

# MALLESONS STEPHEN JAQUES

## For Public Register

Dr Richard Chadwick  
General Manager, Adjudication  
Australian Competition and  
Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

14 September 2009

## Copy to

Mr Peter Armitage  
Blake Dawson  
225 George Street  
Sydney NSW 2000

Ms Liza Carver  
Gilbert + Tobin  
Level 37, 2 Park Street  
Sydney NSW 2000

**Attention:** Mr David Hatfield / Ms Jaime Martin

Dear Dr Chadwick

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation - Applications for authorisation A91147 - A91149 and A91168 - A91169**

### 1 Purpose of letter

- 1.1 We refer to the applications for authorisation A91147 - A91149 lodged by Port Waratah Coal Services Limited ("PWCS"), Newcastle Coal Infrastructure Group Pty Limited ("NCIG") and Newcastle Port Corporation ("NPC") (together, the "Applicants") on 29 June 2009, and applications for authorisation A91168 - A91169 lodged by the Applicants on 24 July 2009 (together, the "Existing Applications").
- 1.2 The Applicants seek to vary the Existing Applications by amending Attachment 1 of their supporting submission dated 29 June 2009 as set out in the "marked up" version of Attachment 1 attached to this letter. Attachment 1 of the supporting submission sets out a description of the conduct for which the Applicants have sought authorisation, and which is (or will be) reflected in provisions set out in a number of agreements.
- 1.3 The Applicants appreciate that this variation may affect the timeframe within which the Commission is able to consider aspects of the Existing Applications (that is, the parts of Attachment 1 which have been varied). The Applicants would be pleased to discuss this issue at a time that is convenient for the Commission.

## 2 Background

- 2.1 On 29 June 2009, the Applicants applied to the Commission for authorisation to “[m]ake a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the proposed conduct set out in Attachment 1” of the supporting submission provided on that date.
- 2.2 The Applicants indicated in the supporting submission that the relevant conduct would be reflected in a number of agreements which were, at that time, being negotiated.
- 2.3 Since 29 June 2009, the Applicants have engaged in an extensive negotiation process culminating in the signing by PWCS and NPC of various agreements, an agreement for lease and variations to leases on 31 August 2009.
- 2.4 A number of changes were agreed to the relevant conduct during the course of negotiations between the Applicants. Accordingly, and as the Commission is aware, those agreements and variations to leases were signed subject to a condition precedent as contemplated by section 45(9) and section 44ZZRM of the *Trade Practices Act 1974* (Cth) (“TPA”).
- 2.5 The changes to the relevant conduct as agreed between the Applicants during the negotiation process are reflected in the amended and marked up version of Attachment 1 that is attached to this letter. In order to comply with the timing requirements in section 45(9) and section 44ZZRM of the TPA, the Applicants now seek authorisation in relation to the conduct reflected in the changes to Attachment 1 (that is, the parts of Attachment 1 which have been varied).
- 2.6 The Applicants have already sought authorisation in respect of the conduct described in the initial version of Attachment 1 and which remains unchanged in the attached and marked-up version of Attachment 1.
- 2.7 For the Commission’s convenience, the Applicants also enclose amended versions of Forms A, B and D lodged with the Commission on 29 June 2009, as varied on 24 July 2009 for the commencement of the new cartel provisions. The amended forms reflect the changes necessary to vary the applications for authorisation as set out in this letter.
- 2.8 The Applicants also attach a clean copy of the revised Attachment 1.

## 3 The conduct reflected in the amended applications for authorisation satisfies the statutory criteria for authorisation

- 3.1 The changes to the relevant conduct agreed by the Applicants largely involve clarifications and practical changes necessary to give effect to the long term solution for capacity expansions for the export of coal from the Port of Newcastle, as approved by NPC and the NSW Government. In this regard, many of the changes involve a variation to the mechanics of the relevant arrangements, or are intended to address practical issues identified by the Applicants during the contract negotiations.

3.2 Having regard to these matters, and the general consistency of the varied arrangements with the framework set out in the Implementation Memorandum, the Applicants consider that the changes to Attachment 1, and the variations to the applications for authorisation, do not have any impact on the Commission's assessment of public benefits and detriments as set out in the Supporting Submission dated 29 June 2009.

3.3 As set out above, the Applicants have sought to vary the Existing Applications in this manner in order to meet the statutory timeframes set out in sections 45(9) and 44ZZRM of the TPA. The Applicants would be pleased to provide further explanation of the changes to Attachment 1 if that would assist the Commission.

#### **4 Further information**

4.1 If the Commission has any questions in relation to the matters raised in this letter, we would be pleased to assist.

Yours sincerely



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Encl 1

**Attachment 1**

# Attachment 1 - Capacity Framework Arrangements

## Introduction

This Attachment describes the conduct for which the Applicants are seeking authorisation, which may be implemented in various provisions of contracts, arrangements or understandings between:

- (a) any or all of PWCS, NPC and NCIG;
- (b) any or all of PWCS, NCIG, NPC and any Hunter Valley coal chain participant, including any producer of coal for export through the Terminals, or exporters of coal through the Terminals; or
- (c) PWCS, NCIG, NPC, any coal producer or exporter, the Hunter Valley Coal Chain Coordinator (or equivalent body) and any above or below rail service provider in the Hunter Valley.

The conduct for which the Applicants seek authorisation is referred to as the "Capacity Framework Arrangements".

The Capacity Framework Arrangements (and the provisions of the contracts, arrangements and understandings which give effect to or implement the relevant aspects of the Capacity Framework Arrangements) are necessary to give binding legal effect to the non-binding principles set out in the Implementation Memorandum signed by PWCS, NCIG and NPC and provided to the Commission in April 2009.

The Capacity Framework Arrangements form a critical component of the proposed long term solution to capacity constraints in the Hunter Valley coal chain.

The Capacity Framework Arrangements do not apply to coal that is delivered by road transport to the Carrington Terminal operated by PWCS.

## The Capacity Framework Arrangements

Any word or expression that is used in this Attachment 1 which begins with a capital letter has the meaning given in Part C.

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### PART A - Conduct between date of authorisation and 31 December 2009

The Applicants seek authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the following conduct being undertaken between 1 July 2009 and 31 December 2009:

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**1. Offer and acceptance of PWCS Base Tonnage for 2009**

Any offer by PWCS, and any acceptance of that offer (in whole or in part) by any Producer, of the 2009 PWCS Base Tonnage for the period 1 July 2009 to 31 December 2009.

The aggregate 2009 PWCS Base Tonnage available for offer is 96.7 Mt.

The amount of the 2009 PWCS Base Tonnage to be offered to each Producer will be equal to:

- (i) that Producer's 2008 binding Nomination for capacity allocation at the PWCS Terminals (inclusive of new mines) proportionally reduced to 95Mt ("2008 Tonnage"); and
- (ii) if that Producer's 2008 Tonnage is less than that Producer's highest actual allocation usage between 2004 and 2007 (inclusive), that Producer will also receive an agreed share of an additional 1.7Mt determined in accordance with clause 7.3 of the PWCS Tonnage Allocation Stage 1.

The offer will be made on the terms of that Producer's existing coal handling services agreement which will be modified to give effect to the 2009 Base Tonnage Offer and the transfer fee cap under the Terminal Access Protocols.

Producers will be entitled to contract for any tonnage up to their 2009 PWCS Base Tonnage offer. Before a Producer can accept any 2009 PWCS Base Tonnage offer that Producer must satisfy the requirements set out in section (b) below.

**(b) Acceptance requirements**

Before a Producer can accept any offer of a 2009 PWCS Base Tonnage, that Producer must:

- (i) advise PWCS of a constant tonnage for each Load Point; and
- (ii) provide PWCS with relevant information required for System Assumptions and contractual alignment.

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**(c) Lapse of offer**

If a Producer does not accept all or any part of a 2009 PWCS Base Tonnage offer by the due date for acceptance then:

- (i) the offer or part of that offer (as applicable) will lapse; and
- (ii) the relevant capacity allocation which was offered but not accepted will be made available in accordance with the nomination and allocation process described in section 1 of Part B.

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## 2. Contractual alignment and vessel queue

The conduct of PWCS:

- (a) requiring Producers to have adequate entitlements to track and train haulage upon lodging any application under the Coal Handling Services Agreement for the provision of coal handling services in respect of each vessel to be loaded;
- (b) refusing to supply coal handling services if a Producer has inadequate track or train delivery entitlements in respect of the application for a vessel to be loaded; and
- (c) in revising flexibility limits or reducing allocations on a pro rata basis should an excessive vessel queue develop or be forecast to develop due to impacts at PWCS. Where excess queuing is due to an impact external to the Terminals, PWCS may, but is under no obligation to, apply adjustments to allocations in a manner that reasonably reflects that impact.

## 3. Transfer fee cap

The conduct of capping the fee that a Producer with a Contracted Allocation at the PWCS Terminals may charge another to use a portion of its Contracted Allocation ("**Relevant Proportion**") at no more than 5% of the fee charged by PWCS for the Relevant Portion.

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**PART B – Conduct if long form documents executed by all parties by 31 August 2009 (or such other date as may be agreed by the Applicants)**

The Applicants seek authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, if by no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS);

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- (a) the PWCS Capacity Framework Documents are executed in full by PWCS and NPC; and
- (b) the NCIG Capacity Framework Documents are executed in full by NCIG and NPC.

**1. Offer and acceptance of PWCS Base Tonnage for 2010**

**(a) PWCS Base Tonnage for 2010**

Any offer by PWCS, and any acceptance of that offer (in whole or in part) by any Producer, of the 2010 PWCS Base Tonnage on an annual basis for a period of up to 10 years commencing on 1 January 2010.

The aggregate 2010 PWCS Base Tonnage available for offer is 97.4 Mtpa.

The aggregate 2010 PWCS Base Tonnage of the NCIG Producers (other than the Excluded NCIG Producers) is, as at 31 August 2009, 24.413 Mtpa.

The amount of the 2010 PWCS Base Tonnage to be offered to each Producer will be equal to the higher of:

- (i) that Producer's 2008 Tonnage; and
- (ii) that Producer's highest actual allocation usage between 2004 and 2007 (inclusive).

The offer will be made on the terms of a new long term ship or pay contract.

Producers will be entitled to contract for any tonnage up to their PWCS Base Tonnage offer and for any length of contract up to 10 years. Before a Producer can accept any 2010 PWCS Base Tonnage offer that Producer must satisfy the requirements set out in section 1(b).

**(b) Acceptance requirements**

Before a Producer can accept any offer of a 2010 PWCS Base Tonnage, that Producer must:

- (i) advise PWCS of a constant annual tonnage for each Load Point Allocation, unless there is a ramp down in respect of the Load Point;
- (ii) provide PWCS with reasonable security as required by PWCS;
- (iii) provide PWCS with either:

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(A) a JORC Code statement; or

(B) a statement generally prepared in accordance with the JORC Code,

of Marketable Coal Reserves for the relevant Mines which supports coal production is feasible with respect to the Load Point Allocations for the term and a written undertaking by the Producer that the same coal reserves are greater than the sum of the Producer's Base Tonnage Offer, any Nominations, NCIG Contracted Allocations and any domestic coal supply contracts;

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(iv) provide PWCS with relevant information required for System Assumptions and contractual alignment; and

(v) provide PWCS with a signed Long Term Ship or Pay Contract.

(c) *Lapse of offer*

If a Producer does not accept all or any part of a 2010 PWCS Base Tonnage offer by the due date for acceptance then:

- (i) the offer or part of that offer (as applicable) will lapse; and
- (ii) the relevant capacity allocation which was offered but not accepted will be made available in accordance with the nomination and allocation process described in section 2 and 2A.

## 2. PWCS Nomination and Allocation

The nomination for capacity allocations at the PWCS Terminals by any Producer, and the allocation of capacity allocations at the PWCS Terminals to any Producer, in accordance with the principles set out in this section 2 and in sections 2A, 2B, 2C and 2D:

### (aa) *Allocation of Capacity for 1 October 2009 to 31 December 2009*

PWCS may elect to offer to Producers any additional PWCS Capacity that is available between 1 October 2009 and 31 December 2009 above the aggregate Base Allocations. If PWCS elects to make this pro rata offer, it will be made to all Producers as follows:

- (i) first, up to the Producer's 2010 Base Tonnage Offer; and
- (ii) then, on a pro rata basis based on their respective 2009 load point allocations.

### (a) *Allocation of Capacity for 1 January 2010 to 30 June 2010*

Any additional capacity above that required to satisfy the capacity allocations which have been offered and accepted in accordance with section 1 will be offered for allocation in the period 1 January 2010 to 30 June 2010 only to all

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existing Producers at PWCS on a pro rata basis based on their respective Base Allocations.

Unless otherwise agreed by PWCS and the Producer, the division of the pro-rata additional allocation will be on a proportional basis across all of the Producer's Load Point Allocations.

If any pro rata offer is not taken up by an existing Producer at PWCS, it will lapse and PWCS will offer it to all Producers that have accepted the pro rata offer by re-applying the process set out in this Section 2(a).

**(b) Allocation of Capacity for 1 July 2010 and beyond**

Allocation of capacity above that required to satisfy the capacity allocations which have been offered and accepted in accordance with section 1 will be offered for allocation from 1 July 2010 and beyond in accordance with the PWCS Annual Capacity Nomination and Allocation Process set out in section 2A below.

**2A. PWCS Annual Capacity Nomination and Allocation Process**

**(a) Expansion Planning**

PWCS will review its Capacity, System Assumptions and expansion plans each year in conjunction with Coal Chain master planning conducted by the HVCCC.

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**(b) Demand Assessment**

- (i) PWCS will undertake an annual demand assessment process with Producers each year. This process will include submission of nominations for 10 year Load Point Allocations, notice of renewals or extensions of existing 10 year Load Point Allocations and notice of any offers of voluntary Load Point Allocation reductions.
- (ii) In the year in which NCIG intends to Commit to NCIG Stage 2, the timing of the annual demand assessment process will be coordinated with NCIG, such that the NCIG Nomination and Allocation process is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

**(c) Nominations**

Expansion Capacity at PWCS Terminals will be available for nomination to Non-NCIG Producers exclusively until 1 January 2010.

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NCIG Producers will only be able to submit nominations for Expansion Capacity when all of the pre-conditions set out in section 2C have been met.

Nominations for Load Point Allocations must:

- (i) Advise a constant annual tonnage for each Load Point Allocation;
- (ii) Nominate a commencement date which:

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- (A) is 1 January in either the 1st, 2nd, 3rd or 4th year after the nomination is submitted; or
- (B) with the approval of NPC, is 1 January in the 5th year after the nomination is submitted, provided that NPC is satisfied that:
  - (I) the Producer nominating for that capacity establishes that the nomination is for a planned mine with infrastructure that has extended lead times for delivery; and
  - (II) the nomination will not have any adverse effect on nominations for allocations which may commence earlier,

provided that nominations to commence in 2010 will commence on 1 July for a term of 10.5 years.

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(iii) Provide reasonable security as required by PWCS;

(iv) provide PWCS with either:

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(A) a JORC Code statement; or

(B) a statement prepared generally in accordance with the JORC Code,

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of Marketable Coal Reserves for the relevant Mines which supports coal production is feasible with respect to the Load Point Allocations for the term and a written undertaking by the Producer that the same coal reserves are greater than the sum of the Producer's Load Point Allocations (or the Base Tonnage Offer), any Nominations, NCIG Contracted Allocations and any domestic coal supply contracts for those mines;

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(v) Provide information relating to the development status of the source mine, including development consent and other approvals to operate;

(vi) Provide a timeline for first coal production, where the nomination relates to a new or expansion project;

(vii) Provide relevant information required for System Assumptions and contractual alignment; and

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(viii) Provide a duly executed and binding Long Term Ship or Pay Contract for the nominated allocation, if the Producer has not already done so.

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If the Nomination is a Dual Nomination, then to be valid, the Nomination must comply with the requirements of section 2A(l) below in addition to the requirements in this section 2A(c).

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If for any reason a nomination does not result in a contract through the nomination and allocation process then that nomination shall have no continuing effect including having any priority under the Priority Rules set out in section 2A(h) below.

**(d) Renewal and Extension**

Every year Producers may submit a one year renewal of their existing 10 year Load Point Allocation (i.e. rolling evergreen allocation). If an annual rolling renewal is not taken up by the Producer, the Load Point Allocation loses its evergreen renewal right.

An end of Load Point Allocation extension of up to 3 years may be exercised by Producers with 5 years remaining on their Load Point Allocation.

**(e) Voluntary Reduction Offer**

A Producer may offer to PWCS a voluntary reduction to a Load Point Allocation. PWCS may reallocate the Load Point Allocation (up to the amount volunteered) to another Producer in accordance with this nomination and allocation process. If any or all of the voluntary reduction is reallocated, PWCS will reduce the Producer's Load Point Allocation by the amount reallocated and the Producer will retain any portion of the voluntary reduction that is not reallocated as a Load Point Allocation.

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**(f) Capacity Assessment and Review**

PWCS will assess its Capacity availability and its ability to meet aggregate nominations and existing Contracted Allocations. If necessary, PWCS will finalise its detailed expansion plan to fulfil the nominations. If necessary, a review of the time in which an expansion of the PWCS Terminals (including the construction of a new terminal) is required to be completed will be conducted in accordance with section 6(e).

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**(g) Allocation**

PWCS will contract Load Point Allocations with Producers. Contracted Allocations which cannot be satisfied by existing Capacity at the PWCS Terminals, will commence within the time required under section 6(b) unless a review of that time has been undertaken in accordance with section 6(e) and either an alternative date for the delivery of capacity is established or the start date is suspended (due to the obligation to expand being suspended). If PWCS cannot satisfy the nominations in full, priority rules will apply.

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If the year is a year in which Dual Nominations are submitted, then Producers which submit nominations with a nominated commencement date that is the same year as the nominated commencement year of the Dual Nominations or later, will receive Load Point Allocations with a suspended start date. The suspension of the start date will cease at the conclusion of the Dual Nomination process.

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**(h) Priority Rules**

Existing Load Point Allocations will not be diluted.

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- (i) Where nominations are made in the same year, nominations starting sooner will be prioritised over nominations starting later provided that:
- (A) where there is no available PWCS capacity in 1st year after the nomination is submitted then, nominations in 1st and 2nd year will have equal priority; and
- (B) where there is no available PWCS capacity in 1<sup>st</sup> or 2<sup>nd</sup> year after the nomination is submitted then, nominations in 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> year will have equal priority.
- (ii) Where nominations are made in the same year to start at the same time, nominations will be prioritised into 4 categories by the relevant mine's development status at the time of nomination. The categories in descending order of priority are:
- (A) the mine has all approvals to operate and has commenced or is able to demonstrate it can commence production by the nominated commencement date;
- (B) the mine has been granted a Mining Lease;
- (C) the mines has lodged an Environmental Assessment Report with the Department of Planning; and
- (D) all other mines.
- (iii) Nominations submitted in the same year that become contracts take priority over nominations submitted in later years.
- (iv) Each priority group is satisfied in full before the next priority group.
- (v) If nominations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.
- (i) ***Capacity Delivery***
- (i) PWCS will deliver Capacity within the contracted timeframe.
- (ii) If necessary, a review of the contracted timeframe for delivery of Capacity will be conducted in accordance with section 6(e). If the contracted timeframe is suspended or extended by that review then the start dates for the relevant Load Point Allocations will similarly be suspended or extended.
- (iii) If capacity is delivered part way through a year the Load Point Allocation will reflect the partial year. For the purposes of any compression allocation, if a Load Point Allocation has been phased in with a staggered start date, the start date of the first phase of the Load Point Allocation is the start date of the entire tonnage amount.
- (iv) If PWCS Capacity is available prior to the start date for next ranking Load Point Allocations, then the applicable Producers will be offered the opportunity to bring forward their start date. If the applicable

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Producers do not accept the offer within 2 weeks of the date of the offer, the available capacity will be treated as Excess Capacity and will be available for allocation until the start date of the next ranking Load Point Allocations.

- (v) If required in accordance with section 5, PWCS Contracted Allocations will be compressed as set out in section 5.
- (vi) Compressed Allocations will be reallocated to Producers who have Load Point Allocations impacted by the relevant event which triggered the requirement to compress.
- (vii) Where the Compressed Allocation is insufficient to satisfy the impacted Producers, the following priority rules will apply:
  - (A) Load Point Allocations commencing in a particular year will take priority over Load Point Allocations starting in a later year;
  - (B) Where Load Point Allocations commence in a particular year, Load Point Allocations where the source mine has all approvals to operate and sufficient track access will take priority;
  - (C) Each priority group is satisfied in full before the next priority group; and
  - (D) If Load Point Allocations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.
- (viii) PWCS may adjust the Compressed Allocation to account for any variation in the System Assumptions between the transferor Producer and the transferee Producer.

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**(i) Load Point Allocation variance**

- (i) If as a result of the application of the allocation process including the priority rules set out in Section 2A(h), a Producer's Load Point Allocation:
    - (A) is initially satisfied in part only and, as a consequence, the tonnage allocated to that Producer is less than 80% of that Producer's nominated annual tonnage for that load point allocation for more than 1 year; or
    - (B) has a start date that is one or more years later than the nominated commencement date (for the avoidance of doubt, this applies to the start date of the first phase of a load point allocation if there is a staggered start date).
- then the Producer may withdraw the nomination by written notice to PWCS within two weeks of the date that PWCS issues the load point allocation to the Producer.

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- (ii) If the Producer does not withdraw the nomination by the due date then the load point allocation is binding on the Producer and PWCS.
- (iii) If the Producer withdraws the nomination, then the nomination will be void and the Producer will have no continued priority in respect of that nomination. PWCS will return to the Producer any security relating to that nomination.
- (iv) Any capacity that becomes available due to the withdrawal of the nomination will be applied to the nominations of other Producers in accordance with the priority rules.
- (v) If a Producer has a Load Point Allocation with a suspended start date and more than 2 years has elapsed since the start date was suspended, the Producer may terminate that Load Point Allocation by providing at least 1 months written notice to PWCS.

**(k) Periodic Load Point Allocation and Tolerance**

- (i) Each Load Point Allocation will be broken down into periodic Load Point Allocations for use in particular Allocation Periods during each year. During an Allocation Period, each Producer may use its periodic Load Point Allocations and any tolerance amounts determined by PWCS for that Allocation Period. A Producer's entitlement in respect of an Allocation Period ceases when it has no further unused Load Point Allocations, excluding any Quarantined Allocation, for that Allocation Period.

**(l) Dual Nominations**

- (i) A Non-NCIG Producer who wishes to submit a valid Dual Nomination:
  - (A) must, at the time the nomination is submitted, inform PWCS that it is a Dual Nomination;
  - (B) must nominate a commencement year which is no earlier than the year following the expected year of completion of NCIG Stage 2, as advised by NCIG at the time NCIG seeks expressions of interest for NCIG Contracted Allocations. For the avoidance of doubt, if the Dual Nomination is submitted in 2009, the earliest possible nominated commencement year is 2013; and
  - (C) is relieved of its obligation to provide security interests in relation to the Dual Nomination at the time the Dual Nomination is submitted to PWCS.
- (ii) Each Producer who submits a valid Dual Nomination will receive a Load Point Allocation which:
  - (A) has a suspended Start Date. The Start Date will remain suspended until that Dual Nomination process has concluded;
  - (B) has an annual tonnage equal to the nominated amount; and

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- (C) is contingent on whether or not NCIG Stage 2 is Committed.
- (iii) If PWCS receives an Escrow Notice, each Load Point Allocation based on a Dual Nomination will in respect of:
- (A) the annual tonnage equal to that Producer's NCIG Contracted Allocation ("Dual Portion") continue to be contingent on the Commitment of NCIG Stage 2; and
- (B) any annual tonnage of the Producer's Load Point Allocation that is in excess of the Dual Portion (the "Excess Portion") cease to be contingent and become an operative Load Point Allocation unless the Producer confirms in writing to PWCS that the Excess Portion is to remain contingent within 10 business days of receiving a notice from PWCS requesting such confirmation.
- (iv) If PWCS receives a notice from NCIG that NCIG Stage 2 is Committed:
- (A) the Dual Portion of the Load Point Allocation will immediately terminate and the Producer will have no continued priority in respect of that Dual Portion; and
- (B) any remaining contingent Excess Portion will cease to be contingent and become an operative Load Point Allocation.
- (v) If PWCS receives notice from NCIG advising that the NCIG process for allocating Non-NCIG Stage 2 Contracted Allocations has terminated any contingent portion of the Load Point Allocation will immediately cease to be contingent and become an operative Load Point Allocation, unless the Producer confirms in writing to PWCS that the contingent portion is withdrawn within 10 Business Days of receiving a notice from PWCS requesting such confirmation.
- (vi) The suspension of the Start Date of any operative Load Point Allocations will cease upon the earlier of:
- (A) the date NCIG advises PWCS that NCIG Stage 2 is Committed;
- (B) the date NCIG advises PWCS that the current NCIG process for allocating Non-NCIG Stage 2 Contracted Allocations has terminated; or
- (C) the Sunset Date.
- (m) Cessation of Suspension of Start Dates**
- (i) If a Load Point Allocation has a Start Date that is suspended (whether due to a review or the Dual Nomination process) then when the suspension ceases the Load Point Allocation will be given a Start Date in accordance with clauses 2A(g) and 2A(h) based on the nomination from which the Load Point Allocation was contracted.

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**2B Allocation of Excess Capacity**

- (i) PWCS will make an announcement when it has any Excess Capacity and invite nominations for that Excess Capacity. Nominations must not exceed the amount of Excess Capacity or any time period stated in the announcement.
- (ii) If NCIG has not committed to NCIG Stage 2, NCIG Producers may only nominate for Load Point Allocations for capacity contracts for the maximum available period not to exceed 2 years in length. If NCIG Stage 2 has been Committed, all Producer's nominations will be treated the same as all other Producers.
- (iii) In allocating the Excess Capacity, the following priority rules will apply unless the Excess Capacity is due to the operation of clause 2D:
- (A) Nominations commencing sooner will take priority over nominations commencing later;
- (B) Nominations for a longer time period will be prioritised ahead of nominations for shorter time periods;
- (C) Nominations will be ranked by the categories set out in clause 2A(h)(i); and
- (D) If nominations within a priority group cannot be satisfied:
- (I) If the date in section 2C(b) has not been reached, nominations by Non-NCIG Producers and Excluded NCIG Producers (for their mines as at 31 August 2009, including any expansion of those mines) within a priority group will be prioritised ahead of nominations by NCIG Producers within that priority group;
- (II) All else being equal, each Producer will be offered their pro-rated share.
- (iv) If the Excess Capacity is due to the operation of clause 2D then the following priority rules will apply to the allocation of that Excess Capacity:
- (A) Nominations by Non-NCIG Producers and Excluded NCIG Producers will be prioritised ahead of nominations by NCIG Producers;
- (B) Nominations commencing sooner will take priority over nominations commencing later;
- (C) Nominations for a longer time period will be prioritised ahead of nominations for shorter time periods;
- (D) Nominations will be ranked by the categories set out in clause 2A(h)(ii); and

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(E) All else being equal, each Producer will be offered their pro-rated share.

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(v) If, after the allocation of capacity to all Nominations for Excess Capacity there is remaining Excess Capacity, PWCS will give notice to all Producers and accept Nominations for Excess Capacity on a first come first served basis.

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**2C Nominations by NCIG Producers**

**(a) Application of this section 2C**

(i) Nothing in this section 2C limits the entitlement of an NCIG Producer to nominate for Unallocated Expansion Capacity at the PWCS Terminals in accordance with section 2B,

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(ii) If a Producer becomes an "NCIG Producer" after 1 January 2009 because:

(A) a Non-NCIG Producer acquires a NCIG Producer after that date;

(B) a Non-NCIG Producer acquires a source mine identified in an NCIG ship or pay agreement after that date; or

(C) an NCIG Producer, or an entity that controls an NCIG Producer, acquires control of a Non-NCIG Producer after that date,

for the purposes of this section 2C, any mine or mines ("**The Specified Mine or Mines**") of that Producer for which it was entitled to submit nominations at PWCS immediately prior to the date it becomes an NCIG Producer will be treated as if it continued to be owned by a Non-NCIG Producer and that Producer may nominate for capacity allocations at the PWCS Terminals in excess of its Base Allocation in respect of the Specified Mine or Mines, including expansion of the Specified Mine.

(iii) If at any time after 1 January 2009 a NCIG Producer or an entity that controls a NCIG Producer acquires a source mine of a Non-NCIG Producer and the output of that Mine was shipped through the PWCS Terminals before the date of the acquisition ("**the Specified Mine**") then the Specified Mine will be treated as if it continued to be owned by a Non-NCIG Producer and that Producer may nominate for capacity allocations at the PWCS Terminals in excess of its Base Allocation in respect of the Specified Mine, including expansion of the Specified Mine.

(iv) A Producer who is entitled to continue to nominate for expansion capacity at the PWCS Terminals under section 2C(a)(ii) or (iii) must not do so for the purposes of increasing the capacity allocations available to any mines other than the Specified Mine or Mines referred to in paragraph 2C(a)(ii) or (iii).

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(b) Nominations by NCIG Producers

Each NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until the later to occur of the following:

- (i) 1 January 2010; and
- (ii) the date on which each of the following has occurred:
  - (A) NCIG Stage 2 is Committed; and
  - (B) either of the following:
    - (aa) NPC notifies PWCS that it has unconditionally approved the specification and construction program for NCIG Stage 2 on the basis that it provides for the construction of the NCIG Terminal to the full extent that has been approved in the Project Approvals (as defined in the NCIG Agreement for Lease) ("Full Expansion") in one expansion tranche; or
    - (bb) NPC (in its absolute discretion) notifies PWCS that NCIG Producers may submit nominations on the basis that it will be subject to any limits and conditions imposed by NPC in accordance with section (iii) below because:
      - (AA) NPC has conditionally approved the specification and construction program for NCIG Stage 2 on the basis that it provides for the Full Expansion in more than one expansion tranche; and
      - (BB) NPC considers that the conditions imposed on its approval will ensure that the Full Expansion will be achieved; and
      - (CC) the first phase of the proposed expansion is the largest expansion practicable at that time having regard to physical and operational constraints to a Full Expansion.
- (iii) If section 2C(b)(ii)(B)(bb) applies, nominations submitted by NCIG Producers (and any resulting Load Point Allocations) will be subject to any limits and conditions that are notified by NPC to PWCS at the time the notice referred to in that section is provided by NPC to PWCS.
- (iv) The intention of this section 2C(b) is to operate to ensure that:
  - (A) NCIG is committed to the Full Expansion of its terminal before NCIG Producers are entitled to access expansion capacity at the PWCS Terminals; and

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(B) NCIG Producers are not entitled to access expansion capacity at the PWCS Terminals whilst there is available existing or potential capacity at the NCIG Terminal.

except where access by NCIG Producers is specifically contemplated in section 2C(a) and section 2B(ii).

**(c) *While Excluded Stage 1 Allocation is excluded from anti-hoarding calculations***

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(i) Further to section 2C(b) and 2C(d), an NCIG Producer (other than an Excluded NCIG Producer) will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until that NCIG Producer has made an election in accordance with section 2C(c)(ii).

(ii) An NCIG Producer may, by written notice to PWCS and the Reviewer, elect to include its Excluded Stage 1 Allocation when determining that NCIG Producer's Utilisation Threshold, in which case the NCIG Producer must nominate a date on which the election will become effective ("**Stage 1 Election Trigger Date**").

(iii) If an NCIG Producer makes an election under section 2C(c)(ii) and is not otherwise prevented from nominating for expansion capacity under the provisions of this section 2C then:

(A) subject to section 2C(c)(iii)(B), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5); and

(B) the nomination referred to in section 2C(c)(iii)(A) must not nominate a start date for delivery date of such capacity allocations which is earlier than the Stage 1 Election Trigger Date.

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**(d) *Period during Nominated Deferral Period***

(i) Further to sections 2C(b) and 2C(c), if an NCIG Producer has specified a Nominated Deferral Period in accordance with section 5(d)(i)(B)(II), then:

(A) subject to section 2C(d)(i)(B), that NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until the expiry of the Nominated Deferral Period; and

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(B) at any time during the Nominated Deferral Period that NCIG Producer may, by written notice to PWCS and the Reviewer, elect to surrender its right to extend the Nominated Deferral Period in accordance with that section, in which case the NCIG Producer must nominate a date on which the election will become effective ("**Stage 2 Election Trigger Date**").

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- (ii) If an NCIG Producer makes an election in accordance with section 2C(d)(i)(B) and is not otherwise prevented from nominating for expansion capacity under the provisions of this section 2C then:
- (A) subject to section 2C(d)(ii)(B), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5); and
  - (B) the nomination referred to in section 2C(d)(ii)(A) must not nominate a start date for delivery of such capacity allocations which is earlier than the Stage 2 Election Trigger Date.

**2D, *Conduct where NCIG is in breach of Deed of Undertaking or Capacity Framework Agreement***

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Any conduct that is in accordance with the following principles:

- (i) In the event of a breach of the Deed of Undertaking or the Capacity Framework Agreement by an NCIG Party, NPC will issue a breach notice to the NCIG Parties detailing the nature of the breach.
- (ii) The NCIG Parties will have 30 days to rectify the breach. During this time, and until the breach is rectified to the satisfaction of NPC (acting reasonably), NCIG Producers will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of their PWCS Base Tonnage. For clarity, nothing in this section 2D(ii) limits the conduct described in section 2C regarding the entitlement of NCIG Producers to nominate for any capacity allocations at the PWCS Terminals in excess of their PWCS Base Tonnage.
- ~~(iii) Section 2D(ii) will not apply to prevent any Excluded NCIG Producer from submitting nominations during the period of the breach (as advised by NPC) for any capacity allocations at the PWCS Terminals in excess of their PWCS Base Tonnage for the mine (or mines) which it operates as at 31 August 2009 (including any expansion or further development of that mine or mines).~~
- (iv) If the breach has not been rectified to the satisfaction of NPC (acting reasonably) within 30 days then:
  - (A) until the breach is rectified to the satisfaction of NPC (acting reasonably), PWCS will be entitled to terminate any unfulfilled PWCS Contracted Allocations of NCIG Producers (other than an Excluded NCIG Producer) for capacity at PWCS which exceeds their PWCS Base Tonnage; and
  - (B) PWCS will be entitled, on receiving a direction from NPC, to reduce the PWCS Contracted Allocations of NCIG Producers by up to 1 Mtpa per month for a period of not less than 2 years determined by NPC (in its absolute discretion) until the breach is rectified to the satisfaction of NPC (acting reasonably) or the PWCS Contracted Allocations of NCIG Producers has been reduced to zero. For clarity, the first

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tonnage reduction may be made on expiry of the 30 day rectification period.

- (v) NPC will be entitled to reduce the rectification period referred to section 2D(ii) and section 2D(iv) for a breach as follows:
- (A) if one other breach has been notified to the NCIG Parties in the 12 months immediately preceding the date on which that breach occurred, the rectification period may be reduced by up to 15 days;
- (B) if two or more other breaches have been notified to the NCIG Parties in the 12 months immediately preceding the date on which that breach occurred, the rectification period for that breach may be reduced by up to 30 days (which, for the avoidance of doubt, means that there is no rectification for that breach).
- (vi) Any conduct, agreement, arrangement or understanding between the NCIG Producers to set the proportion of the tonnage reduction that each of them will bear as set out in the Deed of Undertaking.
- (vii) Nothing in this section 2D will preclude, limit or otherwise restrict the ability of PWCS to compress or reduce the Contracted Allocations of NCIG Producers in accordance with section 5.
- (viii) If PWCS receives a notice from NPC to restore any Load Point Allocations of any NCIG Producers that have been reduced under this section 2D, then PWCS will restore those Load Point Allocations in accordance with the notice to the extent that any Excess Capacity is available.

### 3. *NCIG Nomination and Allocation*

The nomination of capacity allocations of 12 Mtpa at NCIG Stage 2 by any Producer, and the allocation of capacity allocations of 12 Mtpa at NCIG Stage 2 to any Producer, in accordance with the following principles:

**Step 1:** EOI Process: Invite Expressions of Interest (inclusive of an NCIG standard-form Confidentiality Deed) from all Non-NCIG Producers. NCIG will consult with PWCS as to the timing of the nomination and allocation process in accordance with the Implementation Memorandum.

**Step 2:** Provide Information Package and form of ship or pay contract ("SoP") to Non-NCIG Producers who have signed the Confidentiality Deed ("**Nominating Non-NCIG Producers**"); initiate independent due diligence on Nominating Non-NCIG Producers.

**Step 3:** Receive nominations. Nominations must include:

- (i) a commitment to ship a minimum of 3 Mtpa (throughput) when Stage 2 of the terminal is operating at full capacity on the terms of the SoP;
- (ii) a nominated source mine(s) for which registered mining title is held;

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- (iii) development consent for the source mine(s), subject only to conditions of a formal nature;
- (iv) a JORC Code compliant Statement of Marketable Coal Reserves for the source mine(s) showing total Marketable Coal Reserves; and which demonstrates 11 years of coal production for exporting through NCIG CET;
- (v) consent by the applicant to participate in the due diligence enquiries to be conducted on behalf of the financiers for NCIG Stage 2;
- (vi) lodgement of cash or a bond.

**Step 4:** Assess nominations against the criteria and requirements established for the financing of NCIG Stage 2 and those applicants that facilitate the most efficient and effective operation of the terminal, including on the basis of the information provided by Nominating Non-NCIG Producers in Step 3 and the outcome of the due diligence process (“**complying nominations**”). If complying nominations for less than or equal to 12 Mtpa, go to Step 6. If complying nominations for more than 12Mtpa, go to Step 5.

**Step 5:** If NCIG receives complying nominations which in aggregate exceed 12 Mtpa, PWCS will (on behalf of NCIG) allocate capacity to the relevant Nominating Non-NCIG Producers in accordance with a transparent process that:

- (i) is consistent with the principle that allocations of capacity are provided to as many of those Nominating Non-NCIG Producers as possible (including by reducing nominated allocations where appropriate, subject to the relevant Nominating Non-NCIG Producers confirming such reduction); and
- (ii) takes account of the views of HVCCC regarding the optimisation of coal chain utilisation.

If PWCS reduces the nominated allocation of an applicant and that applicant gives notice in accordance with the NCIG Nomination and Allocation Procedure that the reduction is not acceptable, PWCS must (in accordance with this Step 5) allocate the capacity that was to be allocated to that applicant to other applicants who have provided a complying nomination up to their nominated tonnage.

**Step 6:** Confirm indications with successful applicants. Applicants sign provisional SoPs, subject only to the occurrence of Financial Close and submit Bid Bond (the terms of provisional SoPs will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 in excess of the 12 Mtpa except for changes reflecting the fact that NCIG Producers hold shares in NCIG and in one case also contribute its share of the project finance). Any non-allocated tonnes remaining from the 12 Mtpa will be available for further nomination by all Producers (including NCIG Producers) by re-applying Steps 1-6 (with changes as necessary to acknowledge that NCIG Producers may participate in the process).

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**Step 7:** At Financial Close, applicants sign a binding SoPs. The terms of SoPs signed by Non-NCIG Producers will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 except for changes reflecting the fact that NCIG Producers hold shares in NCIG and in one case also contribute its share of the project finance.

#### 4. *Coordination of Nomination and Allocation*

(a) The provision of any information by NCIG to PWCS and NPC in January and July of each year for the purpose of updating those parties of its progress for Commitment of NCIG Stage 2 and advising whether it intends or reasonably expects to commence the NCIG Nomination and Allocation Procedure within the next 6 months.

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The provision of any notice by NCIG to PWCS and NPC before it commences the NCIG Nomination and Allocation Procedure and any coordination between NCIG, PWCS and NPC to ensure that, in the year that the NCIG Nomination and Allocation Procedure is conducted, the NCIG Nomination and Allocation Procedure is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

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(c) The provision by NCIG to PWCS of any:

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(i) Escrow Notice; or

(ii) notice advising that the NCIG process for allocating Non-NCIG Stage 2 Contracted Allocations has terminated.

for the purpose of enabling PWCS to manage Dual Nominations and determine which (if any) parts of a Dual Nomination will be exported through PWCS and which (if any) parts will not be exported through PWCS because they are or will be Contracted Allocations in respect of NCIG Stage 2 in accordance with clause 3.

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#### 4A. *Long term ship or pay contracts*

##### (a) Form of contract

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Any requirement for PWCS to offer capacity at the PWCS Terminals in accordance with the principles set out in sections 2, 2A, 2B, 2C and 2D on the terms of the agreed form of long term ship or pay contract.

Any requirement for NCIG to offer capacity at the NCIG Terminal in accordance with the principles set out in section 3 on the terms of each agreed form of long term ship or pay contract.

##### (b) Terminal Operators to be party to long term ship or pay contracts

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Any requirement for PWCS to ensure that it is a party to each long term ship or pay contract for capacity at the PWCS Terminals.

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Any requirement for NCIG to ensure that it is a party to each long term ship or pay contract for capacity at the NCIG Terminal.

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**(c) Implementation of long term ship or pay contracts**

Any requirement for the Terminal Operators to comply with, implement, enforce and otherwise observe (including by not waiving) and give effect to the provisions of the long term ship or pay contracts which give effect to the conduct described in this Part B.

**(d) Access to terminals by NCIG Producers**

Any exclusion, or any requirement to exclude, a Producer from accessing capacity or services at the NCIG Terminal or the PWCS Terminals on the basis that the Producer is an NCIG Producer and has not executed or acceded to the Deed of Undertaking and the NCIG Producer Deed Poll.

**5. Compression and decompression**

Any compression and/or decompression of any Producer's PWCS Contracted Allocation in accordance with the following:

**(a) When does compression apply?**

PWCS will compress PWCS Contracted Allocations when:

- (i) there is a PWCS Expansion Delay or a PWCS Expansion Shortfall at any time giving rise to a Capacity Shortfall; and
- (ii) there is a NCIG Stage 2 Delay or NCIG Stage 2 Shortfall.

**(b) Compression waterfall for delays or shortfall at PWCS**

When compression applies under section 5(a)(i), PWCS Contracted Allocations of the Producers will be compressed in the following order:

- (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed ("Voluntary Compressed Allocation"), the PWCS Contracted Allocation of those Producers will be compressed as follows:
  - (A) if the aggregate Voluntary Compressed Allocation exceeds the relevant Capacity Shortfall, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Qualified Contracted Allocation bears to the aggregate Qualified Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Capacity Shortfall; and
  - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Capacity Shortfall, the PWCS Load Point Allocations of those Producers will be compressed by the amount that each of them have elected to compress;
- (ii) second, if the compression referred to in section 5(b)(i) does not satisfy the Capacity Shortfall then, subject to section 5(d)(i), the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior

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to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:

- (A) if that Producer's Voluntary Compressed Allocation equals or exceeds that Producer's Unutilised Allocation, the Producer will not be subject to further compression under this section 5(b)(ii);
- (B) if that Producer's Voluntary Compressed Allocation is less than that Producer's Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:
  - (I) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
  - (II) the aggregate Compressed Allocation of all Producers to whom section 5(b)(i) and this section 5(b)(ii) applies equals the relevant Capacity Shortfall; and
- (iii) third, if the compression referred to in sections 5(b)(i) and 5(b)(ii) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer (including Producers who have compressed under sections 5(b)(i) and 5(b)(ii)) will be compressed pro rata in the proportion that their Qualified Contracted Allocation bears to the aggregate Qualified Contracted Allocation of all such Producers until the earlier to occur of the following:
  - (A) the aggregate Compressed Allocation of all Producers is equal to the relevant Capacity Shortfall; and
  - (B) the Compressed Allocation of that Producer under section 5(b)(i) and this section 5(b)(iii) (but not under section 5(b)(ii)) is equal to the General Compression Limit of that Producer.

If a Producer has more than one Load Point Allocation, PWCS will consult with the Producer on the application of the adjustment to the Load Point Allocations. If the Producer and PWCS cannot agree on the application of the adjustment, the adjustment will be applied pro rata across all of the Producer's Load Point Allocations.

***(ba) Residual Capacity Shortfall***

If the relevant Capacity Shortfall referred to in section 5(b) above cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with section 5(b) the PWCS Contracted Allocation of the relevant Producer (or Producers) who are seeking allocations of Capacity to be made available by the relevant PWCS Expansion will be compressed by the residual Capacity Shortfall until such time as additional PWCS Capacity becomes available to satisfy those PWCS Contracted Allocations.

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(c) **Compression waterfall for delays or shortfall at NCIG Stage 2**

When compression applies under section 5(a)(ii), PWCS aggregate Load Point Allocations of Producers will be compressed in the following order to accommodate all or part of the Non-NCIG Stage 2 Allocations at the PWCS Terminals:

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- (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed (“**Voluntary Compressed Allocation**”), the PWCS Contracted Allocation of those Producers will be compressed as follows:
  - (A) if the aggregate Voluntary Compressed Allocation exceeds the Non-NCIG Stage 2 Allocations, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Qualified Contracted Allocation bears to the aggregate Qualified Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant NCIG Capacity Deficit; and
  - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant NCIG Capacity Deficit, the PWCS Contracted Allocation of those Producers will be compressed by the amount that each of them have elected to compress; and
- (ii) second, if the compression referred to in section 5(c)(i) does not satisfy the NCIG Capacity Deficit, subject to section 5(d)(i), the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:
  - (A) if that Producer’s Voluntary Compressed Allocation equals or exceeds that Producer’s Unutilised Allocation, the Producer will not be subject to further compression under this section 5(c)(ii);
  - (B) if that Producer’s Voluntary Compressed Allocation is less than that Producer’s Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:
    - (I) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
    - (II) the aggregate Compressed Allocation of all Producers to whom section 5(c)(i) and this section 5(c)(ii) applies equals the NCIG Capacity Deficit.

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- (iii) If the NCIG Capacity Deficit cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with sections 5(c)(i) and 5(c)(ii) the NCIG Producers, must acknowledge that each of them is required to transfer to Non-NCIG Producers with Non-NCIG Stage 2 Allocations such amount of their Contracted Allocation as is necessary to satisfy the NCIG Capacity Deficit in accordance with the following timetable:

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<b>Period of delay or shortfall</b>	<b>Amount of Contract Allocations to be transferred until NCIG Capacity Deficit satisfied</b>	<b>Date of transfer</b>
Up to 6 months	3 Mtpa	<u>Target Completion Date</u>
Up to 9 months	6 Mtpa	<u>The date that is 6 months after the Target Completion Date</u>
Up to 12 months	9 Mtpa	<u>The date that is 9 months after the Target Completion Date</u>
Over 12 months	12 Mtpa	<u>The date that is 12 months after the Target Completion Date</u>

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The obligation of the NCIG Producers (other than Excluded NCIG Producers) to transfer Contracted Allocations to Non-NCIG Producers will be borne by NCIG Producers in the proportions set out in the NCIG Producer Deed Poll (which is calculated by reference to combined Contracted Allocations at NCIG Stage 1 and PWCS Base Tonnage as at the date of the deed),

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If the transfer is at PWCS, then PWCS may adjust the Compressed Allocation to account for any variation in the System Assumptions between the transferor Producer and the transferee Producer.

If NCIG Producers do not transfer to Non-NCIG Producers the relevant amount of Contracted Allocations that is required under the above paragraph within the time that is required, the PWCS Contracted Allocation of the NCIG Producers (other than Excluded NCIG Producers) will be reduced to cover the shortfall on a pro rata basis in the proportion the PWCS Contracted Allocation of each NCIG Producer (other than Excluded NCIG Producers) bears to the aggregate PWCS Contracted Allocation of all NCIG Producers (other than Excluded NCIG Producers).

If a Producer has more than one Load Point Allocation, PWCS will consult with the Producer on the application of the adjustment to the Load Point Allocations. If the Producer and PWCS cannot agree on the application of the adjustment, the adjustment will be applied pro rata across all of the Producer's Load Point Allocations.

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**(d) Exceptions to compression**

(i) The Contracted Allocation of a Producer will not be compressed under section 5(b)(ii) or section 5(c)(ii) if the Reviewer (acting reasonably and in good faith) is satisfied that:

(A) **delays:** the failure of that Producer to meet the Utilisation Threshold in the relevant period is caused by a delay:

(I) in the development of a new project of that Producer;

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- (II) in the expansion of an existing project of that Producer;
- (III) in the expansion of associated track facilities or channel works; or
- (IV) resulting from adverse geological and/or mining conditions affecting mine production,

which is outside the reasonable control of that Producer; or

(B) **NCIG Excluded Stage 2 Capacity:** in respect of any NCIG Producer (other than an Excluded NCIG Producer):

- (I) the Contracted Allocation of that NCIG Producer is no greater than the projected maximum production of that NCIG Producer from new and existing mines;
- (II) within 5 business days after the date on which NCIG Stage 2 is Committed, that NCIG Producer has specified (by written notice to PWCS and the Reviewer) a period (“Nominated Deferral Period”) during which any part of its Contracted Allocation which comprises allocations of Excluded Stage 2 Capacity (“**Relevant Allocation**”) will not be used by that NCIG Producer, provided that the Nominated Deferral Period may be extended by up to 3 years if that NCIG Producer gives notice to PWCS and the Reviewer of the extension 2 years prior to the end of the initial Nominated Deferral Period; and
- (III) during the Nominated Deferral Period, the NCIG Producer has used its best efforts to transfer the Relevant Allocation for the duration of the Nominated Deferral Period, including by making a bona fide open offer to the market to transfer the Relevant Allocation on customary terms, including by offering to transfer the Relevant Allocation in accordance with the Capacity Transfer System,

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and those sections will also not apply to a Producer that has otherwise offered to transfer all Unused Allocations of that Producer in accordance with section 7(iv), but only to the extent that so much of the Unused Allocations as are not actually transferred.

- (ii) Section 5(b)(iii) only applies to a Producer whose Group Contracted Allocation at the time the relevant Capacity Shortfall arises is 5 Mtpa or more.
- (iii) If:
  - (A) there is a PWCS Expansion Shortfall; and

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- (B) that PWCS Expansion Shortfall was caused or contributed to by failure in the design of the Expansion to deliver the required Capacity,

then the Contracted Allocation of NCIG Producers that is contracted pursuant to an offer of that NCIG Producer's PWCS Base Allocation will not be subject to compression under section 5(b)(iii) in respect of that PWCS Expansion Shortfall.

*(e) Exceptions to calculations for NCIG Producers*

- (i) If a Producer is an NCIG Producer (other than an Excluded NCIG Producer) then, for the purposes of calculating:

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- (A) the pro rata proportion of the aggregate PWCS Contracted Allocation of that Producer to be compressed under section 5(b)(iii);
- (B) the extent to which the compression of that Producer's aggregate PWCS Contracted Allocation will be reduced under section 5(f)(i)(D)(I); and
- (C) the amount which represents that Producer's General Compression Limit,

the Excluded Contracted Allocation of that Producer will be subtracted from that Producer's Contracted Allocation.

- (ii) Unless and until an election is made by an NCIG Producer (other than an Excluded NCIG Producer) in accordance with section 2C(c)(ii) (if any) and that election becomes effective, the Excluded Stage 1 Allocation of that NCIG Producer (including any Contracted Allocation Usage applicable to that Excluded Stage 1 Allocation) will not apply when determining the Utilisation Threshold of that NCIG Producer, provided that:

- (A) the NCIG Producer has developed a proposal (including terms and conditions) for transferring the Excluded Stage 1 Allocation which optimises the potential transfer of that Excluded Stage 1 Allocation; and
- (B) the Reviewer has agreed with that proposal.

*(f) Decompression*

- (i) If:
- (A) in the case of Contracted Allocations compressed under section 5(b), the relevant Capacity Shortfall is reduced; and
- (B) in the case of Contracted Allocations compressed or transferred under section 5(c), Capacity becomes available at NCIG Stage 2 for Non-NCIG Producers,

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then compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) will reduce accordingly such that:

(C) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under section 5(b)(i) or section 5(c)(i) and at any time that Producer wishes to decompress that amount, the amount compressed will be reduced pro rata amongst the Producers who have elected to decompress under this section 5(f)(i)(C) in the proportion that their Voluntary Compressed Allocation (as may be reduced under section 5(f)(iii)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;

(D) second:

(I) with respect to compression under section 5(b)(iii), the amount of any PWCS Contracted Allocation that is compressed under that section will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Qualified Contracted Allocation bears to the aggregate Qualified Contracted Allocation of all such Producers; and

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(II) with respect to the obligation of NCIG Producers referred to in section 5(c)(iii) to transfer Contracted Allocations to the relevant Non-NCIG Producers, that obligation will be reduced pro rata amongst those NCIG Producers in the same proportion that the NCIG Producers initially transferred their Contracted Allocations; and

(E) third, the amount of any Contracted Allocation that is compressed under section 5(b)(ii) or section 5(c)(ii) (as applicable) will be reduced pro rata amongst the Producers to whom the relevant section applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocations of all such Producers.

(iii) For the purposes section 5(f)(i)(C), the Voluntary Compressed Allocation of a Producer will be reduced by any portion of that Producer's PWCS Contracted Allocation which would have been compressed under section 5(b)(ii) or section 5(c)(ii) (as applicable) had that Producer not elected to compress under section 5(b)(i) or section 5(c)(i) (as applicable).

**(g) Cessation of compression**

Compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) will come to an end at the same time that the relevant Expansion Delay or Expansion Shortfall which triggered that compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) comes to an end.

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**(h) Calculation of compression and decompression**

- (i) The Reviewer will be responsible for calculating the extent to which each Producer is required to compress and decompress under this section 5.
- (ii) Subject to relevant confidentiality requirements, each Terminal Operator, must:
- (A) promptly provide the Reviewer with all relevant information that is needed for the Reviewer to accurately calculate the extent to which each Producer is required to compress and decompress under this section 5 and, in any event, provide the Reviewer with a report on the 1<sup>st</sup> business day of each month setting out such information as is reasonably specified by NPC for that purpose; and
  - (B) meet all of the reasonable costs and expenses incurred by the Reviewer in calculating the extent to which each Producer is required to compress or decompress under this section 5 where that compression was the result of an Expansion Shortfall or Expansion Delay of that Terminal Operator.
- (iii) A Producer or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this section 5(h) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
- (A) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision of the Reviewer; and
  - (B) appoint one of those persons to review the decision of the Reviewer.
- The provisions of this section 5(h) will apply to the review to be conducted by that person (with such changes as are necessary).
- (iv) Subject section 5(h)(v), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (v) If a review that is conducted under section 5(h)(iii) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this section 5(h)(v) will be extended by the period of the delay.

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## 6. Co-ordination of Expansion

Any co-ordination of expansion of terminal facilities or services in accordance with the following:

### (a) *Expansion by PWCS - When is obligation to expand triggered?*

- (i) Subject to section 6(a)(ii) and section 6(e), if:
  - (A) the Aggregate PWCS Contracted Allocations from time to time exceeds the Aggregate PWCS Available Capacity at that time (“Capacity Shortfall”); and
  - (B) the Capacity Shortfall cannot be fulfilled through voluntary Contracted Allocation Reductions,

PWCS must expand the PWCS Terminals to provide additional Capacity which, at a minimum, satisfies the Capacity Shortfall. However, PWCS will not be required to expand to meet any nominations for expansion capacity at the PWCS Terminals which nominate for allocations of less than 10 years.

- (ii) Subject to section 6(e), if the existing PWCS Terminals are not capable of being expanded further to provide the additional Capacity that is necessary to satisfy the Capacity Shortfall, PWCS must build a new terminal to provide that additional Capacity. However, for the avoidance of doubt, nothing in this section 6 precludes any person other than PWCS from undertaking a project to construct a new terminal.
- (iii) If at any time PWCS is required to build a new terminal under section 6(a)(ii) (other than Terminal 4, which is specifically addressed in section 10), then:
  - (A) PWCS must use its best endeavours to identify and acquire appropriate sites for that new terminal; and
  - (B) before commencing any work to undertake the construction of that new terminal PWCS must first use its best endeavours to expand the PWCS Terminals that exist at that time to satisfy the relevant Capacity Shortfall.

### (b) *Expansion by PWCS - Time for completion*

- (i) If PWCS is required to expand a PWCS Terminal under section 6(a)(i) then, subject to section 6(e), that expansion must be Completed:
  - (A) in the case of Master Plan Completion Phase 1, two years after the date on which the relevant Capacity Shortfall which triggered that Expansion in accordance with section 6(a)(i) arises;

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(B) in the case of Master Plan Completion Phase 2, two years after the later of:

(I) the date on which the relevant Capacity Shortfall which triggered that Expansion in accordance with section 6(a)(i) arises; and

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(II) the date on which that part of the Hunter River to which PWCS requires access is validated by the relevant authority as clean following completion of the relevant part of the BHP Billiton Hunter River Remediation project; and

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(C) in any other case, within 2 years after the date on which the relevant Capacity Shortfall which triggered that Expansion in accordance with section 6(a)(i) arises.

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(ii) If PWCS is required to build a new terminal under section 6(a)(ii) then, subject to section 6(e), that terminal must be capable of meeting the Capacity Shortfall in respect of which the obligation to build the terminal was triggered within 4 years after the date on which that Capacity Shortfall arises.

(iii) PWCS must advise NPC and affected Producers if a PWCS Expansion Delay or PWCS Expansion Shortfall is expected, including the date on which the PWCS Expansion Delay or PWCS Expansion Shortfall is expected to come into existence and come to an end. PWCS must also advise NPC and affected Producers of any changes to that information.

*(c) Development of NCIG Stage 2*

NCIG must not commence construction of NCIG Stage 2 unless it has first offered to allocate 12 Mtpa of Capacity at NCIG Stage 2 to Non-NCIG Producers under Long Term Ship or Pay Contracts in accordance with the NCIG Nomination and Allocation Procedure.

NCIG must, prior to NCIG Stage 2 being Committed:

(i) take all reasonable steps to ensure that the design and construction of NCIG Stage 2 does not interfere with the ability of PWCS to construct and efficiently operate Terminal 4;

(ii) where there is such interference, use its best endeavours to minimise that interference; and

(iii) consult with PWCS regarding any potential interference.

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(A) . PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion, in which case PWCS must provide all information, records and personnel that the Minister requires in order to consider such request; and¶  
(B) . having considered the request, the Minister may (in the Minister's absolute discretion) agree to relieve or suspend PWCS of its obligation to undertake that PWCS Expansion.¶

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(d) *Time for completion of NCIG Stage 2*

(i) NCIG Stage 2 must be capable of delivering the Capacity that is contracted by Non-NCIG Producers at NCIG Stage 2 within the following time periods:

(A) if NCIG Stage 2 is Committed on or before 31 December 2009, within 4 years after the date on which NCIG Stage 2 is Committed; and

(B) otherwise, within 2 years (or such other time period determined in accordance with section 6(e)) after the date on which NCIG Stage 2 is Committed.

(ii) For the purposes of section 6(d)(i), NCIG must notify each of NPC and PWCS of the date on which NCIG Stage 2 is Committed within 5 Business Days after that date.

(iii) NCIG must advise NPC, PWCS and affected Producers if a NCIG Stage 2 Delay or NCIG Stage 2 Shortfall is expected, including the date on which the NCIG Stage 2 Delay or NCIG Stage 2 Shortfall is expected to come into existence and come to an end. NCIG must also advise NPC, PWCS and affected Producers of any changes to that information.

(e) *Process for review*

(i) Subject to paragraph (iii):

(A) in the case of PWCS, if the Reviewer (acting reasonably and in good faith) notifies PWCS that it is satisfied that

(aa) PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that Expansion in a timely manner (including by taking steps to identify ways of redesigning the Expansion in a manner that would assist in obtaining the Development Consents); and

(bb) notwithstanding PWCS' efforts, the Lessee has been unable to obtain, or is unlikely to obtain, the relevant Development Consents,

the obligation for PWCS to undertake an Expansion under clause 6(a) will be suspended and will recommence at a time determined in accordance with paragraph (iii);

(B) in the case of either Terminal Operator, if a Force Majeure Event prevents an Expansion being undertaken, the obligation to undertake that Expansion under clause 6(a) or clause 6(d) (as applicable) will be suspended and will recommence

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at a time determined in accordance with paragraph (iii);

(C) in the case of either Terminal Operator, if a Force Majeure Event will delay Completion of an Expansion beyond the date by which that Expansion is required to be Completed under clause 6(b) or clause 6(d)(i), the time for Completion of that Expansion will be extended in accordance with paragraph (v); and

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(D) in the case of PWCS, if having used its best efforts to obtain finance for the purposes of undertaking a particular PWCS Expansion, PWCS is unable to obtain such finance then:

(aa) PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion; and

(bb) having considered the request, the Minister may (in the Minister's absolute discretion) agree to relieve or suspend PWCS of its obligation to undertake that PWCS Expansion.

(ii) The relevant Terminal Operator must give NPC a notice setting out the full particulars of a Force Majeure Event as soon as reasonably practicable and, if a notice is delayed, any extension of time to which that Terminal Operator is entitled under 6(e) will be reduced by the period of that delay.

(iii) If the obligation to undertake an Expansion under clause 6(a) is relieved or suspended under paragraph 6(e)(i), then that obligation will recommence at a time determined by the Reviewer or:

(i) in the case of paragraph (i)(A), when the relevant Development Consents are subsequently obtained, in which case the time for meeting the requirements of clause 6(b) will be extended by the period commencing on the date the Reviewer gives notice in accordance with paragraph (i)(A) and ending on the date that the obligation recommences;

(ii) in the case of paragraph (i)(B), when the relevant Force Majeure Event ceases to prevent the Lessee from undertaking the Expansion, in which case the time for meeting the requirements of clause 6(b) will be extended by the period commencing on the date the Force Majeure Event was first notified in accordance with paragraph (i)(B) and ending on the date that the obligation recommences; and

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- (iii) in the case of paragraph (i)(D), when PWCS obtains finance for the purposes of undertaking the relevant Expansion, in which case the time for meeting the requirements of clause 6(b) will be extended by the period commencing on the date the Minister gives notice in accordance with paragraph (i)(D) and ending on the date that the obligation recommences.
- (iv) The time for Completion of an Expansion under clauses 6(b)(i)(C) or 6(d)(i)(B) will be extended if:
- (A) the Reviewer (acting reasonably and in good faith) is satisfied that:
- (I) there are Engineering Limitations that will delay Completion of that Expansion beyond the scheduled time of Completion; or
- (II) notwithstanding that the relevant Terminal Operator undertaking that Expansion has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that Expansion in a timely manner (including by taking steps to identify ways of redesigning the Expansion in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake that Expansion will not be obtained within a time that would reasonably allow the relevant Terminal Operator to Complete the Expansion in accordance with the relevant timeframe for that Expansion under this section 6.
- (v) The length of any extension of time to be given under section 6(e)(i)(C) or 6(e)(iv) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
- (A) in respect of an extension of time for Engineering Limitations, the length of time it would reasonably take to remedy or otherwise address the relevant Engineering Limitations;
- (B) in respect of an extension of time for delays in obtaining Development Consents, the length of time it would reasonably take to obtain the Development Consents, including the period of time it would reasonably take to modify engineering designs to comply with the likely terms of any Development Consent; and
- (C) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force

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Majeure Event and the likely period of the delay it will cause to the Completion of the Expansion.

(vi) It is a condition of any extension of time that is granted under section 6(e)(v) that:

(A) the relevant Terminal Operator must take all reasonable and prudent steps to minimise the impact that the relevant Engineering Limitations or Force Majeure Event (as applicable) may have on the development and construction of the relevant Expansion (including the time for Completion of that Expansion);

(B) in the case of a PWCS Expansion, if Capacity can be realised from the PWCS Expansion it must be made available to Producers at the earliest possible time, notwithstanding that such Capacity may not fully satisfy the relevant Capacity Shortfall which triggered that PWCS Expansion; and

(C) in the case of NCIG Stage 2, if Capacity can be realised from NCIG Stage 2 it must be made available to relevant Non-NCIG Producers, notwithstanding that such Capacity may not fully satisfy all Non-NCIG Stage 2 Allocations,

and each Terminal Operator must also provide information to NPC regarding the conditions set out in paragraph (vi) (including the steps it is taking and proposes to take to comply with those conditions).

(vii) The relevant Terminal Operator or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this section 6(e) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:

(A) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision; and

(B) by agreement with the relevant Terminal Operator (as the case requires), appoint one of those persons to review the decision of the Reviewer.

The provisions of this section 6(e) will apply to the review to be conducted by that person (with such changes as are necessary).

(viii) Subject to section 6(e)(ix), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.

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(ix) If a review that is conducted under section 6(e)(vii) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this section 6(e)(vii) will be extended by the period of the delay.

**7. Capacity Transfers**

- (i) The conduct of capping the fee that a Producer with a Contracted Allocation at the PWCS Terminals may charge another to use a portion of its Contracted Allocation (“**Relevant Proportion**”) at no more than 5% of the fee charged by PWCS for the Relevant Portion.
- (ii) The conduct of capping the fee that a Producer with a Contracted Allocation at the NCIG Terminals may charge another to use a portion of its Contracted Allocation (“**Relevant Proportion**”) so that such fees do not exceed the fees which are charged to that Producer for the Relevant Portion by NCIG by more than 5%.
- (iii) The conduct of sharing of information and coordination between the Applicants (and other participants in the Hunter Valley coal industry) for the purpose of developing and implementing a transparent centralised system to facilitate and manage the offering and acquisition of Unused Allocations (“**Capacity Transfer System**”), including the appointment of a Capacity Transfer System Working Group and CTS Administrator.
- (iv) Making and/or giving effect to any requirement:
  - (A) for Producers to use the Capacity Transfer System to transfer Unused Allocations; ,
  - (B) that Producers who do not use their best efforts to transfer their Unused Allocations on customary terms (including by making a bona fide attempt to transfer Unused Allocations in accordance with the Capacity Transfer System) will not be entitled to claim relief from anti-hoarding compression in accordance with section 5(d)(i) in respect of those Contracted Allocations; and
  - (C) for Producers to pay a fee (including the setting or varying of that fee by the Capacity Transfer System Working Group or CTS Administrator) for using or registering with the Capacity Transfer System for the purpose of covering the cost of establishing, administering, operating and maintaining the Capacity Transfer System.
- (v) The conduct of PWCS in:
  - (A) declining to accept a transfer of Contracted Allocation, having regard to the recommendations of HVCCC, the System

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 <#>If section 6(b)(i)(C) applies then PWCS may trigger a review under this section 6(e) of the time in which a PWCS Expansion is required to be Completed under that clause by submitting a request to NPC prior to contracting allocations. ¶  
 <#>If section 6(d)(i)(B) applies then, at any time prior to the date on which NCIG Stage 2 is Committed, NCIG may trigger a review under this section 6(e) of the time in which NCIG Stage 2 is required to be Completed under that section by submitting a request to NPC. ¶  
 <#>Subject to section 6(e)(v), the obligation to undertake a PWCS Expansion under section 6(a) will be suspended if: ¶  
 <#>the Reviewer (acting reasonably and in good faith) is satisfied that: ¶  
 (I) PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents); and ¶  
 (II) notwithstanding PWCS’s efforts, PWCS has been unable to obtain, or is unlikely to obtain, the relevant Development Consents; or ¶  
 <#>a Force Majeure Event prevents that PWCS Expansion being undertaken. ¶  
 <#>Subject to section 6(e)(vi), the obligation to Complete NCIG Stage 2 under clause 6(d) will be suspended if a Force Majeure Event prevents NCIG Stage 2 being Completed. ¶  
 <#>If the obligation to undertake a PWCS Expansion under section 6(a) is suspended under section 6(e)(iii), that obligation will recommence at a time determined by the Reviewer or: ¶  
 <#>in the case of section 6(e)(iii)(A), when the relevant Development Consents are subsequently obtained; and ¶  
 <#>in the case of section 6(e)(iii)(B), when the relevant Force Majeure Event ceases to prevent PWCS from undertaking the PWCS Expansion; and. ¶  
 <#>in the case of section 6(b)(iii), when PWCS obtains financ’ ... [4]

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Assumptions and operating protocols, and alignment of contractual entitlements; or

(B) adjusting transferred allocations to account for any variation in the System Assumptions of the transferring Producer and transferee Producer,

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(vi) Any capacity at the Terminals that is lost due to a transfer of Contracted Allocation being attributed to the transferring Producer unless agreed by the transferring Producer and transferee Producer and notified to PWCS or NCIG (as the case requires) prior to the transfer.

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#### 7A Assignments of Capacity

(i) The conduct of PWCS in:

(A) declining to accept an assignment of Contracted Allocation, having regard to the recommendations of HVCCC, the System Assumptions and operating protocols, and alignment of contractual entitlements; or

(B) adjusting assigned allocations to account for any variation in the System Assumptions of the assigning Producer and assignee Producer.

(ii) In relation to the PWCS Terminals, the conduct of capping the fee that a Producer may charge to assign or novate its entire Load Point Allocation at no more than 5% of the fees that would have been charged by PWCS to the Producer for the use of that Load Point Allocation in the year in which the assignment or novation becomes effective.

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(iii) In relation to the NCIG Terminal, the conduct of capping the fee that a Producer may charge to assign or novate its entire Contracted Allocation at no more than 5% of the fees that would have been charged by NCIG to the Producer for the use of that Contracted Allocation in the year in which the assignment or novation becomes effective.

#### 7B Pre-emptive rights of Non-NCIG Producers over Non-NCIG Stage 2 Allocations

The conduct of Non-NCIG Producers in giving effect to the provisions of the T Class ship or pay agreements which grant pre-emptive rights to other Non-NCIG Producers in respect of their Non-NCIG Stage 2 Allocations.

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#### 8. Levy

(i) The setting, making, varying and/or giving effect to any industry levy (to be applied to all Terminal Users that contract to utilise the Terminals under a Long Term Ship or Pay Contract or short term contract (including those that do not utilise the Expansion) on a per tonne basis across all coal exported from the Terminals) that may be

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applied by PWCS or NCIG to assist with meeting the cost of any Unallocated Expansion Capacity ("Levy") in accordance with the Levy Protocols, including the following:

(A) A Terminal Operator may elect to apply the Levy whenever:

- (I) that Terminal Operator Completes an Expansion; ,
- (II) the Administrator determines that the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion ("Unallocated Expansion Capacity"); and
- (III) an Administrator has been established.

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provided that NCIG must not apply the Levy to any Excluded Stage 2 Capacity.

(B) Subject to paragraph (C), the Terminal Operator will use its best endeavours to allocate the Unallocated Expansion Capacity to any Producer either under a Long Term Ship or Pay Contract or under any short term contractual arrangement in accordance with the Nomination and Allocation Procedures.

(C) Whilst NCIG has not Committed to NCIG Stage 2, NCIG Producers will only be entitled to nominate for allocations of Unallocated Expansion Capacity at PWCS Terminals under fixed term contractual arrangements for the maximum term then available not exceeding 2 years.

(D) If the Levy is applied in respect of any Unallocated Expansion Capacity, the Levy will cease to apply when the Administrator determines in its reasonable opinion that:

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(aa) the total expansion cost of Unallocated Expansion Capacity is recovered; or

(ab) all Expansion Capacity (as that term is defined in the Levy Protocols) is Contracted under Long Term Ship or Pay Contracts; or

(ac) the costs of Levy administration would exceed all remaining total expansion costs to be otherwise recovered through the Levy.

or until the Terminal Operators agree that the Levy should cease to apply.

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(E) Where the relevant Unallocated Expansion Capacity is allocated under any short term contractual arrangement the Levy will be adjusted accordingly.

(ii) The establishment of a Levy Working Group and the sharing of information and coordination between the Applicants and any Levy

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Working Group for the purpose of developing and implementing protocols for the calculation, charging and collection of the Levy (“Levy Protocols”).

- (iii) Sharing of information and co-ordination between the Applicants, the Levy Working Group and the Administrator for the purpose of calculating the amount of, and period for charging for, the Levy in accordance with the Levy Protocols.

**9. Contractual alignment and access to services**

- (a) The making or giving effect to:

- (i) any limitation or restriction on the offering or contracting of available capacity or services by either PWCS, NCIG or any above or below rail service provider in the Hunter Valley in accordance with the “System Design from 1 July 2009” principles set out in the Contractual Alignment Principles in Attachment 2.
- (ii) the development and implementation of any “System Assumptions” (including any agreement in relation to system capacity, in whole or in part) to define the capacity being constructed and purchased under long term contracts as set out in Attachment 2;
- (iii) any adjustment or variation to contracted allocations or determination of capacity losses based on the Contract Performance Management process set out in the Contractual Alignment Principles in Attachment 2; and
- (iv) sharing of information and coordination between the Applicants, Producers, the HVCCC, above and below rail providers and others for the purpose of:
  - (A) developing a Capacity Transfer System; and
  - (B) to facilitate the operational coordination and efficient operation of different parts of the coal chain,

in each case as contemplated by the Contractual Alignment Principles in Attachment 2.

- (b) The conduct of PWCS or NCIG:

- (i) requiring Producers to have adequate entitlements to track and train haulage upon lodging any application under their contracts for the provision of coal handling services in respect of each vessel to be loaded; and
- (ii) refusing to supply coal handling services if a Producer has inadequate track or train delivery entitlements in respect of the application for a vessel to be loaded.

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(c) The conduct of PWCS in refusing to supply coal handling services if a Producer is an NCIG Producer and the Producer has not provided a notice from NPC that NPC is satisfied that the Producer is bound by the terms and conditions of both the Deed of Undertaking and the NCIG Producer Deed Poll.

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(d) If, at any time:

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(i) the capacity of a Terminal is affected by the construction or integration of any Expansion to the Terminal;

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(ii) PWCS has not met the assumptions relating to the PWCS Terminals as set out in the System Assumptions;

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(iii) the capacity of a Terminal is affected by the weather; or

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(iv) there is a Force Majeure Event.

PWCS may make one or more downward adjustments to the Load Point Allocations of a Producer and any other relevant Producers for the relevant period in a manner that reasonably reflects the lost capacity of the Terminals. Any adjustment will generally be on a pro rata basis unless there are specific circumstances which affect only certain Producers, in which case the adjustment will be on a pro-rate basis for only those affected Producers.

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In deciding the amount of any downward adjustment to the Load Point Allocations of the Producer and any other Producer, PWCS may have regard to the System Assumptions and any recommendations made by HVCCC.

(e) Vessel queue:

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(i) If a Producer is utilising the turn of arrival system for vessels, then if at any time an excessive vessel queue arises or is forecast to arise which PWCS reasonably determines is due to unutilised PWCS Capacity arising from the random nature of vessel arrivals during the relevant period under the turn of arrival system, PWCS may make one or more downward adjustments on a pro rata basis to the Load Point Allocations of the Producer and any other relevant customers who are utilising the turn of arrival system for the relevant period, in a manner that reasonably reflects the lost capacity of the Terminals.

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(ii) In deciding the amount of any downward adjustment to the Load Point Allocations of the Producer and any other customer, PWCS may have regard to the System Assumptions and any recommendations made by HVCCC.

## 10. Terminal 4

Any requirement in relation to the structure, ownership or operation of Terminal 4 that:

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- (a) the Capacity Framework Arrangements set out in this Part B of Attachment 1 will apply to the provision of Capacity at Terminal 4 in the same way as they apply to all other terminals owned and controlled by PWCS;
- (b) access to capacity will be open to all Producers on a non-discriminatory basis, except to the extent discriminatory treatment is expressly contemplated in this Part B of Attachment 1; or
- (c) PWCS must, prior to undertaking the construction of Terminal 4:
  - (i) take all reasonable steps to ensure that the design and construction of Terminal 4 does not interfere with the ability of NCIG to construct and efficiently operate NCIG Stage 2;
  - (ii) where there is such interference, use its best endeavours to minimise that interference; and
  - (iii) consult with NCIG regarding any potential interference.

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**11. Common charges at PWCS Terminals**

Any requirement for PWCS to ensure that:

- (a) the charges applicable to services provided at a PWCS Terminal are the same as charges applicable to like services provided at each other PWCS Terminal; or
- (b) the quantum of the fees it charges to a person for particular services are the same quantum as the fees that it charges to any other person for the same services (although this will not prevent PWCS from applying a different charging method for those fees).

Deleted: 11. Other arrangements specified in the Implementation Memorandum¶ Any other conduct which gives effect to the provisions of the Implementation Memorandum and which is not addressed in Sections 1-10 above.¶

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**12. Information sharing**

- (a) Any conduct which involves the provision of information from one Applicant to another, or the sharing of information between two or more Applicants, for the purposes of giving effect to the conduct described in this Part B.
- (b) Any conduct which involves the provision of information from the Reviewer to one or more Applicants, from one or more Applicants to the Reviewer or the sharing of information between the Reviewer or one more Applicants, for the purposes of giving effect to the conduct described in this Part B.

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## PART C - Dictionary

In this Attachment 1

**Administrator** means the entity created to administer the application, calculation, charging and collection of the Levy, the release of Levy proceeds and the determination of when the Levy ceases to apply.

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**Aggregate PWCS Available Capacity** means the aggregate Capacity of the PWCS Terminals from time to time.

**Aggregate PWCS Contracted Allocations** means the aggregate of all Contracted Allocations at PWCS Terminals. For the purposes of section 6, this:

- (a) will be taken to be the aggregate amount of the Producers' Contracted Allocations before any compression or adjustment under sections 2D, 5(b), 5(c), 9(d) and 9(e) is applied to those Contracted Allocations; and
- (b) excludes any Contracted Allocation which is the subject of a Dual Nomination (or any part of a Dual Nomination) until that Contracted Allocation becomes an operative Contracted Allocation

**Allocation Period** means for the period 1 January 2010 to 31 December 2011, where the Producer has aggregate Load Point Allocations in the relevant year:

- (a) greater than 5 Mtpa, a month; or
- (b) less than or equal to 5 Mtpa, a quarter.

From 1 January 2012 onwards, where the Producer has aggregate Load Point Allocations in the relevant year,

- (c) greater than 3 Mtpa, a month; or
- (d) less than or equal to 3 Mtpa, a quarter,

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**Associate** means, in relation to a person:

- (a) a Related Body Corporate of that person;
- (b) a person, or the trustee or manager of a trust, which Controls that person;
- (c) a person, or the trustee or manager of a trust, which that person Controls;
- (d) a Related Body Corporate of a person included in paragraph (a), (b) or (c);
- (e) a partnership or an incorporated or unincorporated joint venture in which the person, or any one or more of the persons mentioned in paragraph (a), (b), (c) or (d), holds an interest;

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- (f) a body corporate, or the trustee or manager of a trust, which one or more of the persons mentioned in paragraph (a), (b), (c), (d) or (e) alone or together Controls; or
- (g) the trustee of a trust (including a discretionary trust) of which a person included in paragraph (a), (b), (c), (d) or (e) is a beneficiary (whether or not through one or more other trusts, including discretionary trusts).

For the purposes of this definition, a reference to a partnership or an unincorporated joint venture is also a reference to the persons who are parties to that partnership or unincorporated joint venture.

**Base Allocation** means, in respect of a Producer, that part of the PWCS Base Tonnage offer for the year 2009 and 2010 (respectively) that is accepted by that Producer and contracted as Load Point Allocations.

**Capacity** means in respect of:

- (a) the Terminals, the PWCS Capacity; and
- (b) the NCIG Terminal, the coal export capacity of the NCIG Terminal measured in Mtpa (being the amount of coal able to be loaded onto vessels) in the relevant period having regard to the mode of operation and System Assumptions.

**Capacity Framework Agreement** means the agreement of that name to be entered into between NPC, NCIG and PWCS.

**Capacity Shortfall** has the meaning given in section 6(a)(i)(A) of Part B.

**Capacity Transfer System** has the meaning given in section 7(iii).

**Committed** means, in respect of NCIG Stage 2, the point in time as notified to PWCS in writing by NCIG when NCIG is contractually bound to make available Capacity at NCIG Stage 2 to Non-NCIG Producers pursuant to executed and binding long term ship or pay contracts, and **Commit** and **Commitment** have corresponding meanings.

**Completed** means, in respect of an Expansion, that Expansion is commissioned, available to receive coal and is capable of satisfying the Capacity that is required to be satisfied by that Expansion under this document.

**Compressed Allocation** means:

- (a) in respect of a Producer at any time, the extent to which that Producer's Contracted Allocation has been compressed under section 5 of Part B; and
- (b) in respect of all Producers at any time, the extent to which the Contracted Allocations of all Producers has been compressed in accordance with section 5 of Part B at that time.

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**Deleted:** the coal export capacity of the relevant Terminal measured in Mtpa having regard to the mode of operation and system assumptions.¶

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**Contracted Allocation** means, in respect of a Producer, the aggregate amount of Capacity which the Terminal Operators are contractually bound to make available to that Producer, excluding allocations of Capacity for coal that is delivered by road transport to the PWCS Terminal located at Carrington.

**Contracted Allocation Reduction** means a reduction in the Contracted Allocation of a Producer at the PWCS Terminals as agreed between that Producer and PWCS from time to time.

**Contracted Allocation Usage** means, in respect of a Producer at any time, the use by that Producer of that Producer's Contracted Allocation, not including any part of that Producer's Contracted Allocation that has been transferred to another Producer through a capacity transfer or swap, plus:

- (a) any portion of that Producer's Contracted Allocation which has not been used by the Producer as a direct result of a Force Majeure Event; and
- (b) that Producer's use of any NCIG Contracted Allocation of another Producer that is acquired through a capacity transfer or swap.

The adjustments resulting from the application of sections 2D, 5(b), 5(c), 9(d) and 9(e) will be incorporated into the calculation of a Producer's PWCS Contracted Allocation and, accordingly, will not be added to the calculation of that Producer's Contracted Allocation Usage.

**Control** has the meaning given in the *Corporations Act 2001* (Cth).

**Deed of Undertaking** means the deed to be entered into between NPC, NCIG and NCIG Producers which gives effect to all of the provisions initially drafted for inclusion in the NCIG Agreement for Lease, as well as any other relevant or incidental provisions agreed between NPC and NCIG during discussions and negotiations of the long form documentation.

**Development Consents** means all licences, consents, approvals, permits, authorisations, certificates of registration or other concessions issued by a government authority which are required to be obtained or entered into in respect of any part of any Expansion.

**Dual Nomination** means a nomination for Capacity at the PWCS Terminals for which a Non-NCIG Producer has submitted a corresponding nomination to NCIG for the same annual tonnage in NCIG Stage 2, and which is identified as a "Dual Nomination".

**Engineering Limitations** means, in respect of an Expansion:

- (a) the time for delivery of the Expansion in the most efficient and effective manner (having regard to the then prevailing practice for comparable terminals in Australia) will exceed the time in which that expansion is required to be Completed under the relevant document; or
- (b) any engineering limitation in the construction of that Expansion that:

**Deleted:** (a) that Producer's use of any Contracted Allocation of another Producer that is acquired through a capacity transfer or swap; and¶  
(b) any portion of that Producer's PWCS Contracted Allocation which has been compressed in accordance with section 5 of Part B during the 18 month period immediately prior to that time; and¶

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- (i) is of a type that a reasonable and prudent person of sufficient experience, knowledge, qualification and skill would not have foreseen or allowed for when preparing the project plan and project timeline for that Expansion, including:
  - (A) a latent condition affecting the site the subject of the Expansion; or
  - (B) any delay or excessive lead times in the supply of major items of equipment by a supplier;
- (ii) is beyond the reasonable control of the relevant Terminal Operator and not attributable to an employee, agent or Related Body Corporate of that Terminal Operator;
- (iii) the relevant Terminal Operator or any Related Body Corporate of that Terminal Operator could not reasonably have provided against before a specified date;
- (iv) the relevant Terminal Operator could not reasonably have avoided or overcome; and
- (v) has been notified to the Reviewer promptly after the date on which the relevant Terminal Operator undertaking that Expansion became aware of that engineering limitation (whether before or after commencement of construction of that Expansion).

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**Escrow Notice** means a notice from NCIG stating the following:

- (a) each Non-NCIG Producer who submitted a nomination for NCIG Stage 2 and the amount nominated by that Non-NCIG Producer;
- (b) whether or not that Non-NCIG Producer's application has been successful and the date by which each of them was required to execute and deliver a long term ship or pay agreement to accept the allocation that was offered; and
- (c) in respect of each successful Non-NCIG Producer that has executed a long term ship or pay agreement:
  - (i) confirmation that such agreement is being held in escrow; and
  - (ii) the tonnage amount to be contracted by that Non-NCIG Producer if NCIG elects to proceed with NCIG Stage 2 construction and financing.

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**Excess Capacity** means in respect of PWCS, PWCS Capacity less the aggregate of all Load Point Allocations for Producers, if a positive amount.

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**Excluded Contracted Allocation** means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1 or through Excluded Stage 2 Capacity.

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**Excluded NCIG Producer** means Gloucester Coal Limited (ABN 66 008 881 712) and each NCIG Producer that is a wholly-owned subsidiary of Gloucester Coal Limited as at 31 August 2009 for so long as Gloucester Coal Limited satisfies all of the following criteria:

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- (a) it is a publicly listed company;
- (b) it is not an NCIG Shareholder;
- (c) it is not a wholly-owned subsidiary of:
  - (i) an NCIG Shareholder; or
  - (ii) any Associate of that NCIG Shareholder;
- (d) it is an NCIG Producer only because it is controlled by an entity which also controls an NCIG Shareholder.

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For the avoidance of doubt, Gloucester Coal Limited and each NCIG Producer that is a wholly-owned subsidiary of Gloucester Coal Limited will cease to be an Excluded NCIG Producer if at any time Gloucester Coal Limited fails to satisfy any of the criteria set out in paragraphs (a), (b), (c) or (d) above.

**Excluded Stage 1 Allocation** means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1.

**Excluded Stage 2 Capacity** means that portion of the Capacity available at NCIG Stage 2 which is not required to be offered for allocation to Non-NCIG Producers in accordance with section 6(c) of Part B.

**Expansion** means NCIG Stage 2 and each PWCS Expansion (as applicable).

**Expansion Delay** means a PWCS Expansion Delay or an NCIG Stage 2 Delay (as applicable)

**Expansion Shortfall** means a PWCS Expansion Shortfall or an NCIG Stage 2 Shortfall (as applicable).

**Force Majeure Event** means an event or circumstance which:

- (a) in relation to a party:
  - (i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;
  - (ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing the relevant document; and
  - (iii) that party could not reasonably have avoided or overcome; and

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- (b) is not substantially attributable to any breach of the relevant document by one or more of the other parties,

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and so long as the requirements of paragraphs (a) and (b) have been satisfied, may include:

- (c) an act of God, lightning, storm, flood, hurricane, typhoon, cyclone, volcanic activity, fire, earthquake, explosion or peril of navigation;
- (d) theft, malicious damage, strike, lockout, boycott or any a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party;
- (e) a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party;
- (f) act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, terrorism, insurrection, civil commotion, epidemic, rebellion, military or usurped power or martial law;
- (g) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (h) embargo, power or water shortage;
- (i) confiscation by order of any government;
- (j) the introduction of or change to legislative requirements or regulations applicable to an Expansion;
- (k) a direction by a municipal, public or statutory authority (not caused by a failure of the affected party to comply with legislative requirements);
- (l) a delay by a municipal, public or statutory authority (not caused by the affected party);
- (m) the affected party is unable to secure a lease from the applicable NSW State Government authority or department for land that is needed to carry out an Expansion but for which that affected party does not already hold a lease; or
- (n) failure by a financier to meet its commitment to provide funding for an Expansion where that failure is not due to the financier exercising or not exercising (as the case may be) any rights its has against the affected party under the financing documents or otherwise.

**General Compression Limit** means, in respect of a Producer:

- (a) 5% of that Producer's Qualified Contracted Allocation in the calendar year in which that Producer's aggregate Load Point Allocations is first compressed for a PWCS Expansion Delay or PWCS Expansion Shortfall under section 5(b)(iii) of Part B; and

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- (b) for each calendar year thereafter in which that PWCS Expansion Delay or PWCS Expansion Shortfall (and any other concurrent PWCS Expansion Delay or PWCS Expansion Shortfall) subsists, an additional 5% of that Producer's Qualified Contracted Allocation.

**Group Contracted Allocation** means, in respect of a Producer at any time, the Qualified Contracted Allocation of that Producer and other Producer who is a member of the Producer Group of the Producer at that time.

HVCCC means Hunter Valley Coal Chain Coordinator Limited or any body providing planning and logistics services for the Hunter Valley coal chain.

Levy Protocols means the Levy Protocols referred to in section 8 and set out in Schedule A.

Load Point means a single or shared facility where coal is loaded onto trains for transportation through the Hunter Valley rail corridor.

Load Point Allocation means the volume of services to be provided by PWCS, expressed in tonnes, allocated to a Producer in respect of coal to be delivered to PWCS from an individual Load Point.

NCIG Capacity Deficit means the extent to which NCIG Stage 2 fails to satisfy the Non-NCIG Stage 2 Allocations due to either a NCIG Stage 2 Delay or a NCIG Stage 2 Shortfall.

**NCIG Capacity Framework Documents** means:

- (a) the Deed of Variation between NCIG and NPC amending the terms of the Agreement for Lease for the land on which NCIG Stage 1 and NCIG Stage 2 is to be constructed in order to give effect to the relevant provisions of the Capacity Framework Arrangements;
- (b) the Capacity Framework Agreement between PWCS, NCIG and NPC which gives effect to the relevant provisions of the Capacity Framework Arrangements; and
- (c) the Deed of Undertaking.

NCIG Contracted Allocation means in respect of a Producer, the aggregate amount of Capacity that NCIG is contractually bound to make available to that Producer at the NCIG Terminal.

NCIG Party means NCIG and each NCIG Producer who is a party to (or is otherwise bound by) the Deed of Undertaking.

NCIG Producer Deed Poll means the Deed Poll executed on or about 31 August 2009 by NCIG and certain NCIG Producers in favour of NPC and certain Non-NCIG Producers with Contracted Allocations at NCIG Stage 2.

NCIG Member means each shareholder of NCIG Holdings Pty Ltd (ACN 124 700 483) from time to time.

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**NCIG Producer** means each NCIG Member and any Producer who is an Associate of that NCIG Member from time to time, excluding any Producer that delivers coal for export solely by road transport.

**NCIG Stage 1** means the terminal operated by NCIG up to a total Capacity of 30 Mtpa.

**NCIG Stage 2** means any expansion (or part thereof) of the terminal operated by NCIG in excess of the total Capacity that can be delivered by NCIG Stage 1.

**NCIG Stage 2 Delay** means the NCIG Stage 2 is not capable of meeting the Non-NCIG Stage 2 Allocations by the date required for the completion of NCIG Stage 2 pursuant to the Deed of Undertaking,

**NCIG Stage 2 Shortfall** means the extent to which the Capacity available at NCIG Stage 2 falls short of meeting the Non-NCIG Stage 2 Allocations.

**NCIG Terminal** means the terminal and associated infrastructure operated by NCIG,

**Nominated Deferral Period** has meaning given in section 5(d)(i)(B)(II) of Part B.

**Non-NCIG Producer** means a Producer who is not an NCIG Producer, excluding any NCIG Producer entity that delivers coal to PWCS solely by road transport.

**Non-NCIG Stage 2 Allocations** means in respect of a Non-NCIG Producer, the Contracted Allocation which NCIG is contractually bound to make available to that Non-NCIG Producer, at NCIG Stage 2 pursuant to an NCIG Long Term Ship or Pay Contract with that Non-NCIG Producer. For the avoidance of doubt, the Non-NCIG Stage 2 Allocation of a Non-NCIG Producer is the Contracted Allocation that NCIG is contractually bound to make available to that Non-NCIG Producer after completion of any ramp up period for NCIG Stage 2.

**NPC** means Newcastle Port Corporation,

**Producer** means any person who, by virtue of its ownership, management rights or some other means:

- (a) exercises effective operational control over; or
- (b) has, in relation to its dealings with the Terminal Operators, authority to represent the interest of,

one or more mines (including planned mines) producing (or expected to produce) coal for export through the Hunter Valley Coal Chain.

**Producer Group** means, in respect of a Producer, that Producer and each Associate of that Producer.

**PWCS Base Tonnage** means the base tonnage to be offered for allocation to Producers at the PWCS Terminals in the year 2009 in accordance with Part A

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and in the year 2010 in accordance with section 1 of Part B. Allocations of Capacity for coal that is delivered by road transport to the PWCS Terminal located at Carrington are not included in the PWCS Base Tonnage.

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**PWCS Capacity** means the coal export capacity of the Terminals measured in Mtpa being the aggregate amount of coal from time to time, expressed in tonnes, able to be loaded onto vessels at the Terminals in the relevant period, having regard to the System Assumptions and operating protocols.

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**PWCS Capacity Framework Documents** means:

- (a) each Deed of Variation between PWCS and NPC amending the respective PWCS Leases to give effect to the relevant provisions of the Capacity Framework Arrangements;
- (b) the Agreement for Lease for Terminal 4 between PWCS and NPC; and
- (c) the Capacity Framework Agreement between PWCS, NCIG and NPC which gives effect to the relevant provisions of the Capacity Framework Arrangements.

**PWCS Contracted Allocation** means, in respect of a Producer, the Contracted Allocation of that Producer at the PWCS Terminals at that time. For the avoidance of doubt, the expression "PWCS Contracted Allocation" has the same meaning in this document as the expression "PWCS Load Point Allocation"

**PWCS Contracted Allocation Usage** means, in respect of a Producer at any time, the use by that Producer of that Producer's PWCS Contracted Allocation, not including any part of that Producer's PWCS Contracted Allocation that has been transferred to another Producer through a capacity transfer or swap, plus:

- (a) that Producer's use of any PWCS Contracted Allocation of another Producer that is acquired through a capacity transfer or swap;
- (b) any portion of that Producer's PWCS Contracted Allocation which has been compressed in accordance with section 5 of Part B to this Attachment 1 during the 18 month period immediately prior to that time; and
- (c) any portion of that Producer's PWCS Contracted Allocation which has not been used by the Producer as a direct result of a Force Majeure Event.

**PWCS Expansion** means an expansion of existing PWCS Terminals or the building of a new terminal by PWCS (as applicable) as required under section 6 of Part B.

**PWCS Expansion Delay** means a PWCS Expansion that is not Completed within the time required under section 6(b) of Part B (subject to any extension of time permitted under section 6(e) of Part B) but does not include any PWCS Expansion that is suspended under section 6(e)(ii) of Part B.

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**PWCS Expansion Shortfall** means the extent to which a PWCS Expansion falls short of meeting the Load Point Allocations due to be satisfied by that PWCS Expansion.

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**PWCS Terminals** means each coal loading terminal and associated infrastructure operated by PWCS within the Port of Newcastle from time to time.

**PWCS Tonnage Allocation Stage 1** means the PWCS Tonnage Allocation Stage 1 set out in Attachment 1 of PWCS' and NCIG's supporting submission in respect of applications for authorisation A91110 - A91112.

**Qualified Contracted Allocation** means in respect of a Producer, the Contracted Allocation of the Producer prior to any adjustments (including compression) being applied to the aggregate Load Point Allocations of that Producer in accordance with sections 5 and 7.

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**Reviewer NPC** or an independent expert appointed by NPC (in its absolute and sole discretion).

**Sunset Date** means the later of 31 December 2009 and the date which is 6 months after the date on which Non-NCIG Producers entered into long term ship or pay contracts for capacity allocations at Stage 2 to be held in escrow as may be extended by agreement between NCIG and all of those Non-NCIG Producers and with NPC's prior written approval.

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**System Assumptions** means the assumptions for the Hunter Valley export coal chain that underpin the calculation of PWCS Capacity in the relevant period including:

- (f) interface and live run losses between each element in the Hunter Valley Export Coal Chain;
- (g) agreed operating mode of the Hunter Valley Export Coal Chain;
- (h) surge and tolerance requirements;
- (i) capacities of fixed infrastructure;
- (j) rolling stock requirements; and
- (k) vessel requirements,

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detailed in the System Assumption document prepared by HVCCC, as varied from time to time.

**Target Completion Date** means the date by which NCIG Stage 2 is required to be Completed as set out in section 6(d).

**Terminal Access Protocols** means, in relation to PWCS, the proposed PWCS Terminal Access Protocols.

**Terminal Operators** means each of PWCS and NCIG.

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**Unallocated Expansion Capacity** has the meaning given in section 8(i)(A)(II) of Part B.

**Unused Allocations** means the portion of a Producer's Contracted Allocation under a long term ship or pay contract that will not be utilised by that Producer for any period and for any reason after allowing for delivery tolerances permitted under the relevant long term ship or pay contract.

**Unutilised Allocation** means, in respect of a Producer, the difference between the amount that is 95% of that Producer's Contracted Allocation for a relevant period of time and that Producer's Contracted Allocation Usage during that period.

**Utilisation Threshold** means, in respect of a Producer, that Producer's Contracted Allocation Usage is at least 95% of that Producer's Contracted Allocation on average over a period of 18 consecutive months.

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**Schedule A - Levy Protocols**

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# Form B

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 88 (1A) and (1)*

## AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Trade Practices Act 1974* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### 1. Applicants

- (a) Name of Applicants:  
*(Refer to direction 2)*

Port Waratah Coal Services Limited (“PWCS”);

Newcastle Coal Infrastructure Group Pty Limited (“NCIG”); and

Newcastle Port Corporation (“NPC”).

- (b) Short description of business carried on by applicants:  
*(Refer to direction 3)*

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and has also signed an

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Agreement for Lease in relation to the proposed new “Terminal 4” at the Port of Newcastle (together, the “**PWCS Terminals**”). PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

**NCIG** is a consortium formed in 2004 in response to the NSW Government’s invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle (“**NCIG Terminal**”). The first stage of the NCIG Terminal, with a capacity to load approximately 30 Mtpa is expected to become operational in the first quarter of 2010.

**NPC** is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995* (NSW) (“**Act**”). NPC’s principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

- (c) Address in Australia for service of documents on the applicants:

**Port Waratah Coal Services Limited,**

c/- Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

**Newcastle Coal Infrastructure Group Pty Ltd**

c/- Mr Peter Armitage  
Partner  
Blake Dawson  
225 George Street  
Sydney NSW 2000

**Newcastle Port Corporation**

c/- Ms Liza Carver  
Partner  
Gilbert + Tobin  
Level 37  
2 Park Street  
Sydney NSW 2000

**2. Contract, arrangement or understanding**

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:  
(Refer to direction 4)

The Applicants seek authorisation to:

*Make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in Attachment 1 of the Applicants' Supporting Submission dated 29 June 2009 as varied in accordance with Attachment 1 to the letter submitted to the Commission on behalf of the Applicants dated 14 September 2009 ("Capacity Framework Arrangements").*

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The conduct for which authorisation is sought is, or will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

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In particular, the Capacity Framework Arrangements (for which the Applicants seek or have sought authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
- (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;

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- (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
  - (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;
  - (vi) a limitation on the maximum fees for transfers or assignments of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
  - (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.
- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:

*(Refer to direction 4)*

In accordance with the contracts, arrangements or understandings described in 2(a) above, the Applicants and the coal chain participants, producers or exporters with whom they may each enter into contracts may, from time to time, make and/or give effect to contracts, arrangements or understandings that might be cartel provisions or which might have the purpose, effect or likely effect of substantially lessening competition in a market within the meaning of section 45 of the *Trade Practices Act 1974 (Cth)*, in each case in connection with the supply and/or acquisition of coal handling services at the PWCS Terminals and/or NCIG Terminal.

In particular this may arise from the Capacity Framework Arrangements and associated arrangements as described in the Applicants’ Supporting Submission dated 29 June 2009 and in Attachment 1 to the letter submitted to the Commission on behalf of the Applicants dated 14 September 2009.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading

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of coal into vessels for export pursuant to and in accordance with various commercial agreements entered into, or to be entered into as set out in 2(a).

- (d) The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

### 3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

**Port Waratah Coal Services Limited**

PO Box 57

Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

**Newcastle Coal Infrastructure Group Pty Limited**

Level 7, 167 Macquarie Street

Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

**Newcastle Port Corporation**

PO Box 663

Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

### Others

Additionally:

- (i) any producer of coal for export through the Terminals or exporter of coal from the Terminals may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission as well as other coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal (including those listed in Attachment 6 of the Supporting Submission);

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(ii) any above or below rail service provider in the Hunter Valley including those referred to in Attachment 6 of the Supporting Submission may be a party to a contract, arrangement or understanding referred to in 2(a); and

(iii) ~~Hunter Valley Coal Chain Coordinator Limited (or any equivalent or replacement body providing planning and logistics services for the Hunter Valley coal chain).~~

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(b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:  
(Refer to direction 5)

Not applicable.

#### 4. Public benefit claims

(a) Arguments in support of application for authorisation:  
(Refer to direction 6)

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

(b) Facts and evidence relied upon in support of these claims:

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

#### 5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):  
(Refer to direction 7)

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

#### 6. Public detriments

(a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2(c) and the prices of goods or services in other affected markets:  
(Refer to direction 8)

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

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- (b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

**7. Contract, arrangements or understandings in similar terms**

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No. However, as set out above, the Capacity Framework Arrangements for which authorisation is (or has been) sought (or aspects of the Capacity Framework Arrangements) are, or will be reflected in a range of formal agreements and other documents,

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- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:  
(Refer to direction 9)

N/A

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

N/A.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

N/A.

**8. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5 of the Supporting Submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form A and Form D with this Form B.

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- (c) If so, by whom or on whose behalf are those other applications being made?

Please refer to 8(b).

**9. Further information**

- (a) Name and address of person authorised by the applicants to provide additional information in relation to this application:

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation**

Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000  
Telephone: (02) 9296 2281  
Facsimile: (02) 9296 3999

Dated: 14 September 2009

Signed by/on behalf of  
Port Waratah Coal Services Limited,  
Newcastle Coal Infrastructure Group Pty Limited and  
Newcastle Port Corporation

.....  
(Signature)

Dave Poddar  
Partner  
Mallesons Stephen Jaques

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## DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and

(b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.

5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.

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8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

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## Form A

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 88 (1A) and (1)*

### **EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Trade Practices Act 1974* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicants

(a) Name of Applicants:

(Refer to direction 2)

Port Waratah Coal Services Limited (“PWCS”);

Newcastle Coal Infrastructure Group Pty Limited (“NCIG”); and

Newcastle Port Corporation (“NPC”).

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(b) Description of business carried on by applicants:

(Refer to direction 3)

PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and has also signed an Agreement for Lease in relation to the proposed new "Terminal 4" at the Port of Newcastle (together, the "PWCS Terminals"). PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

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NCIG is a consortium formed in 2004 in response to the NSW Government's invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle ("NCIG Terminal"). The first stage of the NCIG Terminal, with a capacity to load approximately 30 Mtpa, is expected to become operational in 2010.

NPC is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995* (NSW) ("Act"). NPC's principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

(c) Address in Australia for service of documents on the applicants:

**Port Waratah Coal Services Limited**

c/- Mr Dave Poddar  
Partner  
Mallesons Stephen Jacques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000

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**Newcastle Coal Infrastructure Group Pty Ltd**

c/- Mr Peter Armitage  
Partner  
Blake Dawson  
225 George Street  
Sydney NSW 2000

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**Newcastle Port Corporation**

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37

2 Park Street

Sydney NSW 2000

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2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:

(Refer to direction 4)

The Applicants seek authorisation to:

*Make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in Attachment 1 of the Applicants' Supporting Submission dated 29 June 2009 as varied in accordance with Attachment 1 to the letter submitted to the Commission on behalf of the Applicants dated 14 September 2009 ("Capacity Framework Arrangements").*

The conduct for which authorisation is sought is, or will be, reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

In particular, the Capacity Framework Arrangements (for which the Applicants seek, or have sought, authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
- (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
- (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);

- (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;
  - (vi) a limitation on the maximum fees for transfers or assignments of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
  - (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.
- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:

(Refer to direction 4)

In accordance with the contracts, arrangements or understandings described in 2(a) above, the Applicants and the coal chain participants, producers or exporters with whom they may each enter into contracts may, from time to time, make and/or give effect to contracts, arrangements or understandings that are, or may be cartel provisions and/or exclusionary provisions within the meaning of section 45 and section 4D of the *Trade Practices Act 1974 (Cth)* in connection with the supply and/or acquisition of coal handling services at the PWCS Terminals and/or NCIG Terminal.

In particular this may arise from the Capacity Framework Arrangements and associated arrangements as described in the Applicants’ Supporting Submission dated 29 June 2009 and in Attachment 1 to the letter submitted to the Commission on behalf of the Applicants dated 14 September 2009.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export pursuant to and in accordance with various commercial agreements entered into, or to be entered into, as set out in 2(a) above.

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

### 3. Parties to the proposed arrangement

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- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

**Port Waratah Coal Services Limited**

PO Box 57

Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

**Newcastle Coal Infrastructure Group Pty Limited**

Level 7, 167 Macquarie Street

Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

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**Newcastle Port Corporation**

PO Box 663

Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

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**Others Additionally:**

- (i) any producer of coal for export through the Terminals or exporter of coal from the Terminals may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission as well as other coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal (including those listed in Attachment 6 of the Supporting Submission); and
- (ii) any above or below rail service provider in the Hunter Valley referred to in Attachment 6 of the Supporting Submission may be a party to a contract, arrangement or understanding in 2(a); and
- (iii) Hunter Valley Coal Chain Coordinator Limited (or any equivalent or replacement body providing planning and logistics services for the Hunter Valley coal chain).
- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
- (Refer to direction 5)

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Not applicable.

4. Public benefit claims



(a) Arguments in support of application for authorisation:

(Refer to direction 6)

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

(b) Facts and evidence relied upon in support of these claims:

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2(c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

6. Public detriments

(a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

(b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

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7. Contracts, arrangements or understandings in similar terms

(a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

(b) Is this application to be so expressed?

No. However, as set out above, the Capacity Framework Arrangements for which authorisation is (or has been) sought (or aspects of the Capacity Framework

Arrangements) are, or will be, reflected in a range of formal agreements and other documents,

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(c) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

N/A.

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

(Refer to direction 10)

N/A.

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

N/A.

#### 8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)?

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture vehicle between the companies listed in Attachment 5 of the Supporting Submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form B and Form D with this Form A.

- (c) If so, by whom or on whose behalf are those other applications being made?

Please refer to 8(b).

#### 9. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation**

Mr Dave Poddar  
Partner

Mallesons Stephen Jacques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000  
Telephone: (02) 9296 2281  
Facsimile: (02) 9296 3999

Dated: 14 September 2009

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Signed by/on behalf of  
Port Waratah Coal Services Limited,  
Newcastle Coal Infrastructure Group Pty Limited and  
Newcastle Port Corporation

.....  
*(Signature)*

Dave Poddar  
Partner  
Mallesons Stephen Jaques

## **DIRECTIONS**

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.

3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details —

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
  - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
  6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
  7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
  8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.

9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

# Form D

Commonwealth of Australia

*Trade Practices Act 1974 — subsection 88 (7)*

## SECONDARY BOYCOTTS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88 (7) of the *Trade Practices Act 1974* for an authorisation under that subsection:

- to engage, in concert with other persons, in conduct that hinders or prevents, or may hinder or prevent, a third person supplying goods to services to, or acquiring goods or services from, a fourth person
- to engage, in concert with other persons, in conduct that prevents or substantially hinders, or may prevent or substantially hinder, a third person from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

*(Strike out whichever is not applicable)*

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

### 1. Applicants

(a) Name of Applicants:

*(Refer to direction 2)*

Port Waratah Coal Services Limited (“PWCS”);

Newcastle Coal Infrastructure Group Pty Limited (“NCIG”); and

Newcastle Port Corporation (“NPC”).

(b) Description of business, activity or occupation carried on by applicants:

*(Refer to direction 3)*

**PWCS** owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle and ~~has also signed an~~ Agreement for Lease in relation to the proposed new “Terminal 4” at the Port of Newcastle (together, the “**PWCS Terminals**”). **PWCS** provides coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export.

**NCIG** is a consortium formed in 2004 in response to the NSW Government’s invitation for submissions to develop an additional or third coal terminal at the Port of Newcastle (“**NCIG Terminal**”). The first stage

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of the NCIG Terminal, with a capacity to load approximately 30 Mtpa is expected to become operational in the first quarter of 2010.

NPC is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995* (NSW) ("Act"). NPC's principal functions are to establish, manage and operate the port facilities and services in the Port of Newcastle and to exercise the port safety functions set out in the Act and in its operating licence.

- (c) Address in Australia for service of documents on the applicants:

**Port Waratah Coal Services Limited,**

c/- Mr Dave Poddar

Partner

Mallesons Stephen Jaques

Level 61

Governor Phillip Tower

1 Farrer Place

Sydney NSW 2000

**Newcastle Coal Infrastructure Group Pty Ltd**

c/- Mr Peter Armitage

Partner

Blake Dawson

225 George Street

Sydney NSW 2000

**Newcastle Port Corporation**

c/- Ms Liza Carver

Partner

Gilbert + Tobin

Level 37

2 Park Street

Sydney NSW 2000

## 2. Conduct

- (a) Description of the conduct proposed to be engaged in, for which authorisation is sought:

*(Refer to direction 4)*

The Applicants seek authorisation to:

*Make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the proposed conduct set out in Attachment 1 of the attached Supporting Submission as varied in accordance with Attachment 1 to the letter submitted to the Commission on behalf of the Applicants dated 14 September 2009 (“**Capacity Framework Arrangements**”).*

The conduct for which authorisation is sought is, or will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

In particular, the Capacity Framework Arrangements (for which the Applicants seek or have sought authorisation) include:

- (i) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (ii) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;
- (iii) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
- (iv) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
- (v) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of



the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;

- (vi) a limitation on the maximum fees for transfers or assignments of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and
- (vii) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

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(b) Number of persons proposing to engage, in concert, in the conduct:

PWCS, NCIG, NPC as well as any coal chain participants, including all producers of coal for export through the Terminals, exporters of coal from the Terminals, Hunter Valley Coal Chain Coordinator Limited (or any equivalent or replacement body providing planning and logistics services for the Hunter Valley coal chain) and any above or below rail service provider in the Hunter Valley, may be a party to a contract, arrangement or understanding referred to in 2(a).

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These producers and exporters include the shareholders in PWCS listed in Attachment 3 of the Supporting Submission, the shareholders in NCIG listed in Attachment 5 of the Supporting Submission, as well as other coal companies in the Hunter Valley in New South Wales producing coal for export or otherwise exporting coal in Attachment 6 of the Supporting Submission).

- (i) Where number of persons stated in item 2 (b) is less than 50, their names and addresses:

**Port Waratah Coal Services Limited**

PO Box 57  
Carrington NSW 2294

(For a description of PWCS' business, please refer to 1(b) above).

**Newcastle Coal Infrastructure Group Pty Limited**

Level 7, 167 Macquarie Street  
Sydney NSW 2000

(For a description of NCIG's business, please refer to 1(b) above).

**Newcastle Port Corporation**

PO Box 663

Newcastle NSW 2300

(For a description of NPC's business, please refer to 1(b) above).

**The Newcastle Coal Producers**

For the names and addresses of the coal producers, please refer to Attachment 6 of the Supporting Submission to this Application.

**Above and below rail service providers**

Please refer to Attachment 6 of the Supporting Submission to this Application.

- (c) Description of the goods or services to which the conduct (whether proposed or actual) relate:

The provision of coal handling services to Hunter Valley coal exporters, including receiving and unloading of coal, the stockpiling of coal and loading of coal into vessels for export pursuant to and in accordance with various commercial agreements entered into, or to be entered into, as set out in 2(a) above.

- (d) The term for which authorisation of the provision of the conduct is being sought and grounds supporting this period of authorisation:

The period of authorisation sought is from 1 July 2009 to 30 June 2024. In relation to the grounds supporting this period of authorisation, please refer to the Supporting Submission.

**Deleted:** including to give effect to the principles and framework set out in the Implementation Memorandum signed by PWCS, NCIG and NPC (and provided to the Commission) in April 2009 as described in the Supporting Submission.

**3. Parties**

- (a) Name and address of the third person whose supply or acquisition of goods or services, or whose trade or commerce involving the movement of goods overseas, is to be, or may be, hindered or prevented by the conduct:

In accordance with the contracts, arrangements or understandings described in 2(a) above, the parties referred to above in 2(b) may, from time to time, be hindered or prevented in relation to the export of coal through the PWCS Terminals and/or NCIG Terminal.

- (b) Name and address of person to or from whom, or the place to or from which, supply or acquisition of goods or services is to be, or may be, hindered or prevented by the conduct:

Please refer to 3(a).

- (c) Names and addresses of persons on whose behalf application is made:

Not applicable.

#### **4. Public benefit claims**

- (a) Arguments in support of application for authorisation:

*(Refer to direction 5)*

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

- (b) Facts and evidence relied upon in support of these claims

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

#### **5. Market definition**

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*(Refer to direction 6)*

The Applicants consider that the relevant market is the market for the provision of coal handling services for coal exported from the Hunter Valley.

#### **6. Public detriments**

- (a) Detriments to the public resulting or likely to result from the conduct for which authorisation is sought, in particular the likely effect of the conduct on the prices of the goods or services described at 2 (c) above and the prices of goods or services in other affected markets:

*(Refer to direction 7)*

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

- (b) Facts and evidence relevant to these detriments:

Please refer to the Supporting Submission and letter submitted on behalf of the Applicants dated 14 September 2009.

**7. Joint Ventures**

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*):

Yes. PWCS is an incorporated joint venture between the companies listed in Attachment 3 of the Supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5 of the Supporting Submission.

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Yes. PWCS, NCIG and NPC have also submitted a Form A and Form B with this Form D.

- (c) If so, by whom or on whose behalf are those other applications being made?  
Please refer to 7(b).

**8. Further information**

- (a) Name, postal address and telephone contact details of the person authorised by the applicants seeking authorisation to provide additional information in relation to this application:

**Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation**

Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000  
Telephone: (02) 9296 2281  
Facsimile: (02) 9296 3999

Dated.....

Signed by/on behalf of  
Port Waratah Coal Services Limited,  
Newcastle Coal Infrastructure Group Pty Limited and  
Newcastle Port Corporation

.....  
*(Signature)*

Dave Poddar  
Partner  
Mallesons Stephen Jaques

## **DIRECTIONS**

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the conduct in respect of which authorisation is sought.
4. Provide details of the conduct in respect of which this authorisation is sought.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing — provide a true copy of the writing; and
  - (b) to the extent that any of the details have not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing.
5. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
  6. Provide details of the market(s) likely to be effected by the conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.
  7. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed conduct. Provide quantification of those detriments where possible.