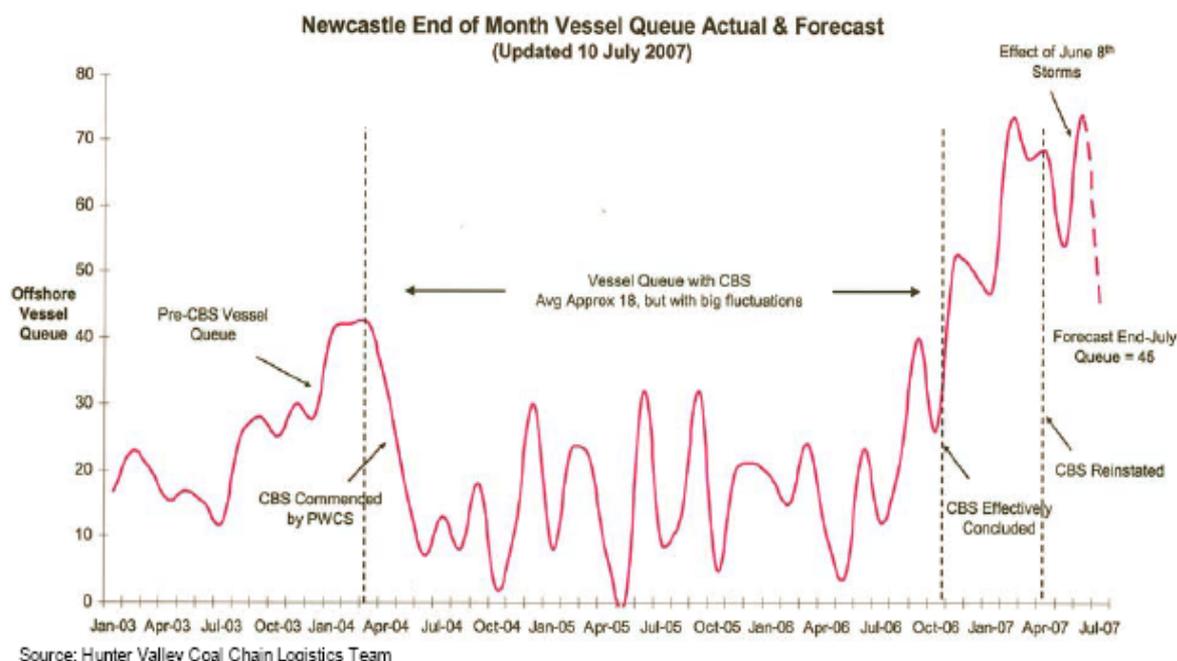
- 2.41 Data provided to the ACCC suggests that the CBS has been effective in reducing the vessel queue at the Port of Newcastle since it was first introduced at the port in 2004.
- 2.42 Figure 2.1 shows the decline in the vessel queue following the initial commencement of the CBS, and the ‘spike’ in the vessel queue following the cessation of the CBS at the end of 2006.<sup>28</sup>

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<sup>27</sup> The key modifications to the Medium Term CBS were to introduce monthly allocations for large producers and to double the flexibility amounts for all producers.

<sup>28</sup> Figure 2.1 sourced from: NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 11.

**Figure 2.1: Vessel queues at Port of Newcastle from Jan 2003 – Jul 2007**



2.43 As Figure 2.1 illustrates, the average vessel queue at the Port of Newcastle was 18 ships from March 2004 to September 2006 (ie. during the period of operation of the CBS). While there were significant fluctuations in the vessel queue during this time, it would appear that the CBS was effective in helping to limit the size of the queue. This is evidenced by a clear decrease in the vessel queue following the introduction of the CBS in March 2004, and a clear increase in the queue following the effective conclusion of the CBS in September 2006.

2.44 In its supporting submission to the application for revocation of authorisation A30236-A30238 and substitution of authorisations A91033-A91035, PWCS indicated that in the fourth quarter of 2006 (following cessation of the CBS), a combination of excess arrivals and unplanned capacity losses contributed to an increase in the queue from 39 to 51 vessels.<sup>29</sup> The vessel queue continued to increase in the first quarter of 2007, reaching over 70 vessels in February 2007.

2.45 NPC submits that the re-introduction of the modified Medium Term CBS in March/April 2007 had a positive impact on decreasing vessel queues at the Port of Newcastle.<sup>30</sup>

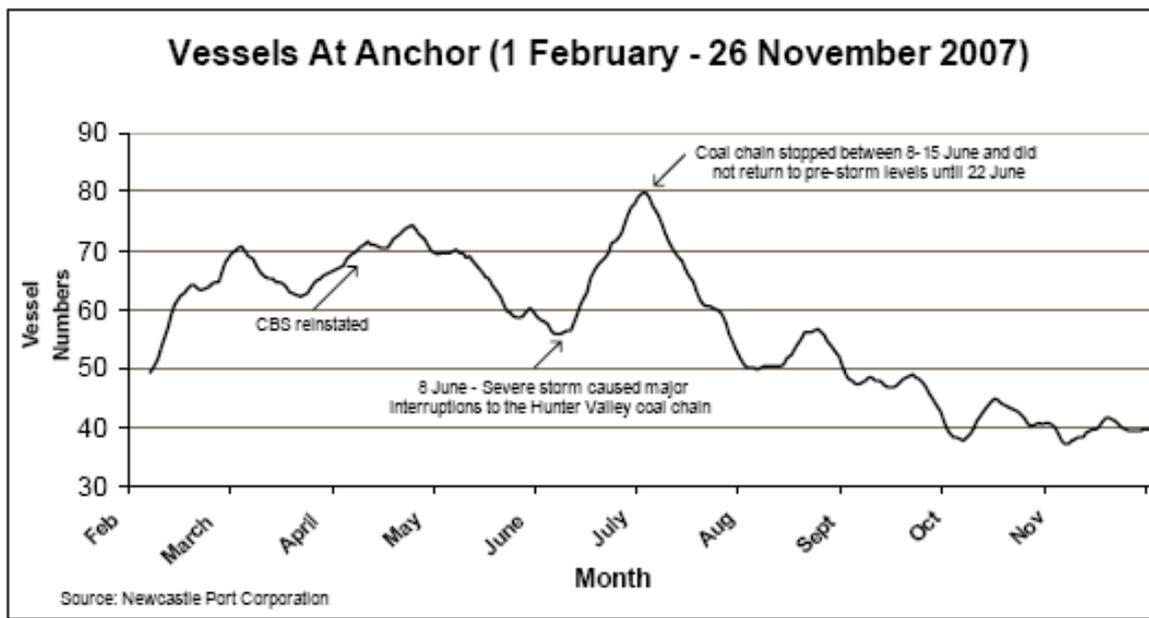
2.46 Figure 2.2 shows the fluctuations in vessel numbers at the Port of Newcastle from 1 February 2007 (approximately 2 months before the re-introduction of the modified

<sup>29</sup> PWCS, Submission supporting application for revocation of authorisation A30236-A30238 and substitution of new authorisations A91033-A91035, 27 February 2007, page 6.

<sup>30</sup> NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 9.

Medium Term CBS) and 26 November 2007.<sup>31</sup> The ACCC notes that the increase in the vessel queue in June 2007 was due to severe storms in the Hunter Valley region which caused major interruptions within the coal chain.

**Figure 2.2: Vessels at anchor at Port of Newcastle from 1 Feb 2007 – 26 Nov 2007**



2.47 The reduction in the vessel queue from 79 vessels at 27 June 2007 to approximately 30 vessels at the end of 2007 is estimated to have produced cost savings of over \$110 million.<sup>32</sup>

2.48 While the Medium Term CBS has helped to limit the size of the vessel queue at the Port of Newcastle, the ACCC notes that the queue remained relatively high throughout 2007, despite the re-introduction of the Medium Term CBS in March/April 2007.

## The Producer Working Group

2.49 The Medium Term CBS was intended to operate as an interim solution to the problem of constrained coal chain capacity within the Hunter Valley while industry developed a longer term solution to address ongoing capacity issues.

2.50 In recognition of this fact, industry participants formed a Producer Working Group in 2007 in order to develop a solution for 2008, when the CBS was due to expire, and to consider necessary longer term reforms.<sup>33</sup>

<sup>31</sup> Figure 2.2 sourced from: NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 9.

<sup>32</sup> PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, page 4.

<sup>33</sup> Ibid, page 27.

- 2.51 The Producer Working Group considered a number of options to manage the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008, including the following<sup>34</sup>:
- capacity allocated on a pro rata basis according to revised port nominations for 2008 (ie. a continuation of the Medium Term CBS);
  - capacity allocated on a pro rata basis according to revised port nominations for 2007;
  - capacity allocation based on highest actual throughput for 2004 to 2006 with protection for new mines, with remaining capacity allocated on a pro rata basis;
  - capacity allocation based on the lesser of each producer's port or rail contracts for 2008;
  - capacity allocation based on 2007 port allocation with remainder shared among new and expanding mines in 2008 on a pro rata basis.
- 2.52 These options were considered by the Producer Working Group at regular meetings between May and October 2007 with a view to agreeing on a mutually acceptable way forward in 2008, and beginning to develop a long term solution to ongoing capacity constraints.<sup>35</sup>
- 2.53 Each option formulated by the Producer Working Group was the subject of a reasonable degree of opposition, and at a meeting held on 10 October 2007, it became apparent that agreement on a way forward would not be reached for 2008.<sup>36</sup>
- 2.54 Following the 10 October 2007 meeting, the ACCC received three applications for authorisation for two different capacity allocation systems for the Hunter Valley coal chain in 2008.

## **Applications for authorisation for capacity allocation in 2008**

### **PWCS, PN and QR**

- 2.55 On 16 November 2007, PWCS, PN and QR lodged applications for authorisation A91068-A91070 for a proposed vessel queue management system (VQMS) intended to replace the Medium Term CBS at the Port of Newcastle in 2008.
- 2.56 Under the VQMS, forecast system demand would be determined by reference to the lesser of each coal producer's port demand nomination or rail contract volumes. Coal chain capacity would then be distributed initially on a pro rata basis to each of the rail providers. It would then be up to the rail providers to allocate their 'rail provider capacity' to their respective individual customers on the basis of their individual haulage contracts.
- 2.57 PWCS, PN and QR acknowledged that, ideally, coal chain capacity should be sufficient to meet demand for coal haulage and coal loading services. However, they argued that infrastructure development and capacity expansion require considerable time, and that

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

the VQMS would satisfy the immediate need for a capacity allocation system at the Port of Newcastle (thereby reducing the vessel queue) while additional infrastructure is developed and brought on line.<sup>37</sup>

- 2.58 PWCS, PN and QR argued that the VQMS is preferable to the CBS because it relies on a more accurate measure of system demand and represents a significant step towards a more permanent 'whole of supply chain' capacity allocation system. PWCS, PN and QR submitted that the VQMS would facilitate the alignment of port and rail capacity and should ensure a co-ordinated approach to further investment.<sup>38</sup>
- 2.59 PWCS, PN and QR requested interim authorisation of the VQMS. On 13 December 2007, the ACCC decided not to grant interim authorisation at that time.
- 2.60 On 22 January 2008, PWCS, PN and QR withdrew their applications for authorisation of the VQMS on the basis that the NSW Government proposal to commission an independent review of the operation of the Hunter Valley coal chain effectively superseded the VQMS proposal.

### **NPC and Donaldson**

- 2.61 On 4 December 2007 and 7 December 2007, NPC and Donaldson both lodged applications for authorisation to effectively extend the operation of the Medium Term CBS for 2008.
- 2.62 These applications for authorisation are discussed in more detail in Chapter 3 of this determination.

### **Ongoing developments**

- 2.63 Industry participants are engaged in ongoing discussions regarding the development of a new system to deal with ongoing capacity constraints in the Hunter Valley coal chain.
- 2.64 As noted above, in early January 2008, the NSW Government appointed the Hon Nick Greiner to facilitate discussions between government and industry to develop a new system to manage coal export allocations in the Hunter Valley.

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<sup>37</sup> Ibid, page 3.

<sup>38</sup> Ibid, pages 6-10.

### 3. The application for authorisation

- 3.1 On 4 December 2007, Newcastle Port Corporation (NPC) lodged applications for authorisation A91072-A91074 with the ACCC.
- 3.2 On 7 December 2007, Donaldson Coal Pty Limited (Donaldson) lodged applications for authorisation A91075-A91077 with the ACCC.
- 3.3 NPC and Donaldson are both seeking authorisation of a Proposed System designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.
- 3.4 The Proposed System potentially raises concerns under the anti-competitive conduct provisions of the Act. Consequently, NPC and Donaldson lodged their applications for authorisation with the ACCC.

#### The Proposed System

- 3.5 At the time of lodgement, both NPC and Donaldson advised the ACCC that the Proposed System is, in all material respects, consistent with the Medium Term Capacity Balancing System (Medium Term CBS) the subject of authorisations A91033-A91035, which expired on 31 December 2007.
- 3.6 The Proposed System is designed to allocate coal chain capacity among producers through the following steps<sup>39</sup>:
- producers submit demand nominations to PWCS on a monthly (large producers) or quarterly (small producers) basis for the forthcoming calendar year (2008);
  - PWCS declares the coal chain capacity for each month and the desired volume of an operational vessel queue at the port. The declared capacity is based upon historical performance, allowing for any known maintenance gains or performance gains;
  - the demand adjustment mechanism operates by all producers accepting a loading allocation that has been determined by dividing the available capacity of the Hunter Valley coal chain between coal producers based on the producer's forecast of the amount of coal it wishes to export through PWCS; and
  - the CBS Administrator manages allocations accordingly.

#### Amendments to the applications

- 3.7 Shortly after lodgement, Donaldson and NPC amended their applications for authorisation in the following respects:
- the definition of 'Forecast Requirement' in Schedule 1 of Attachment 1 to the supporting submissions was amended to refer to the demand nominations submitted by coal producers for the **2008 calendar year**, rather than the 2007 calendar year;
  - Clause 1 of Schedule 5 of Attachment 1 was amended so as to provide for coal producers to lodge demand profiles for 2008 by no later than 31 December 2007.<sup>40</sup>

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<sup>39</sup> NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, page 8.

3.8 On 19 December 2007, following discussions with PWCS regarding the Proposed System, NPC made an additional amendment to its applications to address certain transitional and implementation issues that would arise for PWCS in implementing NPC's proposal, should authorisation be granted by the ACCC.<sup>41</sup> This amendment involves adding a clause to Part A of the Proposed System which provides for the period between 1 January 2008 and the date of implementation of the Proposed System in 2008. Donaldson confirmed in its submission of 13 March 2008 that it "supports the amendment made by NPC and, therefore, has no issue with it being within the scope of the Commission's final authorisation".

## **Other parties**

3.9 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. The applications lodged by NPC and Donaldson both identify the parties proposing to engage in the conduct as being:

- NPC;
- PWCS; and
- Newcastle Coal Producers. A list of these producers is at Appendix B to this determination.

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<sup>40</sup> 2008 demand profiles are necessary in order for the system administrator to determine quarterly loading allocations for 2008.

<sup>41</sup> The amendment would involve the introduction of a new clause 9.4 into Part A of Attachment 1. The additional clause is virtually identical to clause 9.3 of Part A of the existing CBS.

## 4. Submissions received by the ACCC

- 4.1 NPC and Donaldson both provided a supporting submission with their applications for authorisation.
- 4.2 The ACCC also sought submissions from around 35 interested parties potentially affected by the application, including PWCS, PN, QR, coal producers operating in the Hunter Valley and relevant government departments. The ACCC received public submissions from:
- Ashton Coal Mines Limited
  - Anglo Coal Australia Pty Ltd
  - Austar Coal Mine Pty Limited
  - BHP Billiton – Energy Coal
  - Centennial Coal Company Limited
  - Coal & Allied (Rio Tinto Coal Australia Pty Ltd)
  - Department of Resources, Energy and Tourism
  - Genesee & Wyoming Australia Pty Ltd
  - Hunter Enviro Mining (Operations) Pty Ltd
  - Idemitsu Australia Resources Pty Limited
  - Integra Coal Operations Pty Ltd
  - Pacific National (NSW) Pty Limited
  - Peabody Pacific Pty Limited
  - Port Waratah Coal Services Limited
  - Resource Pacific Limited
  - United Mineworkers’ Federation of Australia
  - Whitehaven Coal Mining Pty Ltd
  - Xstrata Coal Operations Pty Ltd
  - Yancoal Australia Pty Limited
  - The Hon Joseph Tripodi MP
  - The Hon Joel Fitzgibbon MP
- 4.3 Donaldson and NPC both provided an additional submission in response to the issues raised by interested parties.
- 4.4 The views of NPC, Donaldson and interested parties are outlined in paragraphs 4.6-4.32 below, and are further discussed in the ACCC’s evaluation of the Proposed System in Chapter 6 of this determination.
- 4.5 Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the ‘Public Registers’ link.

## **NPC's supporting submission**

### **Public benefits**

- 4.6 NPC submits that the Hunter Valley coal chain continues to remain subject to significant capacity constraints and that authorisation of the Proposed System will lead to a reduction in the demurrage charges that would otherwise be payable by coal shippers in the absence of the Proposed System.
- 4.7 In addition, NPC submits that the Proposed System will deliver the following public benefits:
- reduced coal stockpiling costs for most producers compared to the situation where the queue persists;
  - it will permit NPC to better manage safety and environmental issues arising from the existence of large queues at the Port of Newcastle;
  - improved international reputation and international competitiveness of the Port of Newcastle and the Hunter Valley coal industry, to the extent that the existence of large vessel queues would discourage overseas customers from purchasing coal from Hunter Valley producers;
  - allows the current arrangements to continue while the ACCC considers other proposals for the allocation of capacity;
  - provides certainty to producers regarding the coal they can ship, loading times and vessel schedules, thereby enabling better allocation of production;
  - ensures the vessel queue operates at a more efficient level;
  - increases incentives for coal producers to invest in the Hunter Valley coal production and handling facilities;
  - ensures that existing capacity allocations continue, thereby ensuring that existing entitlements of producers are not curtailed or subject to significant reductions without any analysis.

### **Public detriments**

- 4.8 NPC considers that any public detriment arising from the Proposed System is likely to be low for the reasons set out by the ACCC in its determination in respect of applications for authorisation A91033-A91035.

## **Donaldson's supporting submission**

### **Public benefits**

- 4.9 Like NPC, Donaldson submits that the primary public benefit likely to be generated by the Proposed System is a reduction in the vessel queue and associated demurrage costs. Donaldson argues that the vessel queue is likely to rise in early 2008 without some form of capacity management system in place.
- 4.10 Donaldson also argues that the Proposed System would give rise to a significant public benefit by preserving the status quo while industry continues to consult further in order to develop a capacity management solution which is pro-competitive, transparent and equitable to all Hunter Valley coal producers.

## **Public detriments**

- 4.11 Donaldson submits that there is no substantial public detriment likely to be caused by the implementation of the Proposed System for a maximum period of one year.

## **Interested party submissions made prior to the draft determination**

### **Support for the Proposed System**

- 4.12 The following interested parties have expressed support for the Proposed System:
- Ashton Coal Mines Limited
  - Anglo Coal Australia Pty Ltd
  - Centennial Coal Company Limited
  - Genesee & Wyoming Australia Pty Ltd
  - Hunter Enviro Mining (Operations) Pty Ltd
  - Idemitsu Australia Resources Pty Limited
  - Integra Coal Operations Pty Ltd
  - Peabody Pacific Pty Limited
  - Whitehaven Coal Mining Pty Ltd
  - The Hon Joseph Tripodi MP
  - The Hon Joel Fitzgibbon MP
- 4.13 In general, the interested parties listed above support the Proposed System on the basis that it is consistent with the Medium Term CBS, will provide certainty for coal producers operating in the Hunter Valley, and will minimise the vessel queue at the Port of Newcastle compared to the situation where no capacity allocation system is in place.
- 4.14 A number of the interested parties stated that the Proposed System offers an equitable solution to the problem of constrained coal chain capacity by giving all producers a proportionate allocation of available capacity. However, they emphasised the need for the development of a long term solution to the ongoing capacity constraints within the Hunter Valley coal chain, and argued that further expansion activities along the coal chain are needed in order to increase available capacity.

### **Conditional support for the Proposed System**

#### *Xstrata Coal Operations Pty Ltd*

- 4.15 Xstrata Coal Operations Pty Ltd (Xstrata) submits that there is clear evidence that ongoing application of the Medium Term CBS will lead to ongoing and potentially prolonged public detriment in the form of reduced incentives and pressures to invest by some parties.
- 4.16 Consistent with this view, Xstrata only supports the implementation of the Proposed System for the first quarter of 2008, and on the following conditions:

- engagement of an Independent Facilitator to develop a 'Final CBS' to be implemented by 1 April 2008 (target), applied retrospectively to 1 January 2008; and
- the rapid development of clear Access Protocols for coal chain infrastructure and associated commercial frameworks by 30 June 2008. This will enable long term contracts to be executed and investments to proceed without the risk of rationing from mid 2010.

4.17 In Xstrata's view, the collective goal for all producers must be to develop and agree upon the commercial structures and associated open-access protocols required to support a rationing-free operation of the Hunter Valley coal chain by 30 June 2010.

*Coal & Allied (Rio Tinto Coal Australia Pty Ltd)*

4.18 Coal & Allied (C&A) supports the Proposed System on the basis that 2007 (rather than 2008) port nominations are used.

4.19 While C&A would prefer 2007 nominations to be used, it has advised that it would be prepared to support the Proposed System for 2008 based on 2008 nominations on condition that:

- nominations are absolutely capped at 116 million tonnes until coal chain capacity above 116 million tonnes becomes available (ie. at least until the NCIG port comes on stream in mid 2010); and
- the NSW Government commits to engaging in discussions to address the practical application of the common user clauses in the Kooragang lease to allow all coal producers to enter into fixed and firm long term port contracts which will allow all coal producers to pursue their growth agendas over the long term.

*Resource Pacific Limited*

4.20 Resource Pacific Limited (Resource Pacific) believes that the Proposed System has significant shortcomings because it has failed to adequately control the vessel queue at the Port of Newcastle. However, Resource Pacific considers that the Proposed System is better than the alternative situation of having no capacity allocation system in place.

4.21 Resource Pacific argues that it is paramount for industry to develop a workable solution to the ongoing capacity constraints in the Hunter Valley coal chain.

4.22 In order to give industry some time to develop a longer term solution, Resource Pacific is willing to support the Proposed System, based on 2008 nominations, for the first quarter of 2008 (ie. from 1 January 2008 to 31 March 2008).

**Opposition to the Proposed System**

*Austar Coal Mine Pty Ltd and Yancoal Australia Pty Ltd*

4.23 Austar Coal Mine Pty Ltd (Austar) and Yancoal Australia Pty Ltd (Yancoal) oppose the applications for authorisation of the Proposed System.

4.24 Austar submits that competition (free market forces) should be given a chance to redress the imbalance between the demand for coal haulage and coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.

Therefore, Austar's preference is for no capacity allocation system to be authorised for 2008.

- 4.25 Austar and Yancoal consider that the Proposed System is a real threat to the viability of Austar's coal mining operations in 2008. They submit that if Austar is forced to exit the market as a result of the implementation of the Proposed System, then its unique Longwall Top Coal Caving technology will be lost to the Australian market and the Chinese Government will be discouraged from making further investments in Australia.
- 4.26 Austar and Yancoal consider that the Proposed System will raise barriers to entry and increase vertical integration within the relevant markets.

#### *United Mineworkers' Federation of Australia*

- 4.27 The United Mineworkers' Federation of Australia (UMFA) was opposed to the Medium Term CBS, and is opposed to the Proposed System.
- 4.28 The UMFA considers that the Medium Term CBS has had a negative impact because it:
- resulted in sub optimum reductions in vessel queues off the Port of Newcastle;
  - did not provide a commercial incentive for coal producers to improve efficiencies at their loading points;
  - did not encourage industry to invest in infrastructure and rail capacity in an appropriate manner;
  - was subject to manipulation by producers trying to increase their port allocation by inflating their production capacity; and
  - did not encourage industry participants to take steps to rectify the vessel queuing difficulties caused by the 'turn of arrival' access to the port.
- 4.29 The UMFA also argues that a pro rata reduction in port allocations may cause smaller mines to become unprofitable, whereas larger mines could have their allocation reduced to a greater extent and still remain highly profitable.

#### *BHP Billiton – Energy Coal*

- 4.30 BHP Billiton has given in principle support to a whole of system capacity allocation approach. However, BHP Billiton considers that the best approach to addressing capacity issues is to move quickly to expand rail and coal loading capacity. As a consequence, BHP Billiton is generally opposed to capacity allocation systems.

#### **Submissions by PWCS and PN**

- 4.31 PWCS and PN both provided a submission to the ACCC regarding the applications for authorisation lodged by NPC and Donaldson. These submissions focused on comparing the operation of the Proposed System with the VQMS which, at that time, was also the subject of an authorisation application.
- 4.32 Given that the application for authorisation of the VQMS has now been withdrawn, the submissions from PWCS and PN comparing the VQMS to the Proposed System are no longer relevant to the ACCC's consideration of the Proposed System.

## Submissions made after the draft determination

4.33 The ACCC sought submissions from the applicants and interested parties following the release of its draft determination on 29 February 2008. Submissions were received from Donaldson, NPC, Pacific National, Coal and Allied and Peabody Pacific.

### *Donaldson, Peabody Pacific and NPC*

4.34 The Donaldson, Peabody Pacific and NPC submissions discuss the operation of the common user provisions in Port Waratah Coal Service's lease of the Kooragang Terminal. In particular, these submissions provide background on the reasons why the common user provisions were introduced, and give these parties' interpretation of the provisions.

### *Coal and Allied*

4.35 In its submission of 17 March 2008, Coal and Allied submitted that it "welcomes the ACCC's comments that a long term solution is required for the coal industry and agrees that the underlying issues are not being addressed, in particular, the contribution the common user provisions within PWCS's Kooragang Lease has to the ongoing capacity imbalance."

### *Pacific National*

4.36 PN submitted that it does not disagree with the Commission's proposal to grant authorisation, although it considers that the Commission should give greater weight to:

- the reduction in commercial incentives to invest in the Hunter Valley coal chain; and
- the likelihood that the Proposed System will result in the under utilisation of total system capacity.

## 5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

### Applications lodged by NPC

#### Application A91072

- 5.2 NPC lodged application for authorisation A91072 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3 The relevant test is found in section 90(8) of the Act.
- 5.4 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

#### Application A91073

- 5.5 NPC lodged application for authorisation A91073 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.6 The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.7 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

#### Application A91074

- 5.8 NPC lodged application A91074 under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply.
- 5.9 The relevant test for this application is found in section 90(8) of the Act.
- 5.10 Section 90(8) states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

## **Applications lodged by Donaldson**

### **Application A91075**

- 5.11 Donaldson lodged application for authorisation A91075 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.12 The relevant test is found in section 90(8) of the Act.
- 5.13 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

### **Application A91076**

- 5.14 Donaldson lodged application for authorisation A91076 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.15 The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.16 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

### **Application A91077**

- 5.17 Donaldson lodged application A91077 under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply.
- 5.18 The relevant test for this application is found in section 90(8) of the Act.
- 5.19 Section 90(8) states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

## **Application of the tests**

- 5.20 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

- 5.21 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>42</sup>
- 5.22 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>43</sup>
- 5.23 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.24 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

## Definition of public benefit and public detriment

- 5.25 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>44</sup>
- 5.26 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>45</sup>

## Future with-and-without test

- 5.27 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>46</sup>

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<sup>42</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>43</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>44</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>45</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

<sup>46</sup> *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

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

## **Length of authorisation**

5.29 The ACCC can grant authorisation for a limited period of time.<sup>47</sup>

## **Conditions**

5.30 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>48</sup>

## **Future and other parties**

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

- persons who become party to the contract, arrangement or understanding at some time in the future;<sup>49</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>50</sup>

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<sup>47</sup> Section 91(1).

<sup>48</sup> Section 91(3).

<sup>49</sup> Section 88(10).

<sup>50</sup> Section 88(6).

## 6. ACCC evaluation

6.1 The ACCC's evaluation of the Proposed System is in accordance with the net public benefit test outlined in Chapter 5 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the Proposed System.

### The market

6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.

6.3 However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets as it may be apparent that a net benefit will or will not arise regardless of the scope of the defined market.

6.4 NPC and Donaldson submit that the relevant areas of competition are:

- The global market for coal (or, in the alternative, an Asian market for coal); and
- A market for the provision of coal loading services for bulk coal carrying ships in the Newcastle area.

6.5 The ACCC has not received any interested party submissions commenting on the relevant markets.

6.6 The market definition proposed by NPC and Donaldson is consistent with the ACCC's market definition in the original authorisation of the Medium Term CBS (A30236-A30238) and in the authorisation of the modified Medium Term CBS (A91033-A91035).

6.7 For the purposes of assessing the current applications for authorisation lodged by NPC and Donaldson, the ACCC's view on market definition is unchanged.

6.8 The ACCC notes that both markets identified above may be affected by the Proposed System.

### The counterfactual

6.9 As noted in Chapter 5 of this determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.

6.10 At the time of lodging its applications for authorisation, NPC argued that there were two possible counterfactual scenarios:

- (1) No capacity allocation system in operation at the Port of Newcastle; or
- (2) The VQMS (proposed by PWCS, PN and QR) in operation at the Port of Newcastle.

- 6.11 As the VQMS application has been withdrawn, the ACCC considers that, if the Proposed System is not authorised, no capacity allocation system will operate at the Port of Newcastle in 2008.
- 6.12 In its authorisation of the original Medium Term CBS, the ACCC considered that the demand for coal loading services would exceed the capacity of the Hunter Valley coal chain at least until the end of 2007. The ACCC concluded, therefore, that without authorisation of the Medium Term CBS, excessive vessel queues would be likely to form at the Port of Newcastle.
- 6.13 In its authorisation of the modified Medium Term CBS, the ACCC noted that despite recent investments to expand capacity at the Port of Newcastle and within the Hunter Valley coal chain, there was still an imbalance between the demand for coal loading services and the capacity of the coal chain. For 2007, the imbalance was expected to be approximately 16 million tonnes. The ACCC concluded that, if the modified Medium Term CBS was not authorised, a large queue of vessels was likely to persist for 2007, and coal producers would incur substantial demurrage costs.
- 6.14 As noted in Chapter 2 of this determination, the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain is set to continue for 2008. Specifically, it has been estimated that demand for coal loading services will exceed coal chain capacity by approximately 21 million tonnes in 2008.
- 6.15 In light of the ongoing imbalance between demand for coal loading services and the capacity of the Hunter Valley coal chain, and taking into account the increase in the vessel queue following cessation of the Medium Term CBS in early 2007, the ACCC considers that, without authorisation of the Proposed System, a large queue of vessels is likely to persist at the port during 2008, causing coal producers to incur substantial demurrage costs. At the time of lodgement of NPC's applications for authorisation, demurrage charges were averaging US\$13,750 per vessel per day.
- 6.16 While the ACCC considers that the vessel queue at the Port of Newcastle is likely to be greater in the absence of authorisation, the ACCC notes that the vessel queue remained relatively high during 2007, even after the re-introduction of the Medium Term CBS.

## **Public detriment**

- 6.17 As noted in Chapter 4 of this determination, NPC and Donaldson do not consider that the Proposed System is likely to give rise to any significant public detriments.
- 6.18 Based on its previous consideration of the Medium Term CBS and on interested party submissions in respect of the current applications, the ACCC has identified the following potential detriments which may arise from the implementation of the Proposed System (ie. continuation of the Medium Term CBS) in 2008:
- impact on aggregate coal exports from the Hunter Valley coal chain;
  - impact on individual mines;
  - impact on investment in the Hunter Valley coal chain; and
  - reduced incentive to develop a long term solution to ongoing capacity constraints.

6.19 An assessment of each of these potential public detriments follows.

### **Impact on aggregate coal exports from the Hunter Valley coal chain**

6.20 The ACCC considers that any decrease in the volume of coal moved through the Hunter Valley coal chain and exported from Australia as a result of the implementation of the Proposed System would constitute a public detriment.

6.21 In its previous assessment of the Medium Term CBS, the ACCC concluded that any public detriment arising from a reduction in the volume of coal moved through the Hunter Valley coal chain was likely to be negligible.

6.22 The ACCC noted that, in the absence of the Medium Term CBS, the Hunter Valley coal chain would not have been able to move any more coal. The objective of the Medium Term CBS was merely to provide a proportionate allocation of the available coal chain capacity to each producer against which vessel arrivals could be coordinated with greater certainty. The Medium Term CBS incorporated a number of features designed to reduce any under-use of allocation, and to maximise coal throughput, while avoiding excessive vessel queues.

6.23 The ACCC concluded that any limit on the production levels of individual producers was likely to arise as a result of the Hunter Valley coal chain's limited capacity, rather than the re-introduction of the Medium Term CBS. Furthermore, the ACCC considered that in the absence of the Medium Term CBS, it is likely that coal producers would have been required to reduce their production levels due to increased vessel queues and to avoid excess stockpiling of coal.

6.24 In respect of the current applications for authorisation, NPC submits that the adoption of the Proposed System will not have a negative impact on the total volume of coal exported through the Port of Newcastle, or on the production of coal by coal producers in the Hunter Valley, for the reasons outlined in the ACCC's previous authorisations.

6.25 In its submission in response to the ACCC's draft determination, PN submitted that the Proposed System will result in the under utilisation of total system capacity, because the Proposed System allocates system capacity:

on the basis of port (rather than system) demand. . . In addition, the Proposed System will force PN to run its trains in an inefficient manner in terms of rail, system and total capacity.<sup>51</sup>

6.26 Given the similarities between the previously authorised capacity balancing systems and the Proposed System, the ACCC is of the view that any aggregate reduction in volume of coal moved through the Hunter Valley coal chain is likely to remain negligible if the Proposed System is implemented at the Port of Newcastle in 2008.

6.27 The ACCC notes that the Proposed System may cause individual components of the Hunter Valley coal chain to operate in an inefficient manner, and considers that these issues need to be addressed in developing a long term solution to address the capacity constraints facing the coal chain. This is discussed further in 6.42 to 6.61.

6.28 Accordingly, the ACCC considers that the Proposed System is unlikely to result in a public detriment in the form of reduced aggregate coal exports for 2008.

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<sup>51</sup> Pacific National, *Response to ACCC's draft determination*, 17 March 2008.

## Impact on individual mines

6.29 A number of interested parties commented on the potential impact of the proposed system on individual mines.

6.30 In its submission to the ACCC, Coal & Allied stated that it has concerns with the Proposed System using 2008 demand nominations, in part because:

. . . use of the 2008 nominations perpetuates a system whereby expanding producers receive priority over existing users, which can, and has, resulted in existing users having to hand coal chain capacity (which it is actually utilising) to new producers who are in the process of bringing on capacity. Existing users have to cut production, disappoint customers, reduce employment and disappoint shareholders.<sup>52</sup>

6.31 Noting that it had also opposed previous authorisations of a Medium Term CBS at the Port of Newcastle, the United Mineworkers' Federation of Australia (UMFA) submitted that:

The CBS can result in all producers taking an equal reduction in allocation at the Port. As some operations are more marginal in nature than others, any across the board reduction would result or could result in loss of employment at a specific mine or a profitable mine becoming unprofitable, while other mines could have their allocation reduced to a greater extent and still remain highly profitable.

Some mines operate on high levels of contract and casual labour and are able to alter their production without the loss of permanent employment.

To this end, any CBS must have a mechanism by which there can be an independent and fair review so that a particular mine's circumstance can be taken into consideration and allocations to the Port amended accordingly so that mines with special needs would take a lesser reduction.<sup>53</sup>

6.32 Regarding its own circumstances, Austar Coal Mine Pty Ltd (Austar) submitted that:

The CBS is a real threat to the viability of Austar's coal mining operations in 2008. Austar's allocation at the PWCS facilities will be far less under either the VQMS or the CBS compared to Austar's allocation under its port contracts in 2008 . . . Austar would not be able to cover its cash flow requirements at the coal mine in 2008 under the CBS.<sup>54</sup>

[T]here is a real chance that the unique Longwall Top Coal Caving (LTCC) technology used by Austar would be lost to the Australian market. . . LTCC provides the opportunity to recover more coal than possible using conventional longwall methods. An independent study has shown that up to 25% of coal resources in the eastern States of Australia have been identified as potentially suitable for LTCC extraction. Without its further development and implementation, there will potentially be millions of tonnes of coal resources sterilised.<sup>55</sup>

6.33 While individual mines may face reduced loading capacity as a result of the Proposed System, the ACCC considers that this reduction does not directly generate public detriment as it is offset by other producers receiving increased capacity.

6.34 However, the ACCC notes that the transfer of loading capacity from one mine to another is likely to have negative implications for the employees of the mines involved,

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<sup>52</sup> Coal & Allied, Submission to the ACCC, 19 December 2007, page 1.

<sup>53</sup> UMFA, Submission to the ACCC, December 2007, page 3.

<sup>54</sup> Austar, *Submission in response to Newcastle Port Corporation's applications for interim authorisation A91072-A91074*, 11 December 2007, pages 1-2.

<sup>55</sup> Austar, *Submission in response to Newcastle Port Corporation's applications for interim authorisation A91072-A91074*, 11 December 2007, page 7.

as mines with a reduced capacity allocation may be required to make employees redundant. Transaction costs are also likely to occur where new or expanding mines are required to hire employees, or where infrastructure is redeployed. The ACCC considers that the Proposed System is likely to generate public detriment for these reasons.

- 6.35 The ACCC also considers that the Proposed System is likely to generate public detriment to the extent that the proposed system results in the loss of innovative coal mining technology, such as the Longwall Top Coal Caving technology utilised by Austar.

### **Impact on investment in the Hunter Valley coal chain**

- 6.36 In previous assessments of the Medium Term CBS, the ACCC noted that significant public detriment would arise, in the form of lost coal exports, if the effect of the CBS was to delay necessary investment to increase the capacity of the Hunter Valley coal chain. Having said this, the ACCC considered that only negligible public detriment was likely to arise, due to the recent record of investment and the ongoing plans for expansion within the coal chain. However, the ACCC also noted that the risk of this detriment occurring was likely to increase the longer the CBS remained in operation.<sup>56</sup>

- 6.37 In its submission to the ACCC, Xstrata noted that:

there is clear evidence that ongoing application of a CBS in this form will lead to ongoing and potentially prolonged public detriment in the form of reduced incentives and pressures to invest by some parties. . . The CBS has previously limited the ability of rail companies to operate according to contracts with customers, thereby creating uncertainty and risk associated with investment in new rolling stock.<sup>57</sup>

- 6.38 Similarly, the UMFA submitted that:

The CBS in the form it currently operates and the form proposed by the Newcastle Port Corporation does have negative impacts in that it . . . [does] not provide commercial incentive for coal producers to improve efficiencies at their loading points [and does] not encourage the industry to invest in the manner it should in infrastructure and rail capacity . . .<sup>58</sup>

- 6.39 In its submission in response to the draft determination, PN submitted that the Proposed System acted to reduce the incentive to invest in the Hunter Valley coal chain. In particular, PN submits that the Proposed System impacts on PN's ability to invest in a timely manner as:

producers' incentives to enter into contracts reflective of their actual rail capacity demand are reduced under the Proposed System . . . Producers may rely instead on the Proposed System to give them default access to rail capacity due to the absence of real alternatives for the rail operatives.<sup>59</sup>

- 6.40 As discussed in Chapter 2 of this determination, the ACCC notes that there are a number of expansion activities that have been completed or commenced in the Hunter Valley coal chain in the past three years. In addition, a \$1 billion expansion project to commence in 2010 was announced by PWCS on 8 April 2008. The ACCC considers

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<sup>56</sup> ACCC, Final determination in respect of applications for authorisation A30236-A30238, 15 April 2005, page 45.

<sup>57</sup> Xstrata, Submission to the ACCC, 14 December 2007, pages 3-4.

<sup>58</sup> UMFA, Submission to the ACCC, December 2007, page 2.

<sup>59</sup> Pacific National, *Response to ACCC's draft determination*, 17 March 2008.

that this indicates that the existence of the CBS has not completely removed the incentive for investment in the Hunter Valley coal chain.

- 6.41 Having said that, the ACCC considers that the operation of the Proposed System, with its focus on producer demand nominations and coal chain capacity, does not provide the appropriate commercial incentives for investment in additional coal chain capacity. Service providers should be able to capture the benefits from investments in capacity expansions, and should also face the consequences if they cause reductions in the capacity of the coal chain. Given the short term nature of the Proposed System, the ACCC does not consider the level of this detriment to be substantial.

### **Reduced incentive to develop a long term solution to ongoing capacity constraints**

- 6.42 The ACCC notes that the CBS has been in operation for a number of years, and industry is yet to develop a solution to address the underlying issues responsible for the imbalance between the demand for coal loading services and the capacity of the coal chain. The ACCC is concerned that the longer the CBS remains in place, the more likely it is that the operation of the CBS acts to reduce the incentives for industry to develop and implement long term strategies for addressing capacity constraints.

- 6.43 As discussed in Chapter 2 of this determination, the Medium Term CBS was intended to operate as an interim solution to the problem of constrained coal chain capacity within the Hunter Valley while industry developed a longer term solution to address ongoing capacity issues.

- 6.44 In their submissions to the ACCC, Xstrata and the UMFA submitted that the operation of the CBS has reduced the incentive for the stakeholders of the Hunter Valley coal chain to develop a long term solution to address the ongoing capacity constraints.

- 6.45 In its submission, Xstrata stated that:

... it must be recognised that CBS systems have been in application since 2004, and there is thus firm evidence that the previous and current CBS systems are not aligned to long term solutions. This is further evidenced by the fact that some form of rationing system(s) will be required into 2010; this represents a 6-7 year period of rationing in an environment where major infrastructure expansions typically require 3 years.<sup>60</sup>

- 6.46 Focusing on the ‘turn of arrival’ system operated by PWCS, the UMFA submitted that:

The CBS also did not encourage the industry participants to take steps to rectify the vessel queuing difficulties caused by the “turn of arrival” access to the Port. We do note that in today’s Newcastle Herald, it appears PWCS is now considering amendments to the “turn of arrival” system to a system that in part operates on the basis of a timetable or schedule for access to the Port to load coal.<sup>61</sup>

- 6.47 In its response to interested party submissions, NPC submitted that:

The NSW Government has recently appointed the Hon Nick Greiner to assist the industry in the development of a transitional medium term solution. Parallel discussions are also taking place as part of this process to establish a framework for the development of a long term solution.

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<sup>60</sup> Xstrata, Submission to the ACCC, 14 December 2007, page 1.

<sup>61</sup> UMFA, Submission to the ACCC, December 2007, page 2.

NPC considers that the development of a medium term solution, coupled with consideration of long term issues and the parallel development of a long term solution, represents the most appropriate means of dealing with constraints in the Hunter Valley coal chain. . .

NPC disagrees with the Commission and coal producers that the Proposed System may hinder the development of a long-term solution.<sup>62</sup>

- 6.48 As discussed in Chapter 2 of this determination, a Producer Working Group was formed by industry participants in 2007 to develop a solution for 2008, and to consider necessary longer term reforms.<sup>63</sup> While the Producer Working Group held regular meetings between May and October 2007, each option considered by the group met with a reasonable degree of opposition. This has resulted in an application for an additional short term extension to the CBS (ie. the Proposed System), rather than the implementation of a long term solution.
- 6.49 The ACCC notes that the Hon Nick Greiner has been appointed to develop a new model for allocating system capacity to operate while new infrastructure is brought on line, including the construction of a new coal terminal by the Newcastle Coal Infrastructure Group.<sup>64</sup>
- 6.50 The ACCC also notes the ongoing long term planning role of the Hunter Valley Coal Chain Logistics Team (HVCCLT). In particular, an investment program for the next five to ten years has been developed by the HVCCLT. Over \$1 billion in infrastructure investments have been identified that HVCCLT considers could deliver more than \$3 billion in annual exports.<sup>65</sup>
- 6.51 The ACCC is of the view that no significant progress has been made in long term planning for addressing the capacity constraints in the coal chain. Therefore, there is now evidence to suggest that the existence of the CBS is reducing the incentive for the development of a long term solution to these ongoing issues. The ACCC considers that the Proposed System is likely to generate public detriment for this reason.

#### *Developing a long term solution to ongoing capacity constraints*

- 6.52 The ACCC considers that proposed solutions to queuing problems have, until now, focused on minimising the queue until capacity expansions come on line. The ACCC has always considered that queue management systems are appropriate as short term transitional measures only.
- 6.53 The ACCC has become increasingly concerned that the underlying coal chain issues are not being addressed and that foreshadowed capacity expansions alone will not solve the problem.
- 6.54 As noted in the draft determination, the ACCC considers that there are a number of structural, regulatory and contractual issues in the Hunter Valley that appear to be contributing to the ongoing capacity imbalance:

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<sup>62</sup> NPC, *Response to public submissions made by interested parties in relation to NPC's application for authorisation*, 18 February 2008, page 4.

<sup>63</sup> PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, page 27.

<sup>64</sup> The Hon Joseph Tripodi MP, Media Release, *Former Premier to Advise on Coal Allocation*, 4 January 2008.

<sup>65</sup> HVCCLT website: <<http://www.hvcclt.com.au>> viewed 7 February 2008.

- the ‘common user’ provisions in the PWCS lease (or its interpretation of them) have meant that PWCS has not been able to enter into long term contracts to underpin future investment with certainty. This has also had flow-on ramifications for rail contracts. The ACCC notes that PWCS requested the NSW government to remove the ‘common user’ provisions in 2007.<sup>66</sup> The ACCC understands that the provisions remain in the lease.
- it is not clear that the mine approval process takes proper account of constrained coal chain capacity – such that new mines are coming on line before capacity is expanded and, due to the ‘common user’ provisions, existing mines must give up capacity to ‘make way’.
- individual segments of the coal chain are contracting based on assessments of their capacity without reference to the capacity of the coal chain as a whole, and on the basis of what appear to be optimistic assumptions.

6.55 The ACCC considers that the current industry discussions facilitated by Mr Greiner provide industry and government with the opportunity for the development of a coordinated approach to address these underlying issues in the Hunter Valley, rather than just focusing on developing a new method to allocate current scarce capacity in the short term.

*Submissions made in response to the draft determination regarding the common user provisions*

6.56 Donaldson, NPC and Peabody Pacific each provided a submission which commented on the ACCC’s discussion of the common user provisions in the draft determination.

6.57 In its submission of 13 March 2008, Donaldson submits that “the ‘common user’ provisions have acted as a counter balance to the anti-competitive incentives that may arise as a result of the vertical integration of PWCS and some of the major coal producers.”<sup>67</sup>

6.58 In its submission of 11 April 2008, NPC submits that:

There is nothing in [the common user provisions] that prevents PWCS from entering into a long term contract with coal shippers. The ‘common user provision’ does not impose any temporal restrictions on PWCS in terms of its ability to enter into contracts with coal shippers. It neither requires nor prohibits long term contracts. Nor does it require the PWCS to accommodate ships on a ‘turn of arrival’ basis.<sup>68</sup>

6.59 In its submission of 19 March 2008, Peabody submits that the construction given to the common user provisions by NPC and PWCS is incorrect and that they do:

not prevent PWCS entering into long term contracts in order to underpin its future investment. It also does not require that existing coal producers give up currently utilised capacity at the facility to make way for additional capacity demands of existing or new users.<sup>69</sup>

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<sup>66</sup> PWCS media release, *New Regime and site expansion will create certainty for PWCS and its customers*, 20 June 2007.

<sup>67</sup> Donaldson, *Submission on draft determination*, 13 March 2008.

<sup>68</sup> NPC, *Submission in response to the ACCC draft determination*, 11 April 2008.

<sup>69</sup> Peabody Pacific, *Submission to the ACCC’s final determination to grant authorisation to NPC and Donaldson*, 19 March 2008.

6.60 Peabody also submits that:

the common user obligation is thus a form of access regulation which protects the interests of the market as a whole. In this case, however, the access process is subverted by the fact that the owners who control the PWCS bottleneck are also users of the facility.<sup>70</sup>

6.61 The ACCC notes that the intent of the common user provisions was to ensure access to the port for all producers and that the common user provisions are open to varying interpretations. Having said this, the ACCC remains concerned about the current effect of the common user provisions on the Hunter Valley coal chain.

### **ACCC conclusion on public detriments**

6.62 The ACCC considers that the Proposed System is likely to generate public detriment in the form of reduced incentive to develop a long term solution to address capacity constraints in the coal chain, reduced incentive for service providers to invest and the potential for job losses and inefficient allocation of infrastructure.

### **Public benefit**

6.63 NPC and Donaldson submit that the Hunter Valley coal chain continues to remain subject to significant capacity constraints and that authorisation of the Proposed System will lead to a reduction in the demurrage charges that would otherwise be payable by coal shippers in the absence of the Proposed System.

6.64 In addition, NPC and Donaldson argue that the Proposed System will give rise to a public benefit by preserving the status quo while the ACCC fully considers the applications for authorisation currently before it and while industry continues to consult in order to develop a capacity management solution which is pro-competitive, transparent and equitable to all Hunter Valley coal producers.

6.65 Additional public benefits identified by NPC in its supporting submission include:

- reduced coal stockpiling costs for most producers compared to the situation where the queue persists;
- it will permit NPC to better manage safety and environmental issues arising from the existence of large queues at the Port of Newcastle;
- improved international reputation and international competitiveness of the Port of Newcastle and the Hunter Valley coal industry, to the extent that the existence of large vessel queues would discourage overseas customers from purchasing coal from Hunter Valley producers;
- provides certainty to producers regarding the coal they can ship, loading times and vessel schedules, thereby enabling better allocation of production;
- ensures the vessel queue operates at a more efficient level;
- increases incentives for coal producers to invest in the Hunter Valley coal production and handling facilities.

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<sup>70</sup> Ibid.

6.66 In considering public benefits - particularly cost savings from increases in productive efficiency from conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.

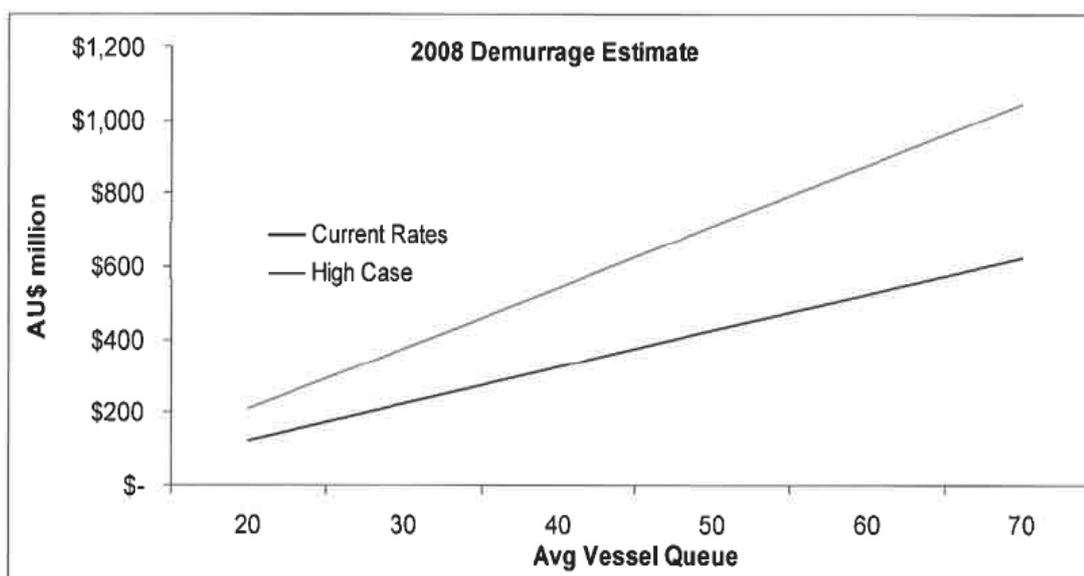
6.67 An assessment of the public benefits claimed by NPC and Donaldson follows.

**Reduction in demurrage charges payable by coal producers**

6.68 NPC and Donaldson submit that the primary public benefit likely to arise from the Proposed System is a reduction in the vessel queue at the Port of Newcastle, and a corresponding reduction in the demurrage costs payable by coal producers.

6.69 Figure 6.1 shows the estimated demurrage costs at the Port of Newcastle in 2008.<sup>71</sup>

**Figure 6.1: Estimated demurrage costs at the Port of Newcastle in 2008**



6.70 While NPC and Donaldson both argue that the Proposed System will lead to a reduction in the demurrage charges payable by coal producers, the ACCC notes that neither applicant has provided the ACCC with an estimate of the aggregate demurrage savings which are likely to be made following the implementation of the Proposed System. NPC has submitted that, “absent authorisation of the Proposed System, excessive vessel queues would be likely to form at the Port of Newcastle, resulting in excessive demurrage charges being payable by coal producers.”<sup>72</sup>

6.71 While the majority of interested party submissions have expressed at least some support for the Proposed System as a means of addressing ongoing capacity constraints

<sup>71</sup> Figure 6.1 sourced from: PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, page 3.

<sup>72</sup> NPC, *Response to public submissions made by interested parties in relation to NPC’s application for authorisation*, 18 February 2008, page 5.

and reducing the vessel queue, no interested parties have attempted to quantify the amount of demurrage savings which are likely to flow from the Proposed System.

6.72 The ACCC notes that in their supporting submission regarding the applications for authorisation for the VQMS, PWCS, PN and QR stated that<sup>73</sup>:

absent a mechanism to manage the system capacity limitations, [PWCS, PN and QR] submit that a significant queue of vessels will re-form at the Port, giving rise to substantial demurrage costs. ... Absent the CBS or another capacity balancing mechanism, PWCS estimates that the vessel queue could increase to 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 between 60 and 70 vessels during 2008 could exceed AUD500 million to AUD600 million. ... With the increased cost of shipping being experienced in late 2007, the actual demurrage payable on sustained high vessel queues in 2008 is likely to be significantly greater than in 2007.<sup>74</sup>

6.73 The above extract suggests that PWCS, PN and QR consider that the CBS (or some other capacity balancing mechanism) is necessary in order to limit the size of the vessel queue and reduce demurrage costs. Although no quantification of the likely savings is provided, the submission gives an indication of the likely costs to industry if no capacity allocation system is in place at the Port of Newcastle for 2008.

#### *ACCC's view*

6.74 In previous determinations, the ACCC concluded that the Medium Term CBS was likely to result in a significant public benefit by reducing demurrage costs for industry and hence improving economic efficiency compared to a situation where the vessel queue persists at the Port of Newcastle.

6.75 While the ACCC has not received any submissions regarding the likely amount of the demurrage savings to be made following the implementation of the Proposed System, the ACCC notes that there is evidence to suggest that the Medium Term CBS (on which the Proposed System is based) has helped to minimise vessel queues at the Port of Newcastle, thereby reducing demurrage costs payable by industry between 2004 and 2007. The ACCC notes that the estimated demurrage savings for the second half of 2007 were over \$100 million.

6.76 Based on this evidence, the ACCC considers that, irrespective of the exact dollar savings, coal producers would be likely to face higher demurrage costs without the Proposed System in place. Therefore, the ACCC accepts that the Proposed System is likely to result in a public benefit by reducing the deadweight demurrage costs for industry.

6.77 However, the ACCC notes that the vessel queue remained relatively high throughout 2007, despite the re-introduction of the Medium Term CBS in April. This suggests that the CBS may not be managing the vessel queue as effectively as it has in the past, and that the amount of any demurrage savings generated by the Proposed System may not be as great as those achieved in previous years. Having said this, the ACCC notes that the vessel queue has been trending down in recent weeks.

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<sup>73</sup> PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, page 3.

<sup>74</sup> Ibid.

## Maintaining the status quo at the Port of Newcastle

6.78 NPC and Donaldson submit that the Proposed System will result in a public benefit by preserving the status quo at the Port of Newcastle while the ACCC fully considers the applications for authorisation currently before it, and industry participants continue working together to develop a longer term solution to ongoing capacity constraints within the Hunter Valley coal chain.

6.79 A large number of interested parties have expressed support for the Proposed System on the basis that it represents a continuation of the CBS which has been in operation at the Port of Newcastle for a number of years. For example, Integra Coal Operations Pty Ltd (Integra) submits that:

introduction of the Proposed System from 1 January 2008, which is effectively a continuation of the current authorised system, will provide certainty to producers and result in minimal disruption to production and scheduling. The transition into the new calendar year will also be more efficient than if an alternate system were to be introduced at this time. Introduction of the Proposed System will minimise the risk that the volume of coal exports from the Port of Newcastle will decrease.<sup>75</sup>

6.80 Similarly, Anglo Coal Australia Pty Ltd (Anglo Coal) submits that:

The Proposed System is consistent with the Capacity Balancing System (CBS) that is currently in place. Producers have been operating mines, planning production and entering into coal supply contracts based on what they understood was their port capacity allocation and their ability to ship coal under the CBS.<sup>76</sup>

6.81 In expressing their support for the continuation of the CBS, a significant number of interested parties also indicated that they were opposed to the VQMS proposed by PWCS, PN and QR. Given that the applications for authorisation of the VQMS have been withdrawn, the views of interested parties regarding the VQMS are no longer relevant to this determination.

6.82 While the majority of interested parties support a continuation of the CBS at the Port of Newcastle for 2008, several interested parties do not consider that the preservation of the status quo will be beneficial to the public. The views of these interested parties (including Xstrata, UMFA and Austar) are discussed in the 'Public detriments' section above.

### *ACCC's view*

6.83 The ACCC considers that there may be some benefit in allowing the CBS to continue while industry participants work together to develop a new solution to address ongoing capacity constraints within the Hunter Valley coal chain.

6.84 Continuation of the CBS on a short term basis will ensure that there is a familiar system in place to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008, while industry reaches an agreed solution for 2009 and beyond.

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<sup>75</sup> Integra, Submission to the ACCC, 11 December 2007, page 1.

<sup>76</sup> Anglo Coal, Submission to the ACCC, 11 December 2007, page 2.

- 6.85 Having said this, the ACCC remains of the view that the detriments associated with the CBS are likely to increase the longer the CBS continues to operate at the Port of Newcastle. Therefore, it is imperative that industry participants come to an agreed solution to the ongoing constraints within the coal chain as soon as possible.
- 6.86 The ACCC wishes to emphasise that industry must begin to address ongoing capacity issues within the Hunter Valley coal chain with a view to ensuring that, in the long term, the coal chain is able to operate without the need for any capacity allocation system in place.

### **Reduced coal stockpiling and other efficiency gains**

- 6.87 NPC submits that the Proposed System will result in a public benefit by reducing coal stockpiling costs for most producers compared to the situation where the queue persists. NPC further submits that the Proposed System will provide certainty to producers regarding the coal they can ship, loading times and vessel schedules, thereby enabling better allocation of production.

#### *ACCC's view*

- 6.88 The ACCC considers that the continued operation of the Proposed System at the Port of Newcastle is likely to provide coal producers in the Hunter Valley with greater certainty regarding their coal shipments, which will allow the producers to more accurately forecast production levels and maintain optimal stockpiling.
- 6.89 The ACCC considers that, to the extent that the Proposed System increases coal producers' certainty regarding their shipments, it will generate a benefit to the public compared to the situation where there is no capacity allocation system in operation at the Port of Newcastle.

### **Management of safety and environmental issues**

- 6.90 NPC submits that the Proposed System will result in a benefit to the public by allowing NPC to better manage safety and environmental issues arising from the existence of large queues at the Port of Newcastle.

#### *ACCC's view*

- 6.91 The ACCC considers that, to the extent that a large queue of vessels at the Port of Newcastle presents an environmental risk to the surrounding area, the Proposed System is likely to help reduce this risk by providing a mechanism to limit the size of the vessel queue forming at the port.
- 6.92 However, as noted elsewhere in this determination, the vessel queue remained relatively high at the Port of Newcastle throughout 2007, despite the operation of the Medium Term CBS from April 2007 to December 2007. Having said this, the ACCC notes that the vessel queue has been trending down in recent weeks.
- 6.93 Given that the Proposed System is essentially a continuation of the CBS, it is possible that the vessel queue will continue to remain high at the Port of Newcastle even with the Proposed System in place. Therefore, the ACCC considers that the size of the environmental benefit generated by the Proposed System may be small.

## **Improved international reputation and international competitiveness**

6.94 NPC submits that the Proposed System will improve the international reputation and international competitiveness of the Port of Newcastle and the Hunter Valley coal industry.

### *ACCC's view*

6.95 The ACCC considers that there are a number of factors which may influence the purchasing decisions of coal buyers, including certainty and timeliness of coal deliveries.

6.96 The ACCC previously concluded that, to the extent that a large vessel queue at the Port of Newcastle would discourage customers from purchasing coal from Hunter Valley coal producers, the CBS has the potential to improve the reputation of the port, and to increase sales of Hunter Valley coal, by reducing the size of the vessel queue. The ACCC notes ongoing concern expressed by overseas customers regarding the queue.

6.97 Similarly, the ACCC considers that the Proposed System may improve the reputation and competitiveness of the Port of Newcastle and the Hunter Valley coal industry by limiting the size of the vessel queue and increasing buyer certainty regarding timely coal deliveries. The ACCC accepts that this improvement in international reputation and competitiveness constitutes a small public benefit.

## **Increased incentives to invest**

6.98 NPC submits that the Proposed System will increase incentives for coal producers to invest in the Hunter Valley coal production and handling facilities.

6.99 In general, submissions received from interested parties do not provide support for this proposition. In fact, as discussed above, a number of interested parties are concerned that the Medium Term CBS has hindered investment in necessary coal chain infrastructure. For example, the UMFA submits that the Medium Term CBS 'did not encourage the industry to invest in the manner it should in infrastructure and rail capacity...'.<sup>77</sup>

### *ACCC's view*

6.100 The ACCC does not accept that the Proposed System will increase incentives for coal producers to invest in Hunter Valley coal production and handling facilities. There are several reasons for this.

6.101 First, the ACCC notes that the Proposed System is designed to deal with the problem of ongoing capacity constraints within the Hunter Valley coal chain. In the ACCC's view, it is these ongoing capacity constraints, and not the Proposed System itself, that will continue to drive investments in coal chain infrastructure. Put another way, the Proposed System provides a mechanism for allocating available capacity to individual producers, but it does not appear to provide any incentives to invest in coal chain infrastructure beyond those which already exist due to the excess demand in the Hunter Valley coal chain.

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<sup>77</sup> UMFA, Submission to the ACCC, December 2007, page 2.

- 6.102 Second, the ACCC notes its previous concern that the continued operation of a CBS at the Port of Newcastle may actually hinder coordinated investment along the Hunter Valley coal chain. This is discussed in more detail in the ‘Public detriments’ section of this determination.
- 6.103 While the ACCC does not accept that the Proposed System will increase incentives to invest in coal chain infrastructure, the ACCC notes that the Proposed System may **facilitate** investment along the coal chain. More specifically, the ACCC considers that any savings generated by the Proposed System in the form of reduced demurrage and other efficiency gains may be used by the Hunter Valley coal industry to invest in necessary infrastructure, thereby increasing the capacity of the coal chain.
- 6.104 To the extent that the Proposed System facilitates investment in the Hunter Valley coal chain, the ACCC considers that it will give rise to a public benefit.

### **ACCC conclusion on public benefits**

- 6.105 The ACCC considers that the Proposed System is likely to result in the following public benefits:
- reduced vessel queues and associated deadweight demurrage costs;
  - reduced coal stockpiling and increased certainty for producers regarding the coal they are able to ship;
  - reduced environmental risk to the area around the Port of Newcastle; and
  - the facilitation of investment in coal chain infrastructure.

### **Balance of public benefit and detriment**

- 6.106 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Proposed System is likely to result in a public benefit that will outweigh any public detriment.
- 6.107 In the context of applying the net public benefit test at section 90(8)<sup>78</sup> of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>79</sup>
- 6.108 The ACCC considers that the Proposed System is likely to generate some public detriment, in the form of:
- reduced incentive to develop a long term solution to the capacity constraints facing the Hunter Valley coal chain;
  - inefficient utilisation of employees and infrastructure by individual mines impacted adversely by the Proposed System, or transaction costs as these are redeployed.

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<sup>78</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>79</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 6.109 The ACCC is satisfied that the Proposed System is likely to result in the following public benefits:
- reduced vessel queues and associated deadweight demurrage costs;
  - reduced coal stockpiling and increased certainty for producers regarding the coal they are able to ship;
  - reduced environmental risk to the area around the Port of Newcastle; and
  - the facilitation of investment in coal chain infrastructure.
- 6.110 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment. However, the ACCC has significant doubts about whether the Proposed System is likely to result in a net public benefit beyond December 2008. In particular, in the event that there is no evidence of the development of a long term solution by this time, the ACCC considers that a continuation of the medium term CBS would be likely to generate significant public detriment. This detriment is likely to involve several billion dollars in lost export revenue, resulting from the failure by industry and governments to develop a long term solution and undertake appropriate investment.

### Conditions

- 6.111 Xstrata has advised the ACCC that it supports the Proposed System subject to the following conditions:
- engagement of an Independent Facilitator to develop a ‘Final CBS’ to be implemented by 1 April 2008 (target), applied retrospectively to 1 January 2008; and
  - the rapid development of clear Access Protocols for coal chain infrastructure and associated commercial frameworks by 30 June 2008. This will enable long-term contracts to be executed and investments to proceed without the risk of rationing from mid 2010.<sup>80</sup>
- 6.112 Coal & Allied also indicated that it would be willing to support the Proposed System on condition that:
- nominations are absolutely capped at 116 million tonnes until coal chain capacity above 116 million tonnes becomes available (ie. at least until the NCIG port comes on stream in mid 2010); and
  - the NSW Government commits to engaging in discussions to address the practical application of the common user clauses in the Kooragang lease to allow all coal producers to enter into fixed and firm long term port contracts which will allow all coal producers to pursue their growth agendas over the long term.<sup>81</sup>
- 6.113 In its response to interested party submissions, NPC submitted that “the Commission’s decision to authorise the Proposed system should not be subject to any conditions relating to the development of a transitional medium term solution.”<sup>82</sup>

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<sup>80</sup> Xstrata, Submission to the ACCC, 14 December 2007, page 3.

<sup>81</sup> Coal & Allied, Submission to the ACCC, 18 December 2007, page 2.

<sup>82</sup> NPC, *Response to public submissions made by interested parties in relation to NPC’s application for authorisation*, 18 February 2008, page 4.

6.114 In this instance, the ACCC considers that the Proposed System is likely to result in a net public benefit, without the imposition of the conditions proposed by Xstrata and Coal & Allied. The ACCC considers that the issues raised by these interested parties should be addressed by the ongoing discussions facilitated by Mr Greiner.

## **Length of authorisation**

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

6.116 In this instance, NPC and Donaldson have both sought authorisation until 31 December 2008, or until the ACCC grants authorisation to applications for authorisation of the VQMS (A91068-A91070) lodged by PN, PWCS and QR. As these applications were withdrawn on 22 January 2008, NPC and Donaldson are effectively seeking authorisation until 31 December 2008.

6.117 Regarding the length of authorisation, Xstrata submitted that:

... it is in the collective interests of all stakeholders to design an end to rationing systems. We therefore cannot support continuation of the extended CBS system past 31 March 2008 (target) as Xstrata is of the view that the CBS does not provide a basis for a longer term solution for the coal chain. ... We strongly recommend that a 'Final CBS' system is designed and implemented by 1 April 2008 (target).<sup>83</sup>

6.118 Similarly, Resource Pacific Limited submitted that 'in order to achieve some working space, RPL is willing to accept a CBS system, based on 2008 shipping nominations for 3 months; ie from 1 January 2008 to 31 March 2008.'<sup>84</sup>

6.119 As discussed above, the ACCC is concerned that the CBS has not addressed the underlying causes of the capacity constraints that impact on the Hunter Valley coal chain. In particular, the ACCC considers that the CBS has acted to reduce the incentive to develop a long term solution to the ongoing capacity constraints. The ACCC considers that, while the CBS has effectively been in operation at the Port of Newcastle since March 2004, industry and governments have failed to adequately address ongoing capacity issues within a reasonable amount of time.

6.120 The ACCC notes the appointment of the Hon Nick Greiner to facilitate industry discussion regarding the development of a longer term solution to the ongoing capacity issues. The ACCC reiterates that, while other attempts in the past have failed, industry's ultimate goal should be to develop a solution which will eliminate the need for any capacity allocation system.

6.121 In light of these considerations, the ACCC has decided to grant authorisation to the Proposed System until 31 December 2008, to provide a transition period. This is designed to allow for the development and implementation of a longer term solution to the ongoing capacity issues affecting the Hunter Valley coal chain as soon as possible, with a view to removing the need for any capacity allocation systems.

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<sup>83</sup> Xstrata, Submission to the ACCC, 14 December 2007, page 2.

<sup>84</sup> Resource Pacific Limited, Submission to the ACCC, 14 December 2007, page 1.

- 6.122 In proposing to grant authorisation, the ACCC recognises the issues underlying the present capacity constraints are complex and that industry's agreed solution may itself require authorisation.
- 6.123 Given the ACCC's concerns regarding the Proposed System, the ACCC considered granting authorisation for a short period of time, for example, until 30 September 2008. However, the ACCC considers that December 2008 will provide a more appropriate transition period as the ACCC expects that any long term solution requiring authorisation would be provided well in advance of the expiry of the authorisation. Any subsequent application for authorisation from industry would need to allow enough time for sufficient consultation with all interested parties prior to any decision by the ACCC.
- 6.124 Similarly, the ACCC will only grant interim authorisation in special circumstances. A key factor for consideration is the urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether it was realistically possible for an application to have been lodged sufficiently early to have made the request for interim authorisation unnecessary.
- 6.125 While the ACCC has decided to grant authorisation until December 2008, if a new solution is developed before this time, industry can seek to implement it immediately. Authorisation of the Proposed System until 31 December 2008 does not require industry to continue operating the Proposed System for the whole of 2008.

## 7. Determination

### The applications

#### Newcastle Port Corporation

- 7.1 On 4 December 2007, Newcastle Port Corporation (NPC) lodged applications for authorisation A91072-A91074 with the Australian Competition and Consumer Commission. On 17 December 2007, NPC amended its applications for authorisation in several respects.<sup>85</sup> On 19 December 2007, following discussions with Port Waratah Coal Services Limited (PWCS), NPC advised the ACCC that it is willing to make one further amendment to its applications in order to address certain transition and implementation issues that would arise for PWCS in implementing NPC's proposal, should authorisation be granted by the ACCC.<sup>86</sup>
- 7.2 Applications A91072-A91074 were made using Form A, Form B and Form D (respectively) of the Trade Practices Regulations 1974. The applications were made under subsection 88(1) of the *Trade Practices Act 1974* (the Act) to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act (A91072);
  - make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act (A91073);
  - engage in conduct to which sections 45D, 45DA, or 45DB of the Act might apply (A91074).
- 7.3 NPC is seeking authorisation for a proposed system designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.
- 7.4 NPC has advised the ACCC that its proposed system is, in all material respects, consistent with the Medium Term Capacity Balancing System (Medium Term CBS) which was in operation at the Port of Newcastle during 2007, and expired on 31 December 2007.

#### Donaldson Coal Pty Limited

- 7.5 On 7 December 2007, Donaldson Coal Pty Limited (Donaldson) lodged applications for authorisation A91075-A91077 with the ACCC. On 10 December 2007, Donaldson amended its applications for authorisation in two respects.<sup>87</sup>
- 7.6 Applications A91075-A91077 were made using Form A, Form B and Form D (respectively) of the Trade Practices Regulations 1974. The applications were made under subsection 88(1) of the Act to:

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<sup>85</sup> This is discussed in more detail in Chapter 3 of this draft determination.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act (A91075);
- make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act (A91076);
- engage in conduct to which sections 45D, 45DA, or 45DB of the Act might apply (A91077).

7.7 Like NPC, Donaldson is seeking authorisation for a proposed system designed to address the imbalance between the demand for coal loading services at the Port of Newcastle and the capacity of the Hunter Valley coal chain in 2008.

7.8 Donaldson's proposed system is, in all material respects, the same as the Medium Term CBS which was in operation at the Port of Newcastle in 2007.

### **The net public benefit test**

7.9 For the reasons outlined in Chapter 6 of this determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

7.10 The ACCC is also satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

7.11 The ACCC therefore **grants** authorisation to applications A91072-A91074 lodged by NPC and applications A91075-A91077 lodged by Donaldson until 31 December 2008.

### **Conduct for which authorisation is granted**

7.12 The ACCC grants authorisation to NPC until 31 December 2008 in relation to the capacity balancing system set out at Attachment 1 to NPC's supporting submission to applications for authorisation A91072-A91074.

7.13 The ACCC grants authorisation to Donaldson until 31 December 2008 in relation to the capacity balancing system set out at Attachment 1 to Donaldson's supporting submission to applications for authorisation A91075-A91077.

7.14 The authorisations extend to any revisions of the proposed arrangements which are consistent with Gilbert and Tobin's letter to the ACCC dated 19 December 2007 (sent on behalf of NPC) providing for transitional provisions relating to the implementation of the proposed arrangements.

7.15 Except as noted in paragraph 7.14 of this determination, the authorisation is in respect of the capacity balancing system as it stands at the time authorisation is granted. Any changes to the capacity balancing system during the term of the authorisation would not be covered by the authorisation.

7.16 This determination is made on 23 April 2008.

### **Interim authorisation**

7.17 At the time of lodging their applications for authorisation, NPC and Donaldson requested interim authorisation for the proposed capacity balancing system. The ACCC granted interim authorisation to NPC and Donaldson on 20 December 2007.

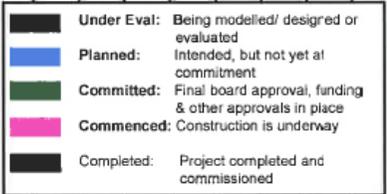
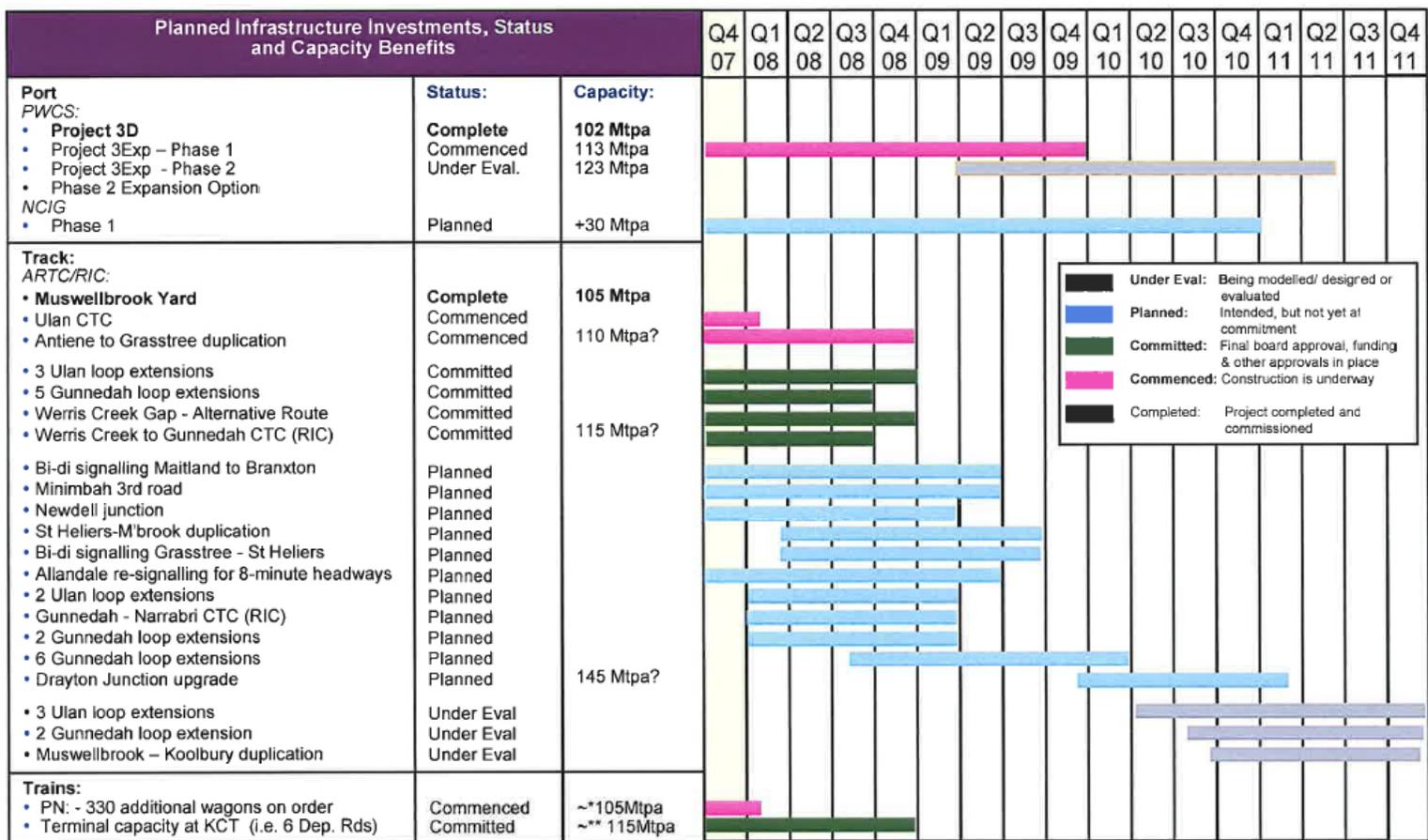
7.18 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

### **Date authorisation comes into effect**

This determination is made on 23 April 2008. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 15 May 2008.

# Appendixes

# A — Expansion activities in the Hunter Valley<sup>88</sup>



Note(\*): Rolling stock system capacity at end of 2007 is approx 105 Mtpa in a **stand alone** configuration as modelled by HVCCLT  
 Note(\*\*): Refuelling and other terminal activities at KCT are being reviewed. Anticipated that sufficient capacity will enable 2008 target of 95Mt

<sup>88</sup> Sourced from: PWCS, PN and QR, Submission supporting applications for authorisation A91068-A91070, 16 November 2007, Attachment E.

## **B — List of Newcastle Coal Producers<sup>89</sup>**

- BHP Billiton
- Coal & Allied
- Peabody Pacific
- XStrata Coal Australia
- Anglo Coal
- Austar Coal Mine Pty Ltd
- Bloomfield Collieries
- Centennial Coal Company
- Donaldson Coal
- Gloucester Coal
- Idemitsu Australia Resources
- Integra Coal
- Resource Pacific Ltd
- White Mining Limited
- Whitehaven Coal Mining Limited

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<sup>89</sup> NPC, Submission supporting applications for authorisation A91072-A91074, 4 December 2007, Attachment A to Attachment 1.