

25 January 2008

Our reference: 5186

Mr Scott Gregson  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601

Dear Mr Gregson

**Applications by Donaldson Coal Pty Limited for Authorisation (A91075 – A91077)**

We act for Donaldson Coal Pty Limited (“**Donaldson**”). Donaldson wishes to respond to some of the issues raised by interested parties in their submissions on Donaldson’s applications for authorisation of a capacity balancing system (“**CBS**”) for the Port of Newcastle.

The majority of submissions support Donaldson’s applications. These submissions indicate that there is widespread industry support for preservation of the status quo while the industry works towards a long-term solution to the coal chain issues facing the Hunter Valley coal industry.

In relation to the process for devising and implementing a long-term solution, Donaldson welcomes the appointment of the Hon. Nick Greiner by the NSW Government to assist the industry. Mr Greiner’s appointment occurred after many interested parties had lodged their submissions. His subsequent appointment should allay a number of interested parties’ concerns about the length of the CBS authorisation and removes any need for conditions imposing a consultation and development process which has already begun with his appointment. However, for the sake of completeness, we address these and other issues raised by the submissions below.

**Conditions on Donaldson’s application**

Xstrata Coal’s submission dated 14 December 2007 appeared to suggest that any authorisation of the CBS should be subject to conditions imposed by the Commission to ensure that another capacity management system is developed and implemented by 1 April 2008 and back-dated to 1 January 2008.

Leaving aside whether the *Trade Practices Act* allows the ACCC to impose such conditions or give retrospective authorisation to any new system, Donaldson considers that Xstrata Coal’s concerns have been largely superseded by the appointment of Mr Greiner. Mr Greiner’s appointment is evidence that there are significant commercial and political incentives on all industry members to develop a long-term solution to the coal chain capacity issues. There appears to be no need for the Commission to impose additional incentives by way of conditions on the CBS authorisation.

Donaldson hopes that a solution to the coal chain issues will be implemented during the course of 2008. If this does occur, the relevant industry members could seek revocation of the CBS authorisation and, if required, apply for a new authorisation. This is the process set out in the *Trade Practices Act* and is the process that should be followed, rather than seeking to obtain the same result by the imposition of conditions on the CBS authorisation.

### **Implementation of the CBS in 2008**

A small number of submissions raised the issue that the CBS does not use 2008 tonnage nominations as the basis for allocating capacity. While this was the case with the original applications for authorisation filed by Newcastle Ports Corporation ("NPC") (A91072 – A91074), this minor error was amended in Donaldson's applications and also by NPC in its amended applications.

### **Validity of Donaldson's applications**

Coal & Allied in its submission of 19 December 2007 gave conditional support to the authorisation of the CBS but, conversely, also argued that Donaldson's applications were invalid. The sole basis for the claim of invalidity was that Port Waratah Coal Services Limited ("PWCS") had not consented or indicated any likelihood of entering into the proposed CBS arrangements for which Donaldson sought authorisation. This has not proven to be the case. PWCS has voted to implement the system for the 2008 year (refer to the media release dated 20 December 2007, attached as Annexure 'A') and has contacted coal producers seeking information required to implement the CBS in 2008. Donaldson submits that there are no factual or legal grounds to support Coal & Allied's position.

### **Withdrawal of the VQMS application**

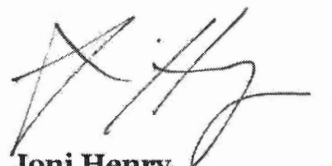
Donaldson notes that the applications for authorisation of the Vessel Queue Management System ("VQMS") (A91068 – A91070) were withdrawn by the applicants on 22 January 2008. Accordingly, there is now only one relevant counter-factual for Donaldson's application, being the absence of a capacity management system at the Port of Newcastle.

Donaldson thanks the Commission for this opportunity to respond to the submissions of interested parties. Please contact us on the numbers below if you have any questions or require further information from Donaldson.

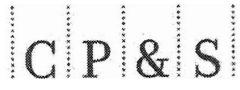
Yours sincerely,  
**Chang, Pistilli & Simmons**



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**Annexure 'A'**

**PWCS Media Release dated 20 December 2007**



THURSDAY DECEMBER 20, 2007

## MEDIA RELEASE

- **HUNTER COAL INTERIM EXPORT ALLOCATION PLAN**
- **CONSIDERATION OF INDEPENDENT ARBITRATOR**

Port Waratah Coal Services (PWCS) this afternoon agreed to an interim coal export plan that will see the so-called 'Capacity Balancing Scheme' (CBS) of 2007 extended through to 2008.

The PWCS Board vote followed approval of the extension by the Australian Competition and Consumer Commission (ACCC) earlier today.

The extension was recently applied for by Newcastle Port Corporation, and will be administered by PWCS.

Under a CBS, coal producers have export allocations rationed on a pro-rata basis when demand for coal exports exceeds the capacity of the Hunter Valley Coal Chain.

The extended CBS will be active from January 1 to December 31 2008, even though Hunter coal producers, coal chain services providers and the NSW Government have agreed to work towards finding a medium-term allocation solution by mid 2008.

It is hoped that a medium term solution, if one can be agreed upon mid next year, will serve the coal chain up until mid 2010.

"The Hunter coal industry has been unable to unanimously agree on how to manage 2008 export coal allocations throughout 2007," PWCS General Manager Graham Davidson said.

"The roll over of the CBS into 2008 is by no means a permanent solution.

"However, it is a step towards reaching consensus on a coal allocation protocol that is perceived to be fair by the industry.

"There is still a lot of work to be done in terms of solving infrastructure constraints in the Hunter Valley Coal Chain.

"There is an urgent need to create a commercial framework that stimulates investment and encourages stakeholders to work in an aligned manner."

Mr Davidson said recent discussions between PWCS and the New South Wales Government had canvassed the notion of appointing an independent figure or panel to arbitrate on how coal export allocations are decided.

"PWCS believes that more independence is required to add rigor and transparency to the process of deciding coal export nominations and allocations, in a manner considered fair to all players.

"PWCS is hopeful that the Hunter coal industry and the NSW Government can give strong consideration to appointing a prominent figure or panel to achieve this.

"This would enable PWCS to focus on its core objective of loading coal and continuing its expansion agenda."

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