

# MALLESONS STEPHEN JAQUES

## For Public Register

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

11 February 2009

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

Dear Dr Chadwick

## **Port Waratah Coal Services Limited and Newcastle Coal Infrastructure Group Pty Limited - Applications for authorisation A91110 - A91112**

### **1 Introduction**

#### *Purpose of letter*

- 1.1 We refer to the applications for authorisation A91110 - A91112 lodged by Port Waratah Coal Services Limited ("PWCS") and Newcastle Coal Infrastructure Group Pty Limited ("NCIG") (together, the "**Applicants**") on 19 November 2008 ("**Existing Applications**").
- 1.2 The Applicants seek to vary the Existing Applications so that they now seek authorisation for the PWCS Tonnage Allocation Stage 1 only for the period from 1 January 2009 until 30 June 2009.
- 1.3 The Applicants no longer seek authorisation at this time for the proposed Long Term Terminal Access Protocols referred to in the Existing Applications. Instead, relevant aspects of the long term solution (including the Long Term Terminal Access Protocols) will form the subject of a separate application for authorisation to be provided to the Commission in March 2009.
- 1.4 This approach is proposed to address the procedural issues raised in the Commission's letter dated 13 January 2009.

#### *Reasons for variation of the Existing Applications*

- 1.5 As the Commission is aware from progress reports provided by the Applicants, a very substantial amount of work has been, and is currently being, undertaken by the Applicants, Newcastle Port Corporation ("**NPC**") on behalf of the NSW Government, and the Producers' Steering Committee to clarify some areas of the terminal access

framework announced by Minister Tripodi on 11 December 2008 and to provide greater detail and development to allow for implementation of a long term Hunter Valley solution based on that framework. Given that it is the Minister's framework, this process is, in large part, being led by NPC on behalf of the NSW Government, with considerable input from the Applicants as well as industry. To this end, a number of working groups have been formed to consider specific issues and facilitate implementation. Project managers have been appointed and NPC is currently preparing an Implementation Memorandum which sets out the detail on how the long term framework will be implemented.

- 1.6 The Applicants and NPC anticipate that the Implementation Memorandum will be finalised by mid-late March 2009.
- 1.7 Notwithstanding this very constructive industry and Government process (which the Applicants recognise has been facilitated greatly by the interim authorisation granted by the Commission), the Applicants are also cognisant of the statutory requirement under the *Trade Practices Act 1974* (Cth) ("TPA") for the Commission to make a determination on the Existing Applications within 6 months of their lodgement date of 19 November 2008, and the resulting need for the Commission to conduct market enquiries, issue a draft determination and consult on that draft determination in sufficient time to issue a final determination by 19 May 2009.
- 1.8 Specifically, the Applicants recognise that providing the Implementation Memorandum to the Commission by mid-late March 2009 will not give the Commission sufficient time to undertake these steps within the statutory 6 month period. We have included this detail in this letter as there has previously been some mis-interpretation by some third parties as to the procedural issues that have been worked through.
- 1.9 Accordingly, in order to maintain the current industry consultation and constructive progression of the long term solution, the Applicants are seeking to vary the Existing Applications to enable the Commission to undertake any necessary further market enquiries and to issue its draft and final determinations in relation to the PWCS Tonnage Allocation Stage 1 within the statutory timeframe. Details of the PWCS Tonnage Allocation Stage 1 remain as set out in the Applicants' submission dated 19 November 2008.
- 1.10 The Applicants envisage that (to the extent appropriate) they will submit a new application for authorisation of the long term solution, as detailed in the Implementation Memorandum, in mid-late March 2009.
- 1.11 The Applicants submit that the arrangements which are the subject of the application for authorisation (as varied by this letter) will give rise to public benefits which will outweigh any public detriments. Further details of the variation sought are set out below.

## 2 Existing Applications for authorisation

2.1 The Existing Applications seek authorisation pursuant to sub-sections 88(1) and 88(7) of the TPA for the making of, or giving effect to, any contract, arrangement or understanding either:

- (a) involving PWCS, NCIG and/or any future terminal operator at the Port of Newcastle; or
- (b) between PWCS or NCIG and any Hunter Valley Coal Chain participant, including all producers of coal for export through the PWCS Terminal, the NCIG Terminal or any future terminal at the Port of Newcastle (together, the “Terminals”), or exporters of coal through the Terminals (whether or not they are shareholders in PWCS or NCIG),

which relates to or is in any way associated with, the PWCS Tonnage Allocation Stage 1 or any Long Term Terminal Access Protocols as described in the submission lodged with the Commission on 19 November 2008 and which may constitute:

- a provision having the effect of substantially lessening competition within the meaning of section 45 of the TPA;
- exclusionary provisions within the meaning of section 45 of the TPA; or
- a provision to which sections 45D, 45DA or 45DB of the TPA might apply.

2.2 The Applicants have sought authorisation for a period of 10 years from 1 January 2009 until 31 December 2018. On 17 December 2008, the Commission granted interim authorisation of the PWCS Tonnage Allocation Stage 1 until 31 March 2009. That interim authorisation is subject to certain reporting conditions.

## 3 Variation sought

3.1 To facilitate continuing constructive progress on the implementation of the long term solution, and having regard to the timing and procedural requirements under the TPA, the Applicants now seek to vary their Existing Applications so that they request authorisation for the PWCS Tonnage Allocation Stage 1 only for the period from 1 January 2009 until 30 June 2009.

3.2 The variation which the Applicants are seeking to the description of the conduct for which they are seeking authorisation is set out below:

*The Applicants seek authorisation for the making of, or giving effect to, any contract, arrangement or understanding either:*

- (a) *involving PWCS, NCIG and/or Newcastle Port Corporation (“NPC”);  
or*
- (b) *between either PWCS, NCIG and / or NPC and any Hunter Valley Coal Chain participant, including all producers of coal for export through the PWCS Terminal or exporters of coal through the PWCS Terminal (whether or not they are shareholders in PWCS or NCIG),*

*which relates to or is in any way associated with, the PWCS Tonnage Allocation Stage 1 as described in the submission lodged with the Commission on 19 November 2008.*

- 3.3 For convenience, the Applicants enclose amended versions of Forms A, B and D lodged with the Commission on 19 November 2008 showing the variation sought in mark-up.

#### **4 Background and proposed variation**

##### ***Background to Existing Applications***

- 4.1 On 19 November 2008, the Applicants lodged the Existing Applications for authorisation of the PWCS Tonnage Allocation Stage 1 and the proposed Long Term Terminal Access Protocols which would (once submitted to, and approved by, the Commission) replace the PWCS Tonnage Allocation Stage 1.
- 4.2 In order to maintain pressure to develop and finalise a long term solution, authorisation was sought conditional upon reporting requirements and an industry timetable requiring a Memorandum of Understanding to be submitted to the Commission by 31 March 2009 and the Long Term Terminal Access Protocols to be submitted by 30 June 2009.
- 4.3 As highlighted in the Applicants’ supporting submission dated 19 November 2008, there was significant progress towards a long term solution during 2008. This progress culminated in Minister Tripodi announcing on 11 December 2008 a detailed proposal for a long term solution to the management of access to, and expansion of, coal terminal capacity at the Port of Newcastle.

##### ***Current work to implement the long term solution***

- 4.4 As set out above, a very substantial amount of work has been, and is currently being, undertaken by the Applicants, NPC (on behalf of the New South Wales Government) and the Producers’ Steering Committee to clarify and develop some areas of the terminal access framework announced by Minister Tripodi and to provide greater detail to allow for implementation of a long term Hunter Valley solution based on that framework. To this end, several work streams and working groups have been established, with support from designated project managers as set out in Attachment 1.

4.5 Broadly, the work streams include:

- **Implementation:** NPC (on behalf of the NSW Government) is progressing the drafting of an Implementation Memorandum, with input from PWCS and NCIG, which will set out details on how the long term framework will be implemented. This includes details of the nomination and allocation process, commitments to expand and the coal levy;
- **Growth:** The NSW Government and the Terminal Operators are currently working towards determining any amendments which will be required to the PWCS/NCIG leases and the governance issues surrounding the proposed new terminal (T4); and
- **Contractual alignment:** A contractual alignment working group has been established and is progressing a contractual alignment mechanism taking into consideration issues relating to rail access (including the ARTC Hunter Valley Undertaking) and the terminals.

4.6 The co-ordination of these processes continues to involve a significant level of co-operation between PWCS, NCIG, producers, services providers and the NSW Government. Importantly, this process has the support of the Applicants, the Producers' Steering Committee and the Government.

4.7 The Applicants and NPC anticipate that the Implementation Memorandum (including necessary agreements to facilitate implementation of the long term solution) will be finalised by mid-late March 2009.

## 5 Public benefits outweigh any public detriments

5.1 The Applicants submit that the PWCS Tonnage Allocation Stage 1 (which is the conduct for which authorisation is sought under the Applicants' amended application) will give rise to public benefits which outweigh any public detriments. Details of these benefits are set out in the Applicants' submission dated 19 November 2008. However, in addition to these, the application (as varied) will enable the Commission to continue to consult with the industry and to continue its necessary processes consistent with the statutory timeframe contained in the TPA.

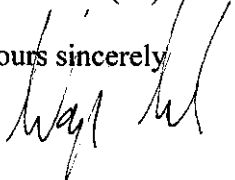
5.2 Importantly, the proposed variation will also enable NPC (on behalf of the NSW Government), the Applicants, the Producers' Steering Committee and producers to maintain the current momentum and progress in relation to implementing a lasting and workable long term solution, on which the Commission can undertake market enquiries as part of a new application to be lodged in mid-late March 2009.

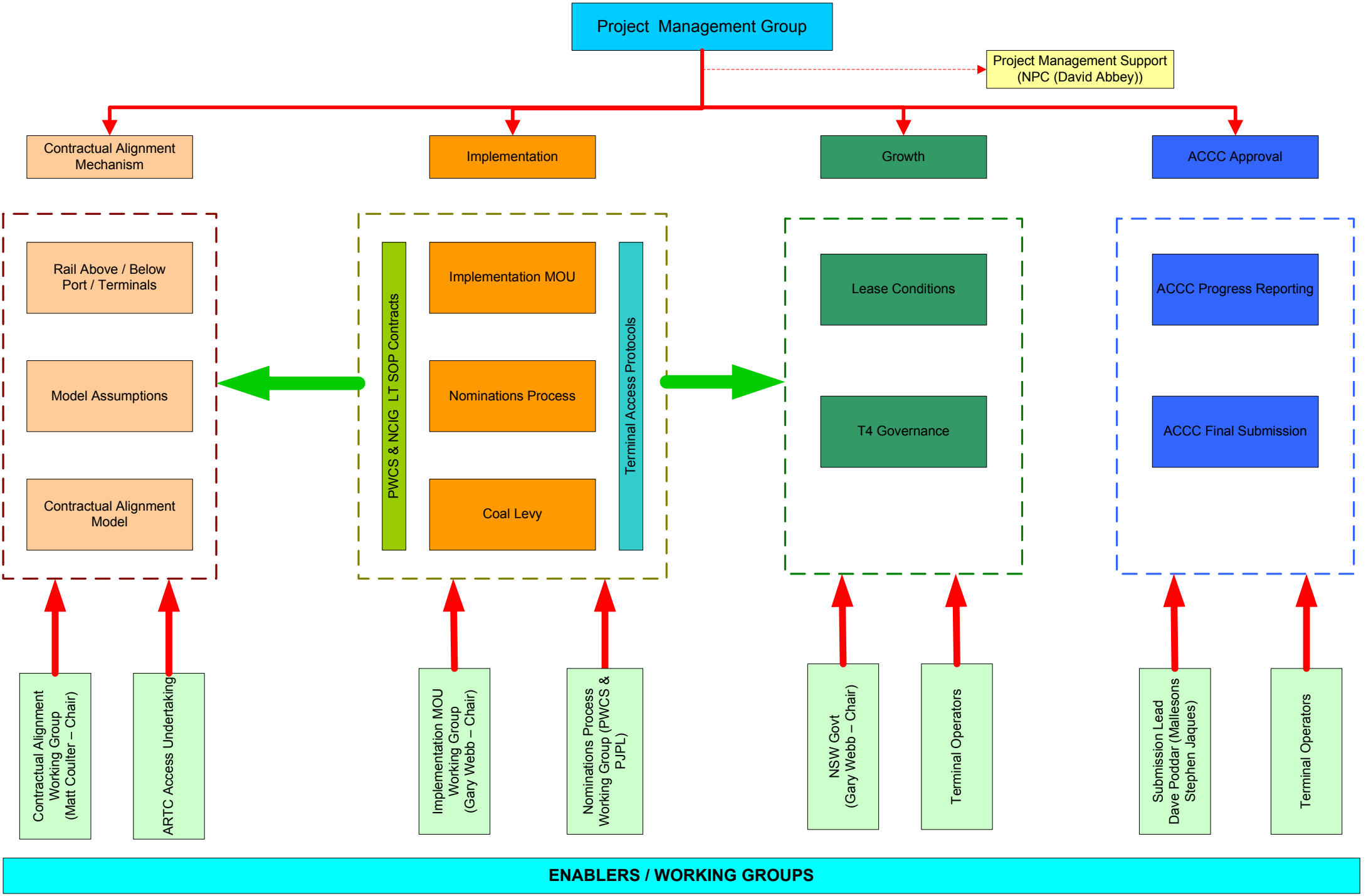
5.3 Authorisation of the PWCS Tonnage Allocation Stage 1 until 30 June 2009 will enable the facilitative process of the last three months to continue and will provide a structured environment while the long term solution is to be finalised and implemented. In this regard, it is imperative that the long term solution which is finally implemented includes mechanisms for aligning with the rest of the coal chain and provides appropriate investment certainty for producers, the Applicants and other service providers. This is particularly important in the current economic climate.

## 6 Conclusion

- 6.1 The Applicants appreciate the Commission's constructive approach in considering their application for authorisation to date, and acknowledge the assistance that the current interim authorisation has provided in enabling the industry to focus resources on clarifying and implementing the long term solution.
- 6.2 Having regard to the matters set out above, the Applicants request that the Commission continues to consider their application for authorisation as varied by this letter and the attached amended Forms A, B and D.
- 6.3 As the PWCS Tonnage Allocation Stage 1 forms the basis of the application for authorisation (as varied), this variation should not affect the continued operation of the current interim authorisation.
- 6.4 Should you have any questions relating to this matter, please contact me, Wayne Leach on (02) 9296 2327 or Stefanie Benson on (02) 9296 2435.

Yours sincerely

*for*  
  
Dave Poddar  
Partner  
Direct line +61 2 9296 2281  
Direct fax +61 2 9296 3961  
Email dave.poddar@malleasons.com



# Form A

Commonwealth of Australia

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

## **EXCLUSIONARY PROVISIONS:**

### **APPLICATION FOR AUTHORISATION**

To the Australian Competition and Consumer Commission:

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

- 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”)

- (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 (“PWCS Terminal”). 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 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.



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

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

c/- Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
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 making of, or giving effect to, any contract, arrangement or understanding, either:

- (i) between PWCS, NCIG and/or Newcastle Port Corporation (“NPC”) ~~and/or any future terminal operator at the Port of Newcastle;~~ or
- (ii) between either PWCS, or NCIG and/ or NPC and any Hunter Valley Coal Chain participant, including all producers of coal for export through the PWCS Terminal, the NCIG Terminal or any future terminal at the Port of Newcastle (“together, the Terminals”), or exporters of coal through the PWCS Terminals (whether or not they are shareholders in PWCS or NCIG),

which relates to, or is in any way associated with, the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the attached supporting Submission.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary 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 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, in particular arising from the proposed PWCS Tonnage Allocation Stage 1 ~~or Long Term Terminal Access Protocols~~ as described in the Submission.

- (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 the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the Submission.

- (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 January 2009 to ~~31 December 2018~~ 30 June 2009. 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 the supporting Submission).

**Newcastle Coal Infrastructure Group Pty Limited**  
Level 7, 167 Macquarie Street  
Sydney NSW 2000

(For a description of NCIG's business, please refer to the supporting Submission).

**Newcastle Port Corporation**  
Corner Scott & Newcomen Streets  
Newcastle NSW 2000

Additionally, any ~~Terminal operator~~, producer of coal for export through the PWCS Terminals or exporter of coal from the PWCS 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 4 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.

- (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.

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

Please refer to the supporting Submission.

**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)*

Please refer to the supporting Submission.

**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.

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

Please refer to the supporting Submission.

**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.

(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 4 of the supporting Submission. NCIG is an incorporated joint venture vehicle between the companies listed in Attachment 5.

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

Yes. PWCS and NCIG 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 and Newcastle Coal  
Infrastructure Group Pty Limited**

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 and Newcastle Coal  
Infrastructure Group Pty Limited

.....  
(Signature)

Dave Poddar  
Mallesons Stephen Jaques  
Partner

## **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 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.

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 B

Commonwealth of Australia

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

## AGREEMENTS AFFECTING COMPETITION: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

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

- to make a contact or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of 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”)

- (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 (“**Terminal**”). 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 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.



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

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

c/- Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
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 making of, or giving effect to, any contract, arrangement or understanding either:

- (i) between PWCS, NCIG and/or ~~and future terminal operator at the Port of Newcastle~~ Newcastle Port Corporation ("NPC"); or
- (ii) between either PWCS, NCIG and/or NPC and any Hunter Valley Coal Chain participant, including all producers of coal for export through the PWCS Terminal, ~~the NCIG Terminal or any future terminal at the Port of Newcastle (together, the "Terminals")~~, or exporters of coal through the PWCS Terminals (whether or not they are shareholders in PWCS or NCIG ),

which relates to, or is in any way associated with, the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the attached supporting Submission.

- (b) Description of those provisions of the contract, arrangement or understanding that are, or would or might, substantially lessen 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 have the purpose or 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 connection with the supply and/or acquisition of coal handling services at the PWCS Terminals, in particular arising from the proposed PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the Submission.

- (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 the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the Submission.

- (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 January 2009 to ~~31 December 2018~~ 30 June 2009. 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 the supporting Submission).

**Newcastle Coal Infrastructure Group Pty Limited**

Level 7, 167 Macquarie Street  
Sydney NSW 2000

(For a description of NCIG's business, please refer to the supporting Submission).

**Newcastle Port Corporation**

Corner Scott & Newcomen Streets  
Newcastle NSW 2000

Additionally, any ~~Terminal operator~~, producer of coal for export through the PWCS Terminals or exporter of coal from the PWCS 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 4 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.

- (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.

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

Please refer to the supporting Submission.

#### **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)

Please refer to the supporting Submission.

#### **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.

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

Please refer to the supporting Submission.

#### **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.
- (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 4 of the supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5.
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?  
Yes. PWCS and NCIG have also submitted a Form A and Form D with this Form B.
- (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 and Newcastle Coal  
Infrastructure Group Pty Limited**

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 and Newcastle Coal  
Infrastructure Group Pty Limited

.....  
(Signature)

Dave Poddar  
Mallesons Stephen Jaques  
Partner

## **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 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, 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 of 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.
  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.

## 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”)

- (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 (“**Terminal**”). 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 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.

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

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

c/- Mr Dave Poddar  
Partner  
Mallesons Stephen Jaques  
Level 61  
Governor Phillip Tower  
1 Farrer Place  
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 making of, or giving effect to, any contract, arrangement or understanding either:

- (i) between PWCS, NCIG and/or Newcastle Port Corporation ("NPC") ~~any future terminal operator at the Port of Newcastle~~; or
- (ii) between either PWCS, ~~or~~ NCIG and/or NPC and any Hunter Valley Coal Chain participant including all producers of coal for export through the PWCS Terminal, ~~the NCIG Terminal or any future terminal at the Port of Newcastle (together, the "Terminals")~~, or exporters of coal through the PWCS Terminals (whether or not they are shareholders in PWCS or NCIG),

which relates to, or is in any way associated with, the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the attached supporting Submission.

- (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 PWCS Terminals or exporter of coal from the PWCS Terminals, may be a party to a contract, arrangement or understanding referred to in 2(a). These producers and exporters include shareholders in PWCS listed in Attachment 4 of the supporting Submission, 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.

- (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 the supporting Submission).

**Newcastle Coal Infrastructure Group Pty Limited**

Level 7, 167 Macquarie Street  
Sydney NSW 2000

(For a description of NCIG's business, please refer to the supporting Submission).

**Newcastle Port Corporation**

Corner Scott & Newcomen Streets  
Newcastle NSW 2000

**The Newcastle Coal Producers**

For the names and addresses of the Coal Producers, please refer to Attachment 7 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 the PWCS Tonnage Allocation Stage 1 ~~or any Long Term Terminal Access Protocols~~ as described in the attached supporting Submission.

- (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 January 2009 to ~~31 December 2018~~30 June 2009. In relation to the grounds supporting this period of authorisation, please refer to 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.

- (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.

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

Please refer to the supporting Submission.

### **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)*

Please refer to the supporting Submission.

**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.

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

Please refer to the supporting Submission.

**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 4 of the supporting Submission. NCIG is an incorporated joint venture between the companies listed in Attachment 5.

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

Yes. PWCS and NCIG 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 and Newcastle Coal  
Infrastructure Group Pty Limited**

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 and Newcastle Coal  
Infrastructure Group Pty Limited

.....  
(Signature)

Dave Poddar  
Mallesons Stephen Jaques  
Partner

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3. Describe that part of the applicant's business relating to the conduct in respect of which authorisation is sought.
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  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.