



Mr Scott Gregson  
General Manager  
Adjudication Branch  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
DICKSON ACT 2602

14 December 2007

Attention: Mr David Hatfield / Ms Sarah Chubb

Dear Sir

**Newcastle Port Corporation - applications for authorisation A91072 - A91074 interested party consultation**

We refer to your letter dated 4 December 2007 in relation to the authorisation applications lodged by Newcastle Port Corporation ("NPC") on 4 December 2007 to extend the PWCS Capacity Balancing System ("CBS") for 2008.

We also refer to the ACCC's letter of 13 December 2007 which advises that the ACCC has decided not to grant interim authorization of the Vessel Queue Management System (VQMS) at this time.

Xstrata Coal notes that one of the ACCC's primary reasons for not granting the interim authorization to the VQMS was that complete information such as the allocation of capacity by rail service providers to each producer under the proposed VQMS had not been forthcoming from the Applicants. We have been verbally advised by the Applicants that the sole reason for withholding capacity allocations was the refusal by a number of producers who were not supportive of the VQMS to allow release of such information. Xstrata Coal notes that we authorized all of the Applicants to release Xstrata Coal's capacity allocation information to the ACCC. Further, Xstrata Coal provided this information directly to the ACCC in a confidential attachment to our submission of 30 November 2007.

Notwithstanding the above, Xstrata Coal recognizes the concerns raised by a number of parties regarding the VQMS. At the same time, it must be recognized 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.

Xstrata Coal is of the belief that the major risk for the NSW export coal industry is that, unless decisive action is taken early in 2008, rationing systems may continue into 2011 and beyond. The collective goal for all producers must be to develop and agree 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. Urgent focus also needs to be applied to the suite of



track and train projects required to sustainably support the 146Mtpa of port capacity that could be available by this time.

In the interim, Xstrata Coal supports the following:

**1. Extension of the CBS for Q1, 2008.**

Whilst not our preferred position because of the benefits that the VQMS could bring, Xstrata Coal supports NPC's application in principle to continue the CBS as an interim measure from 1 January 2008 for Q1, 2008 with one important qualification; the basis for entitlement used in the extended CBS must be 2008 Binding Port Nominations, not 2007 (as per a somewhat obscure appendix to NPC's application). The reasons for this position are included in the attached Appendix One.

We note and appreciate the issues raised by PWCS as to how to practically give effect to extending the CBS in 2008. We encourage PWCS to undertake an immediate consultation on the CHSA for this implementation, noting that a 14 day consultation period from 17 December 2007 would enable implementation from 1 January 2008.

Xstrata has set out more comments specific to the interim authorisation request of NPC in Appendix One.

**2. Design and Implementation of a 'Final CBS' by 1 April 2008 (target).**

For reasons previously provided, 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. (Further explanation is provided in Appendix One) We strongly recommend that a 'Final CBS' system is designed and implemented by 1 April 2008 (target). Principles of the system should include:

- i. Final CBS system to be designed by an Independent Facilitator, authorised by the ACCC, then implemented and administered by PWCS.
- ii. Independent Facilitator to be nominated and agreed by all stakeholders. The Independent Facilitator could engage additional resources as required.
- iii. All producers and service providers to make all necessary information, including contracts and capacity allocation, available to the Independent Facilitator.
- iv. Final CBS system to apply retrospectively from 1 Jan 2008, through to target cessation by 30 June 2010 (with a mechanism to address automatic extension based on pre-determined parameters). Application retrospectively to 1 Jan 2008 is important to address any tendency/intent to delay this Final CBS.
- v. Final CBS system must be designed with principles aligned and supportive of a 'rationing-free' operation of the Hunter Valley Coal Chain by 30 June 2010.



- vi. Allocations for 2008, 2009 and 2010 under the Final CBS system to be determined by the Independent Facilitator, with a maximum denominator not to exceed 116Mtpa for any one year (and hence any producer's 2008 binding nomination) unless the coal chain capacity exceeds 116Mtpa (coal chain capacity as determined by the Hunter Valley Coal Chain Logistics Team's (HVCCLT's) Minimum Throughput Estimate). Xstrata Coal is of the view that a denominator of less than 112Mtpa for 2008 would be appropriate, but would leave this to the decision of the Independent Facilitator.

### **3. Coordinated Focus on Robust Frameworks**

It is unfortunate that immediate and short-term self interest means competition for allocation continues to cripple Hunter Valley performance, long-term reform and growth. In addition to designing and implementing the Final CBS, we recommend that the Independent Facilitator and associated resources be retained through to mid 2008 to develop the following immediate initiatives in partnership with all stakeholders:

- Management structures and resourcing to maximize current/short-term capacity.
- Development of Access Protocols for track and port (coal chain infrastructure).
- Development of Commercial Frameworks to apply from 1 July 2010.
- Execution of long-term contracts to by 1 July 2008 to support investments.
- Management structures required to deliver key Master Plan projects.

### **4. Conclusion**

Xstrata Coal supports the extension of the current CBS system for a period of 1 January 2008 to 31 March 2008 based on the 2008 binding port nominations (and not 2007 nominations as NPC appears to suggest) based on certain conditions. 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. Xstrata Coal thus supports the extension of the current CBS for the first quarter of 2008 on conditions of:

- engagement of an Independent Facilitator to develop a 'Final CBS' to be implemented by 1 April 2008 (target), applied retrospectively to 1 Jan 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.

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Bridger".

Stephen Bridger  
General Manager Commercial  
Xstrata Coal



## **Appendix One - Comments on NPC interim application**

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Xstrata Coal has placed these comments in this Appendix One as it has not been possible to obtain clarity from the ACCC whether NPC really intended to have the 2007 nominations or the 2008 in the NPC CBS. Conflicting positions have been put and therefore Xstrata Coal has responded to the current public documents.

### ***NPC CBS ignores 2008 PWCS contract commitments***

The NPC application in its current form does not simply extend the CBS **and certainly it does not preserve the status quo**. The proposed NPC CBS based on 2007 nominations effectively ignores 2008 contracted port volumes. This means that the NPC CBS is in fact not consistent with the PWCS CBS, which is based on binding port nominations for the relevant contractual year.

We have set out the practical impact of this change on Xstrata Coal in Appendix Two - Confidential.

In this situation, the NPC proposed CBS does not maintain the status quo, but radically alters binding port nominations made 3 years previously on which producers have planned production and made employment decisions.

### ***No Consultation with Industry***

NPC have held no consultation with industry in respect of the extension of the CBS into 2008 or the detail of its operation. In the last 24 hours prior to submitting this letter, Xstrata Coal has learned that major coal producers in the Hunter Valley who would be significantly impacted by the operation of the proposed NPC CBS were not aware of the proposal contained in the detail of NPC's submission that allocation would be based on 2007 PWCS nominations

The NPC CBS therefore potentially has a significant negative impact on the Hunter Valley in terms of production and employment.

### ***CBS Does Not Provide a Basis for a Longer-term Solution for the Coal Chain***

Xstrata Coal is concerned the extension of any form of CBS beyond April 2008 does not result in the change required to address the underlying challenges confronting the coal chain. There are several deficiencies in the operation of the CBS that mean that it is not appropriate as a long term solution:

- The CBS allocates coal chain capacity amongst producers based only on port nominations and as such effectively ignores the upstream elements of the coal chain. It does not consider whether each producer has adequate capacity contracted with rail companies to transport their coal from their mine to the port, or whether there is the underlying track capacity to enable such volumes to be moved by the rail operator.
- The operation of the CBS creates incentives for gaming of port nominations
- 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.
- The CBS does not provide any signals for improving performance across the coal chain. The CBS shares all capacity losses across all the producers rather than allocating them to their source



- The CBS is by definition a short-term solution, providing no surety of access to capacity for existing long-term producers year to year, and providing no certainty (and creating considerable risk) for expanding/new producers to make investment decisions.

### ***Conclusion***

In conclusion, Xstrata Coal would not support the NPC CBS on the basis of 2007 port nominations. Xstrata Coal is prepared to support in principle an extension of the CBS for the first quarter of 2008 subject to conditions as noted earlier and the practical issues that it would need to be implemented by PWCS.

### ***Donaldson Application***

Xstrata Coal's comments in relation to the NPC Application are also broadly applicable to the Donaldson Authorisation application.