Australian Competition & Consumer Commission

Determination

Applications for authorisation

lodged by

Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and the Newcastle Port Corporation

in respect of

the Capacity Framework Arrangements at the Port of Newcastle

Date: **9 December 2009**

Commissioners: Samuel
Kell
Court
Dimasi
Walker

Authorisation no.:
A91147–A91149 and A91168–A91169

Public Register no.: C2009/1252

Summary

The Australian Competition and Consumer Commission (ACCC) has decided to grant authorisation to the proposed Capacity Framework Arrangements until 31 December 2024 to enable a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain to be introduced at the Port of Newcastle.

On 29 June 2009 Port Waratah Coal Services, Newcastle Coal Infrastructure Group and the Newcastle Port Corporation (the Applicants) sought authorisation of certain aspects of a long term solution to the ongoing capacity constraints in the Hunter Valley – the 'Capacity Framework Arrangements'. The Capacity Framework Arrangements have been phased in during the second half of 2009, to be fully implemented by 1 January 2010.

On 14 September 2009 the Applicants amended the Capacity Framework Arrangements for which authorisation is sought. Further revisions were made by the Applicants on 26 October 2009 in order to specify more precisely the proposed 'contractual alignment conduct' for which authorisation is sought.

Authorisation is sought to make and give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in the Capacity Framework Arrangements (provided at Attachment A to this determination). The Capacity Framework Arrangements include:

- the allocation of port capacity to access seekers at the PWCS terminals under long term contracts in accordance with certain nomination and allocation procedures
- the allocation of up to 12 million tonnes per annum of port capacity to access seekers (initially exclusively to non-NCIG producers) at NCIG Stage 2 under long term contracts and in accordance with certain nomination and allocation procedures
- the ability of terminal operators to impose (at their election) an industry levy payable by all users of the terminals in specified circumstances to facilitate expansions of capacity at the PWCS and NCIG coal loading terminals
- certain agreed triggers and processes for determining whether and when expansions of the PWCS coal loading terminals are required (including the construction of a new terminal where necessary)
- 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 the construction of a new terminal) or in the completion of NCIG Stage 2
- a limitation on the maximum fees for transferring unused capacity allocations and the introduction of a transparent and efficient Capacity Transfer System to limit the commercial incentives to hoard coal chain capacity and
- proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

The development of a long term solution

Prior to this application, the ACCC was asked to authorise various transitional measures designed to balance the demand for coal loading services at the Port of Newcastle with the volume of coal that could be exported from the Hunter Valley. Due to an upsurge in global demand for coal in 2004, producers were trying to export more coal than the coal chain could deliver.

The primary benefit of the previous 'capacity balancing systems' was to reduce the large vessel queues that formed offshore. Australian coal producers incurred significant demurrage costs due to delays from queues of up to 70 vessels waiting to be loaded with coal.

Over time the ACCC became increasingly concerned that the industry was not addressing the underlying issues contributing to the capacity imbalance in the Hunter Valley – including the common user provision in PWCS' lease, which was restricting its ability to enter into long term binding contracts to underpin investment, and service providers were contracting based on assessments of individual capacity without reference to the capacity of the coal chain as a whole.

In the absence of a long term solution to the underlying problems, the ACCC questioned whether authorisation of short term capacity balancing systems remained in the public interest.

Industry negotiations for a long term solution started in 2008 with the 'Greiner Review' of the Hunter Valley coal chain. In December, the NSW Minister for Ports and Waterways announced that government and industry had reached agreement on a long term terminal access framework for the Port of Newcastle. Key features of this framework included triggers requiring terminals to build new capacity on demand, long term contracts to underpin investment in terminal capacity, an industry levy to help fund new terminal infrastructure where required, guaranteed access for new entrants and expanding producers and a proposal for a fourth coal loading terminal in Newcastle.

In 2009, discussions about the implementation of the long term solution continued. The Applicants then sign a detailed 'Implementation Memorandum' in April. Further work was still required, prior to the current applications for authorisation being lodged with the ACCC at the end of June.

Implementation

The proposed Capacity Framework Arrangements appear to facilitate, and are a critical part of, the implementation of a long term solution across the Hunter Valley coal chain. However, the ACCC notes that the port-based Capacity Framework Arrangements are only one part of the solution for the Hunter Valley coal chain.

By early December 2009, PWCS executed its long term ship or pay contracts with producers. NCIG advises that it is currently in the process of finalising its contracts with producers for Stage 2 of its new terminal, the first stage of which is expected to commence operating around the end of March 2009.

Having said this, there is still some work to be carried out by the industry in order for the Capacity Framework Arrangements to be implemented by the 1 January 2010 target date. For instance, the Capacity Transfer System Working Group continues to finalise the design of a centralised Capacity Transfer System proposed to operate under the arrangements. Further, the ACCC understands that discussions between the terminal operators and the Australian Rail Track Corporation (ARTC) continue in relation to the operational implementation of contractual alignment across the coal chain.

ARTC's proposed Hunter Valley rail network access undertaking is currently being considered by the ACCC under Part IIIA of *Trade Practices Act* (1974). The proposed access undertaking also forms a critical component of the long term solution in the Hunter Valley coal chain. Interested parties have identified some outstanding issues in relation to contractual alignment which are more appropriately addressed through the access undertaking process.

Interim authorisation

At the time of lodging the application, the Applicants requested urgent interim authorisation to allow the phased-in implementation of the Capacity Framework Arrangements to commence.

The ACCC originally granted interim authorisation on 22 July 2009, subject to a condition that the Applicants execute their respective 'Capacity Framework Documents' by their 31 August 2009 deadline.

One Applicant did not comply with the condition of interim authorisation and on 1 September 2009 the ACCC revoked interim authorisation.

The remaining Capacity Framework Documents were executed on 17 September 2009. On 23 September 2009 the ACCC granted interim authorisation to the Capacity Framework Arrangements, as amended on 14 September.

In its draft determination, the ACCC granted interim authorisation to the further revised Capacity Framework Arrangements received on 26 October 2009.

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

The Capacity Framework Arrangements – balance of public benefits and detriments

The ACCC considers the proposed Capacity Framework Arrangements are likely to result in significant public benefits, including:

- the terminal operators and existing and new producers being able to make more accurate and timely investment decisions
- facilitating the alignment of contractual obligations and incentives across the Hunter Valley coal chain, thereby creating an environment more conducive to optimal operation of the coal chain and efficient investment
- demurrage savings to Australian coal producers
- reducing the environmental and safety risks associated with vessel queues waiting offshore and
- maintaining or improving the international reputation of the Hunter Valley coal industry.

The ACCC considers that any delays in the implementation of the long term solution in the Hunter Valley, including components of the Capacity Framework Arrangements, beyond 1 January 2010, will delay the full realisation of the likely public benefits, and therefore potentially reduce the magnitude of the public benefits generated by the Capacity Framework Arrangements over the life of the authorisation period. Nevertheless, the ACCC considers the Capacity Framework Arrangements are likely to generate significant public benefits.

The ACCC considers there are likely to be some public detriments arising from the exclusive and restrictive nature of the Capacity Framework Arrangements. Further, the extensive information sharing and detailed co-ordination of the operation and expansion of the various components of the Hunter Valley coal chain is likely to result in some detriment by creating a less competitive environment.

The ACCC also considers that certain aspects of the Capacity Framework Arrangements are likely to generate some public detriment from distortions to efficient business decisions. Having said this, the ACCC considers that overall, the likely public detriments will not be substantial.

Therefore, the ACCC considers the public benefit that is likely to result from the proposed Capacity Framework Arrangements is likely to outweigh the public detriment.

Length of authorisation

Given that certain producers' 10 year load point allocations may commence up to 5 years from now, the ACCC has decided to grant authorisation to the Capacity Framework Arrangements for 15 years until 31 December 2024.

The ACCC considers this will provide greater certainty to producers and service providers, given significant infrastructure investments involved.

The Capacity Framework Arrangements are a complex set of arrangements that require a number of parties to work together to ensure the Hunter Valley coal chain operates efficiently and effectively. The ACCC is granting authorisation for an extended period of time on the basis of the information before it and the commitments made by the Applicants in the Capacity Framework Arrangements.

The ACCC notes that NCIG's terminal will be operated on a fundamentally different basis than PWCS' terminals, and this is reflected in the more detailed arrangements that PWCS has in place to ensure contractual alignment. Nevertheless, the ACCC is granting authorisation on the basis that if contractual alignment issues arise in the operation of NCIG's terminal that have broader operational impacts in the Hunter Valley coal chain, NCIG will work the Hunter Valley Coal Chain Coordinator and other coal chain participants to resolve those issues and to ensure that contracts are aligned, including engaging in the conduct described in the Capacity Framework Arrangements.

If the Capacity Framework Arrangements do not operate in the way described or deliver the benefits claimed, the ACCC has the power to review this authorisation at any time.

Contents

List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	*Trade Practices Act 1974*
AHA	Indicative Access Holder Agreement – in relation to ARTC's proposed Hunter Valley Rail Network Access Undertaking.
ARTC	Australian Rail Track Corporation
HV Access Undertaking	Proposed Hunter Valley Rail Network Access Undertaking lodged with the ACCC by the Australian Rail Track Corporation on 23 April 2009.
HVCCC	Hunter Valley Coal Chain Coordinator
HVCCLT	Hunter Valley Coal Chain Logistics Team
mtpa	Million tonnes per annum
NCIG	Newcastle Coal Infrastructure Group
NPC	Newcastle Port Corporation
OSA	Indicative Operator Sub-Agreement – in relation to ARTC's proposed Hunter Valley Rail Network Access Undertaking.
PWCS	Port Waratah Coal Services Limited
T4	Proposed new coal loading terminal ('terminal 4') at the Port of Newcastle.

1. The applications for authorisation

1.1. On 29 June 2009 Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and Newcastle Port Corporation (the 'Applicants') lodged applications for authorisation A91147–A91149 under section 88(1) of the *Trade Practices Act 1974* (the Act) for certain aspects of a long term solution to the ongoing capacity constraints of the Hunter Valley coal chain. The Applicants subsequently provided a public submission in support of the applications for authorisation on 30 June 2009.

1.2. On 24 July 2009 the Applicants lodged further applications for authorisation A91168–A91169 under section 88(1A) of the Act in relation to a contract, arrangement or understanding which may contain a cartel provision. The additional applications were lodged with the Australian Competition and Consumer Commission (ACCC) as a result of the amendments introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures)* Act 2009, which commenced on 24 July 2009.

1.3. The conduct under the additional applications A91168–A91169 is the same conduct and is in the same terms as the Applicants' original applications for authorisation lodged with the ACCC on 29 June 2009.

1.4. In particular, authorisation is sought to make or give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in the 'Capacity Framework Arrangements'.

1.5. On 14 September 2009 the Applicants requested to vary the existing applications for authorisation (A91147–A91149 and A91168–A91169). The Applicants submitted that since lodging the applications in June 2009, they agreed that changes were required to the Capacity Framework Arrangements to clarify the proposed conduct and to address certain practical issues identified by the Applicants during ongoing negotiations.[1]

1.6. On 26 October 2009 the Applicants lodged further revisions to the proposed Capacity Framework Arrangements. The primary purpose of these revisions was to provide greater clarity in relation to the proposed 'contractual alignment conduct' for which authorisation is sought.

1.7. The proposed Capacity Framework Arrangements for which authorisation is sought are provided at Attachment A to this determination.[2]

1.8. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the Act. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not.

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1 Application to amend applications (A91147–A91149 and A91168–A91169), 14 September 2009, page 2.

2 Attachment 1 to the Applicants' letter requesting to amend existing applications for authorisation (A91447–A91149 and A91168–A91169), 26 October 2009.

1.9. Further information about the authorisation process is contained in Attachment B. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment C.

1.10. Application A91147 was made under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.

1.11. Application A91148 was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

1.12. Application A91149 was made under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply. That is, to engage in conduct with other persons which may hinder or prevent a third person supplying or acquiring goods and services to, or from, a fourth person. Also, to engage in conduct with other persons that may hinder or prevent a third person from engaging in trade or commerce involving the movement of goods from Australia to places outside Australia.

1.13. Application A91168 was made under section 88(1A) of the Act to make or give effect to a contract, arrangement or understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of the Act, and which would also be, or might be, an exclusionary provision within the meaning of section 45 of the Act.

1.14. Application A91169 was made under section 88(1A) of the Act to make or give effect to a contract, arrangement or understanding, a provision of which would be, or may be a cartel provision within the meaning of Division 1 of Part IV of the Act, or which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

1.15. The Capacity Framework Arrangements set out a very broad and detailed description of the proposed conduct for which authorisation is sought. An overview of the Capacity Framework Arrangements is provided in Chapter 2 of this determination. The Applicants advise that the proposed Capacity Framework Arrangements have been divided into two sections – Parts A and B – to reflect the phasing-in of the long term solution in the Hunter Valley by 1 January 2010.

1.16. The Applicants' original supporting submission to the application requested authorisation of the proposed Capacity Framework Arrangements for 15 years until 30 June 2024.[3]

1.17. In response to the draft determination proposing to grant authorisation until 30 June 2020, the Applicants submitted that the duration of authorisation should be at least 15 years and expire on 31 December to better match contracting periods.

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[3] The Applicants' supporting submission to the applications (A91147–A91149 and A91168–A91169), 30 June 2009, page 11.

Other parties

1.18. The Applicants seek authorisation to extend to other parties, namely:

- any exporter of coal through the terminals at the Port of Newcastle
- any above or below rail service provider in the Hunter Valley and
- the Hunter Valley Coal Chain Coordinator.

1.19. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

Interim authorisation

1.20. At the time of lodging the original applications, the Applicants also requested urgent interim authorisation of the proposed Capacity Framework Arrangements so that: [4]

- the long term solution can start to be implemented – namely, PWCS can give effect to the 2009 Base Tonnage Offer for the period 1 July 2009 to 31 December 2009, as well as the respective nomination and allocation procedures at the terminals and contractual alignment principles
- NCIG and PWCS can enter into long term ship or pay contracts with producers, and therefore obtain sufficient certainty to undertake planning in relation to investment and expansion decisions, and in the case of producers, sales decisions and other commercial arrangements with other Hunter Valley service providers.

1.21. On 22 July 2009 the ACCC granted conditional interim authorisation to allow the Applicants to commence the phased-in implementation of the Capacity Framework Arrangements.

1.22. In reaching this decision, the ACCC had regard to the following:

- there is sufficient urgency for the Applicants to need to be able to commence implementing key aspects of the proposed Capacity Framework Arrangements at the Port of Newcastle for the remainder of 2009, in order to facilitate the long term solution being able to commence across the Hunter Valley coal chain by 1 January 2010
- the operation of the 2009 Base Tonnage Offer is unlikely to delay the implementation of the long term solution in the Hunter Valley
- the significant public benefit arising from the implementation of a long term commercial framework, namely, sufficient certainty for industry participants regarding coal volumes to underpin efficient investment across the entire coal chain.

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[4] The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 28.

1.23. Interim authorisation was subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009. This was in accordance with the timeframes set out within the applications for authorisation. The ACCC's decision indicated that it would revoke the interim authorisation should any of the Applicants fail to execute the Capacity Framework Documents by 31 August 2009.

1.24. As noted above, on 24 July 2009 the Applicants lodged further applications for authorisation in relation to a contract, arrangement or understanding which may contain a cartel provision. The additional 'cartel applications' also included a request for interim authorisation.

1.25. Given the ACCC granted conditional interim authorisation on 22 July 2009 for the same conduct, and for the reasons set out in that decision, the ACCC granted conditional interim authorisation to the 'cartel applications' on 29 July 2009.

1.26. On 31 August 2009 the Applicants advised that NCIG had not executed its Capacity Framework Documents. Accordingly, on 1 September 2009 the ACCC revoked the conditional interim authorisation which had previously been granted to the in relation to the Capacity Framework Arrangements.

1.27. On 17 September 2009 the Applicants advised that NCIG had now executed the Capacity Framework Documents. At that time, the Applicants also requested that the ACCC grant interim authorisation to the Capacity Framework Arrangements, as amended on 14 September 2009.

1.28. On 23 September 2009 the ACCC granted interim authorisation to the Capacity Framework Arrangements, as amended on 14 September 2009. The amendments included the removal of the previous section 11 of Part B of the arrangements.

1.29. The ACCC reconsidered interim authorisation as part of its draft determination and decided to grant interim authorisation to the further revised Capacity Framework Arrangements received on 26 October 2009 (provided at Attachment A).

1.30. Copies of the ACCC's interim authorisation decision documents are available from the ACCC's website **www.accc.gov.au/AuthorisationsRegister**.

The draft determination

1.31. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.32. On 28 October 2009 the ACCC issued a draft determination proposing to grant authorisation to the proposed Capacity Framework Arrangements until 30 June 2020.

1.33. A conference was not requested in relation to the draft determination.

2. The conduct

2.1 Authorisation is sought to make and give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in the Capacity Framework Arrangements. The proposed Capacity Framework Arrangements for which authorisation is sought are provided at Attachment A to this determination. Please refer to Attachment A for a full description of the conduct for which authorisation is sought.

2.2 The proposed 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 the Applicants in April 2009.

2.3 The proposed Capacity Framework Arrangements include:[5]

- nomination and allocation procedures for coal loading capacity at the port:
  - the allocation of capacity to access seekers at the PWCS terminals under long term contracts in accordance with the 'PWCS Nomination and Allocation Procedure'
  - the allocation of up to 12 million tonnes per annum of capacity to access seekers (initially exclusively to non-NCIG producers) at NCIG Stage 2 under long term contracts and in accordance with the 'NCIG Nomination and Allocation Procedure'
- expansion arrangements at the port to facilitate usage of terminal capacity:
  - the ability of terminal operators to impose (at their election) an industry levy payable by all users of the terminals in specified circumstances to facilitate expansions of capacity at their respective terminals
  - certain agreed triggers and processes for determining whether and when expansions of the PWCS coal loading terminals are required (including the construction of a new terminal where necessary)
  - 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 the construction of a new terminal) or in the completion of NCIG Stage 2
  - a limitation on the maximum fees for transferring unused capacity allocations and the introduction of a transparent and efficient Capacity Transfer System to limit the commercial incentives to hoard coal chain capacity, and
- contractual alignment:
  - 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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5 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 2.

2.4 It is proposed that the Capacity Framework Arrangements will be reflected in a range of agreements and other documents, including:

- a formal Capacity Framework Agreement between the Applicants which gives effect to the relevant provisions of the Capacity Framework Arrangements
- long term ship or pay contracts for PWCS coal loading terminals and NCIG Stage 2
- Deed of Variation which amends the leases for the land on which the PWCS terminals are located
- Deed of Variation which amends the lease for the land on which NCIG Stage 2 will be located to include the NCIG Nomination and Allocation Procedures for 12 million tonnes per annum of capacity at NCIG Stage 2
- Deed of Undertaking between NPC and NCIG
- an agreement for the lease of the new 'Terminal 4' (T4) between PWCS and NPC, and
- levy protocols for the calculation, charging and collection of an industry levy by NCIG and PWCS to assist with meeting the cost of any Unallocated Expansion Capacity.

2.5 At the time of lodging the applications for authorisation, the Applicants advised that they proposed to provide the ACCC with copies of the relevant contracts and documents (or relevant parts of those documents) in which the Capacity Framework Arrangements are reflected as soon as is practicable.[6]

2.6 The Applicants advised that while authorisation is not being sought separately for those documents, this would, as a practical matter, enable the ACCC to see how those documents give effect to the Capacity Framework Arrangements (that is, the conduct for which authorisation is sought).[7]

2.7 The Applicants submit it was not possible for all aspects of the long term solution to be implemented and operational by 1 July 2009, when the ACCC's previous authorisation of the PWCS Stage 1 Allocation system expired. As such, it is proposed that the long term solution will be phased-in over the last six months of 2009.

2.8 The proposed 'phased-in' approach involves the following steps:[8]

- Phase 1 – involves PWCS offering capacity allocations to existing producers that use the PWCS terminal based on the '2009 Base Tonnage Offer' for the period between 1 July 2009 and 31 December 2009 under a modified PWCS Coal Handling Services Agreement, which will incorporate the 'PWCS Terminal Access Protocols'.
- Phase 2 – involves PWCS implementing and giving effect to the PWCS Nomination and Allocation Procedure. Pursuant to that procedure, PWCS will offer capacity allocations to existing producers that use the PWCS terminals based on the '2010 Base Tonnage Offer' for the period from 1 January 2010

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6 Ibid, page 4.
7 Ibid.
8 Ibid, page 6.

onwards, and invite demand nominations for additional capacity allocations under the terms of new long term ship or pay contracts to commence on 1 January 2010.

2.9 The proposed Capacity Framework Arrangements have been divided into two parts – Parts A and B – to reflect the above phased-in approach. They are described in further detail in the following pages.

Part A – proposed Capacity Framework Arrangements

2.10 Part A covers the phasing-in period for implementation of the long term solution between 1 July 2009 to 31 December 2009, and any offer by PWCS and any acceptance of that offer by a producer of the '2009 PWCS Base Tonnage' for that period.[9]

2009 Base Tonnage Offer[10]

2.11 This section of Part A of the proposed Capacity Framework Arrangements involves any offer by PWCS, and any acceptance of that offer by a producer (in whole or in part), of 2009 PWCS Base Tonnage for the period 1 July 2009 to 31 December 2009.

2.12 The aggregate 2009 PWCS Base Tonnage available for offer is 96.7 million tonnes per annum.

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

- a producer's 2008 binding nominations for capacity allocation at the PWCS terminal proportionally reduced to 95 million tonnes (the '2008 Tonnage') and
- if a producer's 2008 Tonnage is less than the producer's highest allocation usage between 2004 and 2007, the producer will also receive an agreed share of an additional 1.7 million tonnes.

2.14 Before a producer can accept a 2009 PWCS Base Tonnage Offer they will be required to provide a break down of tonnes at each load point (at their mines) and provide PWCS with relevant information required for PWCS System Assumptions and contractual alignment.

2.15 PWCS System Assumptions are the assumptions for the Hunter Valley coal chain that underpin the calculation of PWCS capacity in the relevant period including:[11]

- interface and live run losses between each element in the Hunter Valley export coal chain
- agreed operating mode of the Hunter Valley export coal chain
- surge and tolerance requirements
- capacities of fixed infrastructure
- rolling stock requirements and

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9 Ibid, page 3.

10 Information appearing under this heading is obtained from Clause 1, Part A of the Capacity Framework Arrangements.

11 Part C of the Capacity Framework Arrangements, page 51.

- vessel requirements.

Contractual alignment and the vessel queue[12]

2.16 Under Part A of the proposed Capacity Framework Arrangements, PWCS will refuse to supply coal handling services if a producer has inadequate track or train delivery entitlements in respect of an application for a vessel to be loaded.

2.17 In addition, PWCS proposes to revise flexibility limits or reduce allocations on a pro-rata basis should an excessive queue develop or be forecast to develop.

Transfer fee cap

2.18 Clause 3 of Part A of the proposed Capacity Framework Arrangements outlines the following conduct:

- 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 (the 'relevant portion') at no more than 5 per cent of the fee charged by PWCS for the 'relevant portion'.

Part B – proposed Capacity Framework Arrangements

2.19 At the time of lodging the original applications for authorisation, the Applicants advised that Part B (or 'phase 2') of the proposed Capacity Framework Arrangements will only commence if the 'PWCS Capacity Framework Documents'[13] and 'NCIG Capacity Framework Documents'[14] are executed in full by no later than 31 August 2009, 'or such other date as may be agreed by the Applicants.'[15]

2.20 Subject to the relevant documents being executed, PWCS anticipated being able to obtain acceptance of the '2010 Base Tonnage Offers' and binding nominations for expansion capacity under long term ship or pay contracts from producers in September/October 2009.[16]

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12 Information appearing under this heading is obtained from Clause 2, Part A of the Capacity Framework Arrangements.

13 PWCS Capacity Framework Documents: each Deed of Variation to PWCS and NPC amending respective PWCS leases; the Agreement for Lease of T4 between PWCS and NPC; and the Capacity Framework Agreement between PWCS, NCIG and NPC.

14 NCIG Capacity Framework Documents: 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 2 is to be constructed; the Capacity Framework Agreement between PWS, NCIG and NPC; and the Deed of Undertaking.

15 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, pages 3 and 6.

16 Ibid, page 9.

2.21 The 'PWCS Capacity Framework Documents' were signed by PWCS and NPC on 31 August 2009. The 'NCIG Capacity Framework Documents' were signed by NCIG and NPC on 17 September 2009. There were additional NCIG documents which were not originally contemplated as 'NCIG Capacity Framework Documents'.[17]

2.22 Following the draft determination, NPC and PWCS advised that signed long term ship or pay contracts, including acceptance of base tonnages and nominations, were submitted by producers to PWCS by the due date of 30 October 2009. Under its terminal access protocols, PWCS provided contracted load point allocations to producers on 1 December 2009 and will then issue a final updated allocation schedule to each producer with the producers' load point allocation commitments by 15 December 2009.[18]

2.23 NCIG advises that it is currently in the process of finalising Stage 2 contracts with 'T Class Shippers' (or non-NCIG producers).[19]

2.24 Further, PWCS and NPC advised that significant progress has been made in the development of the proposed Capacity Transfer System under Part B of the arrangements. Phase 1 of the implementation of the Capacity Transfer System is planned to be delivered in mid to late December 2009. The ACCC is advised that the Capacity Transfer System Working Group will continue to develop the mechanics of the system 'so that it may be implemented before 1 January 2010'.[20]

PWCS Base Tonnage for 2010[21]

2.25 The proposed conduct under this section of Part B of the Capacity Framework Arrangements involves any offer by PWCS, and any acceptance of that offer by a producer (in whole or in part), of the 2010 PWCS Base Tonnage on an annual basis for a period of up to 10 years commencing on 1 January 2010.

2.26 The aggregate '2010 PWCS Base Tonnage Offer' is 97.4 million tonnes per annum. The aggregate '2010 PWCS Base Tonnage' of the NCIG producers (other than excluded NCIG producers) is, at 31 August 2009, 24.413 million tonnes per annum.

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

- the producer's 2008 Tonnage and
- the producer's highest actual allocation usage between 2004 and 2007.

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17 Additional NCIG Capacity Framework Documents: a letter from NPC stating the circumstances in which it will approve the final form of NCIG long term ship or pay contracts; a side deed which clarifies the basis on which the NPC may withhold its approval of the plans and specifications for the expansion of the NCIG terminal, as well as what the NPC will consider to be the 'full expansion' of the NCIG terminal; and a Deed Poll signed by NCIG and NPC in relation to Stage 2 shortfall or delay.

18 Submission from PWCS and NPC, *Submission responding to ACCC information request dated 16 November 2009*, 24 November 2009, page iv.

19 Submission from NCIG, 26 November 2009, page ii.

20 Ibid, pages i and ii.

21 Information appearing under this heading is obtained from Clause 1, Part B of the Capacity Framework Arrangements.

2.28 PWCS will make this offer to producers on an annual basis under the terms of new long term 'ship or pay' contracts. 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.

2.29 Before a producer can accept any offer of 2010 PWCS Base Tonnage, a producer must, among other things:

- advise PWCS of a constant annual tonnage for each load point allocation
- provide PWCS with a JORC Code compliant statement of marketable coal reserves for the relevant mines which supports that coal production is feasible with respect to load point allocations for the term
- provide PWCS with relevant information required for PWCS System Assumptions and
- provide PWCS with a signed long term ship or pay contract.

PWCS Nomination and Allocation[22]

2.30 Authorisation is sought for the nomination of capacity allocations at PWCS' terminals by any producer and PWCS' allocation of capacity allocations to producers.

2.31 PWCS may elect to offer existing producers any additional PWCS capacity (above the aggregate Base Allocations) on a pro rata basis that is available:

- between 1 October 2009 and 31 December 2009 and
- 1 January 2010 and 30 June 2010.

2.32 From 1 July 2010 and beyond, allocation of capacity at PWCS' terminals will be conducted in accordance with the 'PWCS annual capacity and nomination and allocation process' (outlined immediately below).

PWCS annual capacity nomination and allocation process[23]

2.33 Each year, PWCS will review its capacity, PWCS System Assumptions and expansion plans. To enable this review, PWCS will provide relevant information to, and obtain relevant information from the Hunter Valley Coal Chain Coordinator (HVCCC), producers and other service providers in the Hunter Valley. In undertaking this review, PWCS will have regard to Coal Chain Master Planning conducted by the HVCCC and information received from producers and other service providers.

2.34 PWCS will also undertake an annual demand assessment process with producers. This process will include submission of nominations for 10 year load point allocations, notice of renewals or extensions of existing load point allocations (that is, 'rolling evergreen allocation') and notice of any offers of voluntary load point allocation reductions.

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22 Information appearing under this heading is obtained from Clause 2, Part B of the Capacity Framework Arrangements.

23 Information appearing under this heading is obtained from Clauses 2A, 2B and 2C, Part B of the Capacity Framework Arrangements.

2.35 PWCS will contract load point allocations with producers. Contracted allocations which cannot be satisfied by existing capacity at PWCS coal loading terminals, will commence within certain timeframes outlined within the Capacity Framework Arrangements.

2.36 Expansion capacity at PWCS existing coal loading terminals will be available exclusively to non-NCIG producers until the later of the following to occur:

- 1 January 2010 and
- the date on which the each of the following has occurred:
  - NCIG Stage 2 is committed and
  - either of the following:
    i) 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) on one expansion tranche or
    ii) 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.

2.37 The intention of these requirements (at paragraph 2.36) is to ensure that NCIG is committed to the full expansion of its terminal before NCIG producers are entitled to access expansion capacity at PWCS terminals. NCIG producers will also not be entitled to access expansion capacity at PWCS' terminals while there is still available existing or potential capacity at the NCIG terminal.

2.38 A producer's nomination for expansion capacity at PWCS terminals must include, among other things:

- a constant annual tonnage for each load point allocation
- a commencement date (up to 5 years from when the nomination is submitted)
- a JORC Code compliant statement of marketable coal reserves for the relevant mines which supports that coal production is feasible with respect to load point allocations for the term
- information relating to the development status of the source mine, including development consent and other approvals to operate
- a timeline for first coal production
- relevant information required for PWCS System Assumptions and
- a duly executed and binding long term ship or pay contract for the nominated allocation, if the producer has not already done so.

2.39 The PWCS Nomination and Allocation Procedures also include certain rules which prioritise the order in which nominations for expansion capacity and any excess capacity at PWCS' coal loading terminals will be satisfied. However, existing load point allocations will not be diluted.

2.40 Every year producers may submit a one year renewal of their existing 10 year load point allocation (that is, rolling evergreen allocation). If an annual rolling renewal is not taken up by the producer, the specific load point allocation loses its evergreen renewal right.

2.41 A producer's load point allocation will be broken down into periodic load point allocations for use in particular periods. A producer may use its periodic load point allocation and any tolerance amounts determined by PWCS for that period. A producer's entitlement in relation to the period ceases when it no longer has unused load point allocations for that 'allocation period'.

2.42 For the period 1 January 2010 to 31 December 2011, where a producer has an aggregate load point allocation greater than 5 million tonnes per annum, the allocation period for that producer will be a month (that is, 'large producers'). If a producer has aggregate load point allocations less than or equal to 5 million tonnes per annum, they will have a quarterly allocation period (that is, 'small producers').

2.43 From 1 January 2012, small producers, and therefore those that receive a quarterly allocation period, will be those producers with an aggregate load point allocation of 3 million tonnes per annum or less. Large producers (with an aggregate load point allocation greater than 3 million tonnes per annum) will have a monthly allocation period.

NCIG Nomination and Allocation Procedures[24]

2.44 Authorisation is sought for the nomination of capacity allocations of 12 million tonnes per annum at NCIG Stage 2 by a producer and NCIG's allocation of that capacity.

2.45 This capacity offer in relation to NCIG Stage 2 will initially be made exclusively to non-NCIG producers.[25] Capacity of 'NCIG Stage 1' (that is, 30 million tonnes per annum) has been fully allocated to NCIG producers only.[26]

2.46 In particular, NCIG will offer a total of 12 million tonnes of capacity at NCIG Stage 2 in accordance with the following steps:

- Step 1 – invite expressions of interest from all non-NCIG producers. NCIG will consult with PWCS as to the timing of the nomination and allocation process
- Step 2 – provide information package and form of ship or pay contract to non-NCIG producers
- Step 3 – NCIG will receive nominations from producers, which must include:
  - a commitment to ship a minimum of 3 million tonnes per annum when Stage 2 of the terminal is operating at full capacity
  - a nominated source mine(s) for which registered mining title is held
  - development consent for the source mine(s)

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24 Unless stated otherwise, information appearing under this heading is obtained from Clause 3, Part B of the Capacity Framework Arrangements.

25 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168-–A91169), 30 June 2009, page 2.

26 Ibid, page 14.

- a JORC Code compliant statement of marketable coal reserves for the source mine(s) showing total marketable coal reserves, as well as demonstrating 11 years of coal production for exporting through NCIG
- consent by the applicant to participate in the due diligence enquiries to be conducted on behalf of the financiers for NCIG Stage 2 and
- lodgement of cash or a bond.

- Step 4 – NCIG will assess nominations against certain criteria, including those applicants that facilitate the most efficient and effective operation of the coal loading terminal and the outcome of the due diligence process.
- Step 5 – if NCIG receives aggregate complying nominations from producers in excess of 12 million tonnes per annum, PWCS will (on behalf of NCIG) allocate capacity to the relevant nominating non-NCIG producers.
- Step 6 – if NCIG receives aggregate complying nominations from producers' which are less than 12 million tonnes per annum, it will confirm nominations with producers. These producers will sign ship or pay contracts with NCIG, subject to the occurrence of Financial Close. The balance of any non-allocated tonnes will be made available for nomination by all producers (including NCIG producers), in accordance with steps 1 to 6.
- Step 7 – At Financial Close, producers sign binding ship or pay contracts with NCIG. The terms of ship or pay contracts signed by non-NCIG producers will generally be the same as the terms signed by NCIG producers for allocations at NCIG Stage 2.

Dual nomination process[27]

2.47 Dual nomination refers to the situation where a non-NCIG producer has nominated for capacity at the PWCS terminals as well as submitting a corresponding nomination to NCIG for the same annual tonnage in Stage 2 of NCIG's terminal.

2.48 Among other things, at the time of submitting a nomination for capacity with PWCS, a non-NCIG producer must inform PWCS that it is a Dual Nomination.

2.49 A producer which submits a valid Dual Nomination for capacity at PWCS' terminals will receive a load point allocation which:

- has a suspended start date
- has an annual tonnage equal to the nominated amount and
- is contingent on whether NCIG Stage 2 is committed.

2.50 If PWCS receives a notice from NCIG that Stage 2 is committed:

- the dual portion of the load point allocation at PWCS will immediately terminate and
- any remaining contingent excess portion will cease to be contingent and become an operative load point allocation.

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[27] Information appearing under this heading is obtained from Clause 2A(l), Part B of the Capacity Framework Arrangements.

2.51 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 at PWCS will immediately cease to be contingent and become an operative load point allocation at PWCS.

Conduct where NCIG is in breach of Deed of Undertaking or Capacity Framework Agreement[28]

2.52 In the event of a breach of the Deed of Undertaking or the Capacity Framework Agreement by an NCIG Party (that is, NCIG and each NCIG producer who is a party to, or is otherwise bound by, the Deed of Undertaking), NPC will issue a breach notice to all of the NCIG parties. The NCIG parties will have 30 days (or shorter if another breach has occurred in the immediately preceding 12 months) to rectify the breach.

2.53 During the 30 day period, NCIG producers will not be entitled to nominate for any capacity allocations at PWCS terminals in excess of their PWCS Base Tonnage.

2.54 If the breach is not rectified within 30 days to the satisfaction of the NPC, then:

- until the breach is rectified, PWCS will be entitled to terminate any unfulfilled PWCS contracted allocations of NCIG producers for capacity at PWCS which exceeds their PWCS Base Tonnage and
- PWCS will be entitled, on receiving a direction from the NPC, to reduce the PWCS contracted allocations of NCIG producers by up to 1 million tonnes each month for a period of not less than 2 years, determined by NPC, until the breach is rectified to the satisfaction of NPC or the PWCS contracted allocations of NCIG have been reduced to zero.

2.55 If PWCS receives a notice from NPC to restore any load point allocation of any NCIG producers, then PWCS will restore those load point allocations in accordance with the notice to the extent that any excess capacity is available.

2.56 Authorisation is also sought for any conduct, agreement, arrangement or understanding between the NCIG producers to set the proportion of the tonnage reduction that each of them will bear.

Compression and decompression of contracted allocation[29]

2.57 Authorisation is sought for any compression or decompression of a producer's PWCS contracted allocation due to a delay or shortfall in expanding the capacity of the terminals at the Port of Newcastle.

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[28] Information under this heading is obtained from Clause 2D, Part B of the Capacity Framework Arrangements.

[29] Information appearing under this heading is obtained from Clause 5, Part B of the Capacity Framework Arrangements.

2.58 In particular, PWCS will compress PWCS contracted allocations when: [30]

- there is a PWCS expansion delay or an expansion shortfall which gives rise to a capacity shortfall and
- there is a NCIG Stage 2 delay or NCIG Stage 2 shortfall.

2.59 When there are delays or shortfalls in expansion capacity at PWCS terminals, PWCS will compress contracted allocations to accommodate the capacity shortfall in the following order:[31]

- first, producers may voluntarily elect for a portion of their contracted allocation to be compressed
- next, producers who have failed to meet the Utilisation Threshold of 95 per cent for the previous 18 month period will be compressed on a pro rata basis in the proportion that their unutilised allocation bears to the aggregate unutilised allocations of producers (referred to as 'anti-hoarding compression')
- last, if there is still a capacity shortfall, all producers will be compressed pro rata in the proportion that their contracted allocation bears to the aggregate contracted allocation.

2.60 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 agreement is not reached, the adjustment will be applied pro rata across all of the producer's load point allocations.

2.61 When there is a NCIG Stage 2 delay or NCIG Stage 2 shortfall, 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:[32]

- first, producers may voluntarily elect for a portion of their PWCS contracted allocation to be compressed
- next, each producer that has failed to meet the Utilisation Threshold of 95 per cent for the previous 18 month period will be compressed pro rata in the proportion that their unutilised allocation bears to the aggregate unutilised allocation (referred to as 'anti-hoarding compression') and
- last, if there is still an NCIG capacity deficit, NCIG producers will be required to transfer to non-NCIG producers with 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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30 Clause 5(a), Part B of the Capacity Framework Arrangements.
31 Clause 5(b), Part B of the Capacity Framework Arrangements.
32 Clause 5(c), Part B of the Capacity Framework Arrangements.

Period of delay or shortfall	Amount of contracted allocations to be transferred (million tonnes per annum) until NCIG capacity deficit is satisfied	Date of transfer
Up to 6 months	3 mtpa	Target completion date of NCIG Stage 2
Up to 9 months	6 mtpa	The date that is 6 months after the target completion date of Stage 2.
Up to 12 months	9 mtpa	The date that is 9 months after the target completion date of Stage 2.
Over 12 months	12 mtpa	The date that is 12 months after the target completion date of Stage 2.

2.62 There are certain exceptions to compression, including for producers that have failed to meet their utilisation threshold for reasons outside their control.[33]

2.63 Compression will come to an end when the relevant expansion delay or shortfall which triggered the compression comes to an end.

2.64 A Reviewer will be responsible for calculating the extent to which each producer is required to compress and decompress under Clause 5 of the Capacity Framework Arrangements.[34] The Reviewer will be the NPC, or an independent expert appointed by the NPC.

2.65 Each terminal operator is required to provide the Reviewer with all relevant information (subject to confidentiality requirements) that is required to accurately calculate compression and decompression volumes. A producer or the NPC (if the NPC is not the Reviewer) may seek a review of the Reviewer's compression and decompression calculations by notifying the other party and the Minister.

Coordination of expansion activities[35]

2.66 Authorisation is sought for the coordination of expansion of terminal facilities and services. In particular, the Capacity Framework Arrangements provide that PWCS must expand its existing coal loading terminals to provide additional capacity if:

- the aggregate PWCS contracted allocations from time to time exceeds the aggregate PWCS available capacity (that is, Capacity Shortfall) and
- the Capacity Shortfall cannot be fulfilled though voluntary contracted allocation reductions.

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33 Clause 5(d), Part B of the Capacity Framework Documents.

34 Clause 5(h), Part B of the Capacity Framework Documents.

35 Information appearing under this heading is obtained from Clause 6, Part B of the Capacity Framework Arrangements.

2.67 At a minimum, PWCS' capacity expansion must satisfy the Capacity Shortfall. However, PWCS is not required to expand to meet any nominations for expansion capacity at its terminals which seek allocations of less than ten years.

2.68 If the existing PWCS coal loading terminals are not capable of being expanded further to provide the additional capacity to satisfy the Capacity Shortfall, then PWCS must build a new terminal ('T4'). Clause 6 also states that nothing in this section of the Capacity Framework Arrangements prevents any person other than PWCS from constructing a new terminal at the Port of Newcastle.

2.69 If PWCS is required to expand an existing coal loading terminal, the expansion must be completed in accordance with the following timeframes:

- in the case of Master Plan Completion Phase 1 – two years after the date on which the Capacity Shortfall which triggered the expansion arises
- in the case of Master Plan Completion Phase 2 – two years after the later of:
  - the date on which the Capacity Shortfall which triggered the expansion arises and
  - the date on which that part of the Hunter River to which PWCS requires access is validated by the relevant authority as clean following the completion of he relevant part of the BHP Billiton Hunter River Remediation Project
- in any other case, within 2 years after the date on which the Capacity Shortfall which triggered the expansion arises.

2.70 If PWCS is required to build T4, it must be capable of meeting the Capacity Shortfall which triggered the construction of the new terminal within 4 years of that Capacity Shortfall arising.

2.71 PWCS must advise NPC and affected producers if a PWCS expansion delay or expansion shortfall is expected, including the date on which the expansion delay or capacity shortfall is expected to commence and end.

2.72 The Capacity Framework Arrangements provide that NCIG must not commence construction of NCIG Stage 2 unless it has first offered to allocate 12 million tonnes per annum of capacity to non-NCIG producers under long term ship or pay contracts (in accordance with the NCIG Nomination and Allocations Procedure outlined above).

2.73 Prior to NCIG Stage 2 being committed, NCIG must:

- 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 T4
- where there is such interference, use its best endeavours to minimise the interference and
- consult with PWCS regarding any potential interference.

2.74 NCIG Stage 2 must be capable of delivering the contracted capacity to non-NCIG producers within the following time periods:

- if NCIG Stage 2 is committed on or before 31 December 2009, within four years after the date the commitment is made and
- otherwise, within two years after the date NCIG Stage 2 is committed.

2.75 NCIG must advise NPC, PWCS and affected producers if an NCIG Stage 2 delay or capacity shortfall is expected, including the date on which the Stage 2 delay or shortfall is expected to commence and end.

2.76 The Capacity Framework Arrangements also outline circumstances where the Reviewer may decide to suspend the terminal operators' obligations to expand (for example, PWCS has failed to obtain the relevant development consents despite best efforts), or agree to an extension of the period to complete the expansion following a Force Majeure event.[36]

Capacity transfers[37]

2.77 Authorisation is sought under Part B of the proposed Capacity Framework Arrangements for the conduct of PWCS and NCIG capping the fee that a producer with contracted allocations at any terminal can charge another producer to use a portion of its contracted allocation to no more than 5 per cent of the fee charged by PWCS or NCIG for the relevant portion.

2.78 Authorisation is also sought for the following conduct in relation to capacity transfers:

- sharing information and coordination between the Applicants (and other participants in the Hunter Valley coal industry) for the purpose of developing and implementing a transparent and centralised system to facilitate and manage the offering and allocation of unused allocation (the 'Capacity Transfer System'), including the appointment of a Capacity Transfer System Working Group and Administrator
- any requirement that producers use the Capacity Transfer System
- producers that do not use best efforts to transfer unused allocations (including by making a bona fide attempt to transfer unused allocation in accordance with the Capacity Transfer System) will not be entitled to claim relief from 'anti-hoarding compression'
- for producers to pay a fee for using or registering with the Capacity Transfer System for the purpose of covering the cost of establishing, administering, operating and maintaining the system
- the conduct of PWCS declining to accept a transfer of contracted allocation having regard to the recommendations of the HVCCC, PWCS System Assumptions and operating protocols, and alignment of contractual entitlements and

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36 Clause 6(e), Part B of the Capacity Framework Arrangements.

37 Information appearing under this heading is obtained from Clause 7, Part B of the Capacity Framework Arrangements.

- the conduct of PWCS in adjusting transferred allocations to account for any variation in the PWCS System Assumptions of the 'transferring producer' and the 'transferee producer'.

Assignment of capacity[38]

2.79 Authorisation is sought for PWCS to:

- decline to accept an assignment of contracted allocation having regard to the recommendations of the HVCCC, PWCS System Assumptions and operating protocols, and alignment of contractual entitlements or
- adjust assigned contracted allocations to account for any variation of the PWCS System Assumptions of the 'assigning producer' and the 'assignee producer'.

2.80 Authorisation is also sought for PWCS and NCIG to cap the fee that a producer may charge to assign or novate its entire load point allocation at no more than 5 per cent of the fee charged by PWCS or NCIG for the use of that load point allocation in the year in which the assignment or novation becomes effective.

Industry levy[39]

2.81 Authorisation is sought for the setting, making, varying and giving effect to any industry levy that may be applied by PWCS or NCIG to assist with meeting the cost of any unallocated expansion capacity at their terminals, in accordance with the Levy Protocols provided at Annexure A to the Capacity Framework Arrangements. Such an industry levy is to be applied to all terminal users that contract to use the terminals under a long term ship or pay contract or short term contract (including those that do not utilise the proposed expansion).

2.82 In addition, authorisation is sought for the establishment of a Levy Working Group and the sharing of information and coordination between the Applicants, the Levy Working Group and the Administrator (to be established) for the purpose of:

- developing and implementing protocols for the calculation, charging and collection of the levy and
- calculating the amount of, and period, for charging the levy, in accordance with the Levy Protocols.

2.83 Any industry levy will be applied on a per tonne basis across all coal exported from the terminals. The Levy Protocols govern the imposition of any levy, including that:

- PWCS or NCIG may elect to apply the levy whenever:
  - they complete an expansion and
  - the Administrator determines that the contracted allocation for that expansion is less than the capacity that is made available from the expansion and

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38 Information appearing under this heading is obtained from Clause 7A, Part B of the Capacity Framework Arrangements.

39 Information appearing under this heading is obtained from Clause 8, Part B of the Capacity Framework Arrangements.

- the Administrator has been established.

- NCIG must not apply the levy to any 'Excluded NCIG Stage 2 Capacity', being that portion of capacity which is *not* required to be offered for allocation to non-NCIG producers
- while NCIG has not committed to Stage 2, NCIG producers will only be entitled to nominate for allocations of unallocated expansion capacity at PWCS coal loading terminals under fixed term contractual arrangements for the maximum term then available not exceeding 2 years
- if the levy is applied in respect of any unallocated expansion capacity, the levy will cease to apply when the Administrator determines:
  - the total expansion cost of unallocated expansion capacity has been recovered or
  - all expansion capacity is contracted under long term ship or pay contracts or
  - the costs of the levy administration would exceed all remaining total expansion costs to be otherwise recovered though the levy, or

  until PWCS and NCIG agree that the levy should cease to apply.

Contractual alignment and access to services[40]

2.84 Authorisation is sought for the conduct of PWCS and NCIG:

- 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
- 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.

2.85 Authorisation is sought for PWCS to refuse to supply coal handling services to an NCIG producer if it 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.

2.86 Authorisation is also sought for PWCS to make one or more downward adjustments to producers load point allocations if, at any time:

- the capacity of a terminal is affected by the construction or integration of any expansion to the terminal
- PWCS has not met the assumptions relating to the PWCS terminals as set out in the System Assumptions
- the capacity of a terminal is affected by the weather or
- there is a Force Majeure Event.

2.87 Any such adjustment by PWCS will generally be on a pro rata basis unless there are specific circumstances which only affect certain producers, in which the adjustment

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[40] Information appearing under this heading is obtained from Clause 9, Part B of the Capacity Framework Arrangements.

will be on a pro rata basis for only those affected producers. In deciding the amount of any adjustment, PWCS may have regard to the PWCS System Assumptions and any recommendations made by the HVCCC.

2.88 Similarly, authorisation is sought for PWCS to make one or more pro rata downward adjustments to the load point allocations of producers utilising the 'turn of arrival' vessel system if an excessive vessel queue arises or is forecast to arise.

2.89 Further, authorisation is sought for the following conduct:

- Sharing information and coordination between the Applicants, producers, HVCCC and above and below rail service providers for the purpose of:
  - determining and reviewing system capacity for any period
  - developing and reviewing system assumptions (including the PWCS System Assumptions) and
  - developing, measuring and reviewing producer performance standards (such as load point standards, train standards, unloading standards, cargo assembly standards and vessel standards)
  - determining and coordinating flexibility and tolerance limits in relation to capacity allocations during any period
  - developing and reviewing a Capacity Transfer System and
  - facilitating and reviewing the operational coordination and efficient operation of different parts of the coal chain.
- Making or giving effect to contracts with producers based on any agreed system capacity, system assumptions, performance standards, flexibility and tolerance limits, for the purpose of facilitating contractual and operational alignment across the coal chain.
- Making or giving effect to any adjustment or variation to contracted allocations or determination of capacity losses due to a producer deviating from system assumptions or performance standards.

Terminal 4[41]

2.90 Authorisation is sought for any requirement in relation to the structure, ownership or operation of T4 that:

- Part B of the Capacity Framework Arrangements will apply to the provision of capacity at T4
- access to capacity will be open to all producers on a non-discriminatory basis, except to the extent discriminatory treatment is contemplated in Part B of the Capacity Framework Arrangements.

41 Information appearing under this heading is obtained from Clause 10, Part B of the Capacity Framework Arrangements.

2.91 Prior to undertaking the construction of T4, PWCS must:

- take all reasonable steps to ensure that the design and construction of T4 does not interfere with the ability of NCIG to construct and efficiently operate NCIG Stage 2
- where there is such interference, use its best endeavours to minimise the interference and
- consult with NCIG regarding any potential interference.

Common charges at PWCS terminals[42]

2.92 Authorisation is sought for any requirement for PWCS to ensure that 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
- 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).

[42] Information obtained under this heading is obtained from Clause 11, Part B of the Capacity Framework Arrangements.

3. Background to the application

The Applicants

3.1. **Port Waratah Coal Services Limited** (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 ('T4') with the NSW Government.

3.2. PWCS is an incorporated joint venture between a number of coal producers and other participants in the Hunter Valley coal industry, including exporters and importers of coal from the Hunter Valley. Attachment D to this determination lists the current shareholders of PWCS.

3.3. PWCS provides coal handling services to Hunter Valley coal exporters, including the receiving and unloading of coal, stockpiling coal and loading coal into vessels for export.

3.4. The operation of PWCS' terminals is based on a 'cargo assembly' system. PWCS' terminals consist of rail receival infrastructure, stockpiling areas, coal reclaimers and a dedicated conveyor system which carries the coal to shiploaders. PWCS currently has five shipping berths (two at Carrington and three at the Kooragang Island). Around 99 per cent of all coal received at PWCS' terminals is transported via rail. The shiploaders at the Kooragang Island terminal can operate at a peak rate of 10 500 tonnes per hour, while the shiploaders at the Carrington terminal have a capacity of 2500 tonnes per hour.[43]

3.5. Part of the land on which PWCS' terminals are situated is owned by the NSW Government and leased to PWCS. When the current applications for authorisation were lodged with the ACCC, the lease regarding the Kooragang Island terminal required PWCS to operate the terminal as a 'common user facility' – which required PWCS to provide access to the Kooragang Island terminal on a non-discriminatory basis to all producers who wish to ship coal.

3.6. The proposed Capacity Framework Arrangements for which authorisation is sought are intended to substitute the common user provisions in PWCS' previous lease.[44]

3.7. PWCS' total 'nameplate' coal loading capacity at the end of 2009 is 113 million tonnes per annum.[45] PWCS' System Capacity for 2010, which is set according to track and other coal chain factors, has been determined at 106.7 million tonnes per annum.[46] PWCS has development approval to complete construction of its Kooragang Terminal Master Plan and to operate at 145 million tonnes per annum.[47]

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43 Information provided at paragraph 3.4 was obtained from PWCS' website, **www.pwcs.com.au**, viewed on 10 September 2009.

44 Submission from the Applicants, 13 July 2009, page 7.

45 PWCS media release, *Long-term Newcastle coal export plan advances towards commencement on January 1, 2010*, 3 December 2009.

46 Ibid.

47 Previous applications for authorisation (A91110–A91112) lodged by PWCS and NCIG on 19 November 2008, page 7.

3.8. **Newcastle Coal Infrastructure Group** (NCIG) is an incorporated joint venture between six Hunter Valley Coal producers – namely, BHP Billiton (though Hunter Valley Energy Coal), Centennial Coal Company Limited, Peabody Energy Coal (Excel Coal Limited), Whitehaven Coal and Felix Resources. Attachment E to this determination lists the members' shares of NCIG.

3.9. NCIG was formed in 2004 following the NSW Government's invitation for submissions to develop an additional coal loading terminal at the Port of Newcastle.

3.10. NCIG does not currently operate a terminal at the Port of Newcastle. The first stage of NCIG's terminal, with a capacity to load 30 million tonnes of coal per annum, is currently under construction and is expected to be operational around the end of the first quarter of 2010. All capacity for this first stage has been contracted to NCIG shareholders. NCIG-member producers currently export coal though PWCS' terminals.

3.11. The NCIG terminal will consist of rail infrastructure, a coal storage area, wharf facilities and shiploaders. There will be two shipping berths constructed as part of NCIG's first stage of development. A third shipping berth is proposed to be built in the second stage of development (with capacity up to 66 million tonnes per annum).[48]

3.12. NCIG advises that its terminal will operate based on a dedicated stockpile model. Under this model, NCIG allocates a dedicated stockpile to each NCIG shipper based on its percentage of total throughput.[49]

3.13. As a result, NCIG shippers will operate on an even and regular train schedule to fill these dedicated stockpiles (for instance, run the same number of trains per week). NCIG producers receive an annual throughput entitlement based on its ship or pay commitment. Its monthly shipping allocation is one twelfth of its annual entitlement, subject to agreed tolerances.[50]

3.14. Each NCIG shipper manages its own train schedule and will be able to deliver coal to the terminal until its dedicated stockpile area is full. NCIG advises that it is the responsibility of the NCIG shipper to ensure that vessels arrive with sufficient frequency so as to prevent the stockyard from becoming full.

3.15. **Newcastle Port Corporation** (NPC) is a statutory State-owned corporation constituted under the *Ports and Maritime Administration Act 1995 (NSW).* 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 under its legislation and operating licence.

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48 Previous applications for authorisation A91110–A91112 from PWCS and NCIG, 19 November 2008, page 8.

49 Submission from NCIG, 3 December 2009, page ii.

50 Ibid.

The Hunter Valley coal chain

An overview

3.16. The Hunter Valley coal chain is a complex export system comprising:[51]

- 35 coal mines owned by 14 individual coal producers
- 24 points at various mines for loading coal onto trains
- approximately 28 trains (owned by two above rail operators), making an average of two trips per day
- more than 80 different export blends of coal
- five berths and shiploaders at the port and
- total stockpile capacity of 3.4 million tonnes at the Port of Newcastle, which allows approximately 1.5 million tonnes of workable stockpile space for port operations.

3.17. In 2009, approximately 95 million tonnes of coal chain export capacity was made available to the Hunter Valley export industry.[52]

3.18. The Hunter Valley coal chain is located near Newcastle in NSW and is spread over a 350 km area from around Gunnedah in the north, Ulan in the west and Newstan in the south. A map of the Hunter Valley coal network is provided at Figure 3.1 below.

3.19. Around 80 per cent of coal exported from the Hunter Valley is thermal (or steaming) coal primarily used for electricity generation. The remaining 20 per cent of exports is coking (or metallurgical) coal which is used to manufacture steel.[53]

3.20. The majority of coal from the Hunter Valley is exported to Japan (approximately 55 per cent), South Korea (approximately 17 per cent) and Taiwan (approximately 10 per cent).[54]

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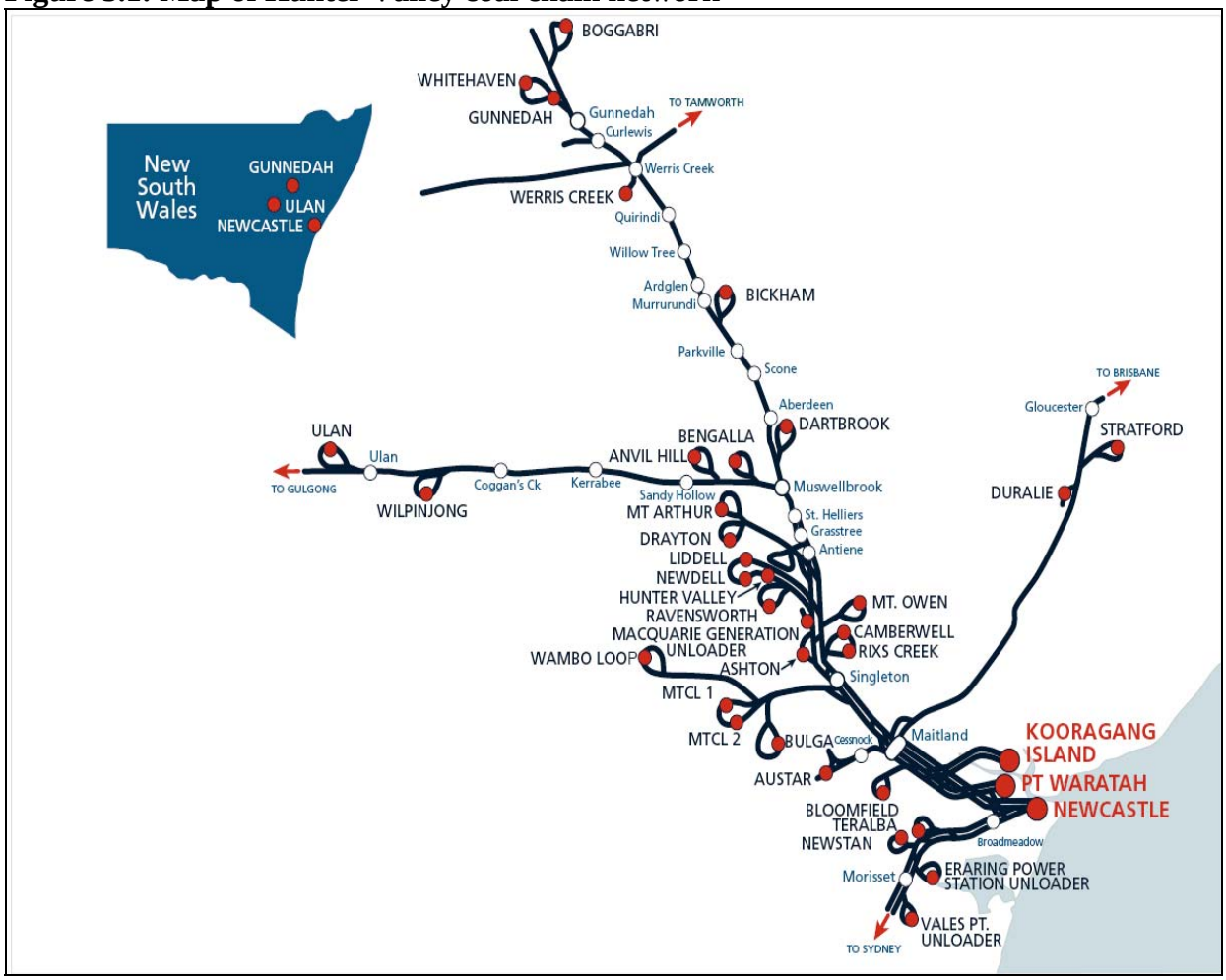
51 Information obtained from the Hunter Valley Coal Chain Logistics Team's website, **www.hvcclt.com.au**, viewed on 17 September 2009.

52 Ibid.

53 PWCS, August 2009 *End of Month Charts*, **www.pwcs.com.au**, viewed on 17 September 2009.

54 Ibid.

Figure 3.1: Map of Hunter Valley coal chain network[55]



Hunter Valley coal exports

3.21. Table 3.1 shows that between 2004 and 2007, annual coal exports through PWCS increased by approximately 7 million tonnes (9 per cent) from 77.81 million tonnes of coal in 2004 to 84.80 million tonnes of coal in 2007. In 2008, a record 91.4 million tonnes of coal was exported from the Port of Newcastle. This was an increase of 6.6 million tonnes of coal (approximately 8 per cent) from 2007 volumes.

55 Figure 3.1 was sourced from the Hunter Valley Coal Chain Logistics Team's website, **www.hvcclt.com.au**, viewed on 17 September 2009.

Table 3.1: Annual throughput at PWCS from 2004 to 2008[56]

Year	Volume (million of tonnes)
2004	77.81
2005	80.33
2006	79.92
2007	84.80
2008	91.40

3.22. The current (annualised) shiploading rate at PWCS for 2009 is 91.3 million tonnes per annum.[57]

The Hunter Valley Coal Chain Logistics Team[58]

3.23. Since 2003, the Hunter Valley Coal Chain Logistics Team (HVCCLT) has been operating as a cooperative organisation responsible for planning all coal exports from the Hunter Valley. Membership of the HVCCLT was open to any future operators of transport and port infrastructure in the Hunter Valley coal chain. The current members are:

- Asciano and QR National – the above rail providers
- Australian Rail Track Corporation (ARTC), Rail Infrastructure Corporation and Railcorp – the track owners
- Port Waratah Coal Services – current terminal operator
- NPC.

3.24. The objectives of the HVCCLT are two-fold – to maximise daily coal export volumes and to coordinate planning for the provision of future coal chain infrastructure. A minimum of 14 days notice is received for the arrival of a vessel at the Port of Newcastle. The HVCCLT coordinates vessel berthing, stockpile layouts and train sequencing with the aim of fulfilling customers' orders in the shortest possible timeframe.

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56 Table compiled by the ACCC from PWCS', *Annual Report 2007*. page 11; and PWCS' *December 2008 end of month report* viewed at **www.pwcs.com.au** on 6 February 2009.

57 PWCS' *November 2009 End of Month Report*, viewed at **www.pwcs.com.au** on 2 December 2009.

58 Unless otherwise stated, information provided under this heading was obtained from the Hunter Valley Coal Chain Logistics Team's website, **www.hvcclt.com.au**, viewed on 17 September 2009.

The establishment of the Hunter Valley Coal Chain Coordinator

3.25. As part of the 2008 Greiner Review of the Hunter Valley coal chain, it was identified that the HVCCLT required greater access to information in order to effectively perform its planning and coordination functions. It was proposed that the HVCCLT be incorporated as an independent entity.

3.26. The Hunter Valley Coal Chain Coordinator (HVCCC) was incorporated on 27 August 2009 and will take over the work of the HVCCLT in the coming months. The major change between the HCCCLT and the HVCCC is that the HVCCC is a legal entity with representation from coal producers and service providers. An objective of the HVCCC will be to plan and coordinate the daily operation of the coal chain in order to maximise the volume of coal transported, in accordance with the proposed new contractual arrangements. The HVCCC will also provide a centralised and coordinated forward delivery plan and an annual coal chain capacity plan.[59]

3.27. Further, the HVCCC will also perform a key role in monitoring and recording system performance against the performance standards that form the basis of contracts across the coal chain.[60]

Above rail operators

3.28. As previously mentioned, there are two operators currently providing rail haulage services to Hunter Valley coal producers – QR National and Pacific National (owned by the Asciano Group).

QR National[61]

3.29. QR National commenced operations in the Hunter Valley in 2005. It currently operates 6 trains and has a 20 per cent share of the Hunter Valley rail haulage market, delivering 19.8 million tonnes of coal in 2007–08.

3.30. QR National currently has rail haulage contracts with 5 coal producers (covering 11 mines) for coal exports from the Hunter Valley. Table 3.2 lists QR National's contracts and the rail haulage distances for each mine.

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59 Announcement, *CEO appointed to Hunter Valley Coal Chain Coordinator*, 11 September 2009, viewed on **www.hvcclt.com.au** on 17 September 2009.

60 *Attachment 2 – Contractual Alignment Principles,* supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009.

61 Information provided under this heading was obtained from QR National's website, **www.qrnational.com.au**, *Hunter Valley system,* viewed on 17 September 2009.

Table 3.2: QR National's contracted mines in the Hunter Valley coal chain[62]

Contracted mine (exports)	Haul (km)	Customer
Warkworth (MTCL 1)	83	Rio Tinto Coal Australia Pty Ltd
Mount Thorley (MTCL 2)	83	Rio Tinto Coal Australia Pty Ltd
Bulga	87	Xstrata Coal Pty Ltd
Mount Owen	99	Xstrata Coal Pty Ltd
Newpac (Ravensworth)	104	Xstrata Coal Pty Ltd
Muswellbrook (Ravensworth)	104	Muswellbrook Coal Co Ltd
Hunter Valley	108	Rio Tinto Coal Australia Pty Ltd
Ashton	113	Felix Resources Pty Ltd
Mount Arthur	120	BHP Billiton Ltd
Bengalla	134	Rio Tinto Coal Australia Pty Ltd
Ulan	275	Xstrata Coal Pty Ltd

Pacific National

3.31. Pacific National is fully owned by the Asciano Group and hauls around 88 per cent of coal in NSW, representing approximately 90 million tonnes of coal per annum.[63] Pacific National moves coal from 17 customers in the Hunter Valley across distances generally ranging from 20km to 320km.[64]

Australian Rail Track Corporation

3.32. ARTC was established in 1998 under the *Corporations Act 2001*, whose shares are owned by the Australian Government. In September 2004, ARTC commenced a 60 year lease of certain parts of the NSW rail network, including the Hunter Valley coal network. ARTC is responsible for managing the network and granting access to the network.[65]

3.33. ARTC's stated objectives in the Hunter Valley are to:

- actively cooperate with and support industry arrangements and forums seeking to optimise coal supply chain capacity

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62 Extract of table obtained from QR National's website, **www.qrnational.com.au**, *Hunter Valley system*, viewed on 17 September 2009.

63 Previous applications for authorisation (A91068–A91070) lodged by Pacific National, QR Limited and PWCS, 16 November 2007, Attachment A to the supporting submission to the applications.

64 Information obtained from Pacific National Brochure, **www.pacificnational.com.au**, viewed on 17 September 2009.

65 ARTC access undertaking application, 23 April 2009, *Hunter Valley Coal Network Access Undertaking*, page 3.

- deliver rail capacity to meet industry demand.[66]

3.34. ARTC's responsibilities in relation to the network include:

- selling rail access
- pricing access
- capital investment
- operational management and
- management of infrastructure maintenance.[67]

3.35. As at November 2007, the theoretical capacity of the Hunter Valley rail network was around 124 million tonnes per annum. At this time, ARTC also reported that the largest coal volumes were in the lower end of the Hunter Valley, but noted expected growth over the next few years in coal mining along the Ulan line and in the Gunnedah Basin. Apart from being a longer distance from the port, the rail corridor between Muswellbrook and the Gunnedah Basin is only rated for 100 tonne coal wagons, as opposed to 120 tonne wagons in most other parts of the Hunter Valley network.[68]

Hunter Valley Rail Network Access Undertaking

3.36. On 23 April 2009 ARTC lodged a voluntary access undertaking application for the Hunter Valley rail network (HV Access Undertaking) with the ACCC for assessment under Part IIIA of the Act. The proposed HV Access Undertaking sets out the terms and conditions on which ARTC proposes to provide access to the Hunter Valley rail network.

3.32 Some of the features proposed by ARTC's Hunter Valley Access Undertaking include:

- that coal producers may contract directly with ARTC for track access rights, as opposed to a model where access rights are held by above rail service providers; and
- that applicants seeking coal access rights demonstrate capability to offload the anticipated coal at the port (referred to as 'Network Exit Capability').

3.33 ARTC submits that the principle objective in contracting directly with producers is for ARTC to obtain greater commitment to the long term investments in capacity that will be needed to meet demand, as well as to provide coal producers with a greater degree of control over the transportation of their coal and the alignment of their contracts across the coal chain.[69]

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66 Submission from ARTC in relation to previous applications for authorisation A91110–A91112, 5 December 2008, page 3.

67 Ibid, page 2.

68 ARTC, *Hunter Valley Corridor, 2007-2012 capacity strategy - consultation document,* 29 November 2007, page 3.

69 Submission from ARTC, 10 July 2009, page 2.

3.34 The ACCC notes that the HV Access Undertaking also forms part of the long term solution to the capacity constraints in the Hunter Valley coal chain. ARTC advised the ACCC that it is proposing to put in place long term track access agreements with coal producers and other access seekers, to commence on 1 January 2010.[70]

3.35 The ACCC is currently considering submissions received from interested parties in relation to the HV Access Undertaking. Due to delays in receiving information from ARTC, the ACCC has extended the period for making a decision on the undertaking application. The day by which the ACCC must now use its best endeavours to make a final decision is 22 April 2010.

3.36 In a submission to the ACCC's HV Access Undertaking process, the NSW Minerals Council stated that:

> - …ARTC must be committed to obtaining ACCC acceptance of the amended HVAU (including the AHA and OSA) regardless of whether individual coal producers decide to enter into Proposed New AHA's before 1 January 2010 or not.
> - ARTC should not require any coal producer to enter a Proposed New AHA until it has obtained ACCC acceptance of the amended HVAU (including the AHA or OSA)…
> - Until ARTC obtains ACCC acceptance of its HVAU, it should:
>   - Extend the PN and QRN access contracts to provide track access for the coal of all producers who have not entered into Proposed New AHAs
>   - Provide track access capacity commitments (conditional on subsequent execution of an AHA under an amended HVAU accepted by the ACCC) to all coal producers to match their port terminal capacity commitments and domestic network exit capabilities…[71]

3.37 The ACCC recognises that ARTC's track access arrangements and the arrangements at the port are related. However, this application for authorisation relates to the port-based Capacity Framework Arrangements only. ARTC's track access arrangements are being considered separately by the ACCC under its access undertaking process.

3.38 The ACCC's assessment of the proposed Capacity Framework Arrangements is separate from and should not be taken to be indicative of its assessment of ARTC's proposed HV Access Undertaking under Part IIIA of the Act.

Previous ACCC authorisations

3.37. As outlined in Chapter 2 of this determination, the current application seeks authorisation for very broad and detailed arrangements which form part of the long term solution to the ongoing capacity constraints in the Hunter Valley coal chain. Prior to the current application, the ACCC was requested to authorise various transitional measures to manage the vessel queues at the Port of Newcastle (or 'capacity balancing systems').

3.38. An ACCC authorised capacity balancing system has essentially been in operation at the Port of Newcastle since interim authorisation was first granted by the ACCC to the short term 'Capacity Distribution System' in March 2004.

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70 Submission from ARTC, 17 November 2009, page 1.

71 Submission to the ACCC's HV Access Undertaking process from the NSW Minerals Council, 1 December 2009, page 3.

3.39. The most recent authorised capacity balancing system – called 'PWCS Tonnage Allocation Stage 1' – operated at the Port of Newcastle during the first six months of 2009.

3.40. In previous authorisation decisions, the ACCC noted that the underlying coal chain issues in the Hunter Valley were not being addressed and that infrastructure capacity expansions alone would not solve the problem. In particular, structural, regulatory and contractual issues in the Hunter Valley were contributing to the ongoing capacity imbalance.

3.41. Table 3.3 summarises the history of previous applications for authorisation for capacity balancing systems at the Port of Newcastle. Copies of all of the ACCC's previous decisions are available from its website: **www.accc.gov.au/AuthorisationsRegister**.

Table 3.3: History of applications for authorisation of capacity balancing systems

Authorisation	Date lodged	Authorisation	Date authorisation expired
Applications for authorisation of a 'Short Term Capacity Distribution System' Lodged by PWCS (A90906 – A90908)	5 February 2004	Interim authorisation granted on 6 March 2004 Final authorisation granted on 9 July 2004	31 December 2004 The ACCC was reluctant to extend authorisation beyond this date because of the lack of certainty whether a vessel queue was likely to persist during 2005.
Applications for authorisation of a 'Medium Term Capacity Distribution System' Lodged by PWCS (A30236 – A30238)	1 October 2004	Interim authorisation granted on 3 November 2004 Final authorisation granted on 15 April 2005	31 December 2007 The ACCC noted there was greater likelihood of potential public detriment resulting from the Medium Term Capacity Distribution System the longer the authorisation ran. Under the terms of the Medium Term Capacity Distribution System, the scheme would only operate during the period of authorisation if the demand for coal loading services exceeded the capacity of the coal chain by 3 million tonnes, as well as receiving the support of the industry. In September 2006, the industry voted to discontinue the system. PWCS subsequently sought authorisation to reinstate a modified version of this scheme for the balance of the original period of authorisation.

Applications for authorisation to reinstate a modified 'Medium Term Capacity Balancing System'. Lodged by PWCS (Applications for revocation of authorisations A30236 – A30238 and substitution of authorisations A91033-A91035)	27 February 2007	Interim authorisation granted on 14 March 2007 Final authorisation granted on 23 May 2007	31 December 2007
Applications for authorisation of a 'Vessel Queue Management System'. Lodged by Pacific National, QR Limited and PWCS. (A91068-A91070)	16 November 2007	ACCC decided not to grant interim authorisation on 13 December 2007	This application was withdrawn on 22 January 2008.
Two separate applications for authorisation effectively seeking to extend the operation of the 'Medium Term Capacity Balancing System'. Lodged by NPC (A91072-A91074) and Donaldson Coal Pty Limited (A91075-A91077).	NPC: 4 December 2007 Donaldson: 7 December 2007	Interim authorisation granted on 20 December 2007 Final authorisation granted on 23 April 2008	Authorisation granted until 31 December 2008 to provide a transition period that would allow for the development of a longer term solution to address the ongoing capacity constraints in the Hunter Valley coal chain.

Applications for authorisation of 'PWCS Tonnage Allocation Stage 1'. Lodged by PWCS and NCIG (A91110-A91112).	19 November 2008	Interim authorisation granted 17 December 2008. Final authorisation granted on 13 May 2009.	30 June 2009 The ACCC considered that the industry had continued to make sufficient progress and appeared to be close to finalising a long term solution to the capacity constraints in the Hunter Valley. The ACCC considered the industry had had sufficient time to develop and finalise an appropriate long term commercial framework, which should remove the need for transitional 'capacity balancing systems' to operate at the Port of Newcastle beyond 30 June 2009.

The history of the development of a long term solution

The 2008 Greiner Review[72]

3.42. In January 2008, the Hon. Nick Greiner AC was appointed by the NSW Government to conduct a review of the Hunter Valley coal chain.

3.43. Following initial meetings with producers and service providers, Mr Greiner's brief was expanded in February to develop a long term framework for the expansion and management of the Hunter Valley coal chain.

3.44. In June 2008, coal producers developed a proposal for access to the coal terminals at the Port of Newcastle which was submitted to Mr Greiner. In July 2008, Mr Greiner provided his report to the NSW Minister for Ports and Waterways. The report identified the following key requirements to achieve a major expansion of the capacity of the Hunter Valley coal chain:

- improve information sharing with the logistics coordinator
- enhance coordination of the coal chain
- develop a long term framework for export terminal access to ensure access to capacity and
- develop a framework for track access to ensure expansion of track capacity.

3.45. The initial proposal developed by coal producers in relation to the issue of access to the PWCS and NCIG coal loading terminals, formed part of Mr Greiner's Report to the NSW Government.[73]

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72 Unless otherwise stated, the information contained under this heading was sourced from the previous applications for authorisation (A91110–A91112) from PWCS and NCIG, 19 November 2008, pages 9, 15 and 16.

3.46. The NSW Government indicated that it required the long term solution to contain a mechanism that catered more expressly for new entrants to the Hunter Valley to access export capacity.

NSW Government's long term terminal access proposal

3.47. On 12 December 2008 the former NSW Minister for Ports and Waterways, the Hon. Joe Tripodi MP, announced a proposed terminal access framework to resolve outstanding issues in the negotiations between the coal industry and the NSW Government in response to the Greiner Review.

3.48. As announced by the NSW Government, the key elements of the proposal were:

- triggers requiring terminals to build new capacity on demand
- long term contracts to underpin investment in terminal capacity
- an industry levy to help fund new terminal infrastructure where required
- guaranteed access for new entrants and expanding producers
- business and planning certainty for existing producers
- protection for small producers and
- a proposal for a fourth coal terminal.[74]

3.49. PWCS responded to the announcement in December 2008, noting that the framework included:

- the opportunity for PWCS to lease additional government land and build a fourth coal loading terminal on Kooragang Island
- an ability for all producers to commit to long term terminal contracts, creating export certainty and security and a solid foundation for future infrastructure investment along the entire coal chain
- a trigger whereby new producers and existing producers wanting to expand give between two and four years' notice, enabling infrastructure to be built for them
- an ability for a pro rata levy on all coal exports to cover the cost of any terminal expansion shortfalls (e.g. when contracts do not align exactly with construction needs)
- a mechanism enabling larger producers to have their contracts compressed up to a maximum of five per cent per annum if PWCS expansions are delayed or fall short of targeted capacity. Smaller producers (exporting less than 5 million tonnes annually) would not be subjected to compression.[75]

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73 Submission in relation to previous applications for authorisation (A91110–A91112) from Coal and Allied, 5 December 2008, page 2.

74 The Hon. Joe Tripodi, Minister for Port and Waterways, Media Release, *Plan to end coal supply chain deadlock,* 12 December 2008.

75 PWCS, Media Release, *PWCS welcomes new Hunter Terminal Access Proposal*, 12 December 2008.

Ongoing industry discussions in 2009

3.50. Following the completion of the Greiner Review and the NSW Minister for Ports and Waterway's announcement in December 2008, the industry and government continued to progress the development of a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain.

3.51. The industry discussions were largely being led by NPC, on behalf of the NSW Government, with input from PWCS, NCIG and a Producers' Steering Committee. Among other things, the parties were seeking to clarify and develop some areas of the terminal access framework, and to provide greater detail to allow for the implementation of a long term solution based on that framework.

3.52. A number of industry working groups were formed to consider specific issues and to facilitate implementation of the long term solution. A summary of the work being carried out in early 2009 follows:

- **Implementation** – NPC was progressing the drafting of an Implementation Memorandum, with input from PWCS and NCIG, which would set out the details of how the long term framework will be implemented. This included details of the nomination and allocation process for the implementation of a long term contractual framework at the terminals, commitments to expand capacity for producers which is supported by long term 'ship or pay' contracts, and access arrangements that ensure new and expanding coal producers will have access to export terminal capacity. The industry initially anticipated the Implementation Memorandum would be finalised by mid-late March 2009.

- **Growth** – The NSW Government, PWCS and NCIG determining any amendments which would be required to their individual leases with the NSW Government, as well as governance issues surrounding the proposed new coal loading terminal (T4) at the Port of Newcastle.

- **Contractual alignment** – A contractual alignment working group was established to develop a contractual alignment mechanism considering issues relating to rail access (including the ARTC HV Access Undertaking) and the coal loading terminals at the port.

The Implementation Memorandum

3.53. In early April 2009, PWCS, NCIG and NPC signed the Implementation Memorandum. A copy of the Implementation Memorandum is provided at Attachment 4 to the current applications for authorisation, which is available from the ACCC's website **www.accc.gov.au/AuthorisationsRegister**.

3.54. The Implementation Memorandum included a commitment from the parties to comply with an implementation procedure. In particular, relevant contracts and other documents that implemented the long term solution were to be completed by 15 June 2009. These documents included:

- deeds of amendment to PWCS' and NCIG's lease with the NSW Government
- long term ship or pay contracts for PWCS and NCIG terminals
- capacity nomination and allocation procedures at PWCS and NCIG

- terminal access protocols at PWCS and NCIG
- coal chain access protocols – addressing contractual alignment between terminal access, track access and above rail
- the lease between NSW Government and PWCS for a new terminal (T4) at the Port of Newcastle.

The current application – phased implementation of the Capacity Framework Arrangements

3.55. On 29 June 2009 the ACCC received a new application for authorisation in relation to for certain aspects of a long term solution to the ongoing capacity constraints in the Hunter Valley – namely, the Capacity Framework Arrangements.

3.56. The Applicants submitted that it was not possible for all aspects of the long term solution to be implemented and operational by 1 July 2009, when the ACCC's authorisation of the previous PWCS Stage 1 Allocation system expired.

3.57. Further, the Applicants submitted that the proposed Capacity Framework Arrangements represented a fundamental shift in the way that the industry has operated for a large number of years. Accordingly, at the request of the industry, it was proposed that the long term solution be phased-in over the last six months of 2009, to be fully operational by 1 January 2010.

3.58. In the current applications for authorisation, the Applicants now committed to finalise relevant legal documentation – called Capacity Framework Documents – by 31 August 2009. PWCS and NPC executed their documentation by this deadline. NCIG executed their Capacity Framework Documents on 17 September 2009.

3.59. The ACCC considers the finalisation of the long term Capacity Framework Documents was a significant milestone for the Hunter Valley coal industry. Having said this, the ACCC notes there is some work to be carried out by the industry in order to fully implement the long term solution, including ongoing work between the terminal operators and ARTC to ensure their contractual arrangements are aligned, as well as finalising the details of a Capacity Transfer System.

4. Submissions received by the ACCC

Prior to the draft determination

4.1. The ACCC tests the claims made by an applicant in support of an application for authorisation through an open and transparent public consultation process. To this end, the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

4.2. The Applicants provided a supporting submission with their applications for authorisation and subsequently provided four[76] submissions in response to issues raised by interested parties and other issues.

4.3. Broadly, the Applicants submit that the proposed Capacity Framework Arrangements are part of a larger and integrated long term solution that has been developed by the industry, the components of which provide the basis for capacity expansions at the Port of Newcastle and long term alignment of capacity at other levels of the Hunter Valley coal chain. This will result in substantial benefits for the Hunter Valley, NSW and Australian economies.

4.4. The ACCC sought submissions from around 40 interested parties potentially affected by the application including, coal producers, rail providers, the rail track owner and government.

4.5. An overview of the public submissions received from interested parties follows:

- **Coal and Allied Industries –** supports the long term goals that the applications for authorisation are seeking to achieve, and supports the progress made by the Applicants in developing the Capacity Framework Arrangements. However, Coal and Allied notes certain features of the arrangements which may not result in an optimal outcome for the industry.

  Further, if remaining contractual alignment issues are not effectively resolved, Coal and Allied considers it unlikely that the size of the vessel queue at the Port of Newcastle can be effectively managed. In particular, the provision of long term contracts in the various components of the coal chain is insufficient alone to ensure reduced queue size, as evidence by the long vessel queues observed at the Dalrymple Bay Coal Terminal in Queensland.

- **Xstrata –** believes the industry has made substantial progress over the last two years in developing a new commercial framework which governs access to, and efficient operation of, the coal chain and therefore supports authorisation of the proposed Capacity Framework Arrangements. However, Xstrata's submission notes that the interface of the contractual alignment arrangements under the Capacity Framework Arrangements with the proposed ARTC HV Access Undertaking is a critical component of the long term solution.

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[76] A supplementary submission (dated 27 August 2009) in response to issues raised by interested parties and the ACCC was provided by PWCS only. A second supplementary submission (dated 22 September 2009) provided in response to issues raised by interested parties in relation to the amended application was provided by PWCS only.

- **Gloucester Coal –** expressed strong support for, and commitment to, the long term solution as described in the applications for authorisation.
- **Bloomfield Collieries –** supports a transition from the status quo to the long term solution as it requires the management of considerable change for producers, including their contractual arrangements with Hunter Valley service providers. However, Bloomfield expressed concerns in relation to certain amendments to the Capacity Framework Arrangements.
- **Peabody –** considers the proposed phasing in period is an essential step in delivering a lasting long term solution for the industry and supports the applications for authorisation.
- **Idemitsu Australia Resources –** believes there has been considerable work done by all the parties in the development of a long term solution, which it supports.
- **ARTC –** recognises and supports the need for contractual alignment across the Hunter Valley coal chain, which will assist in increasing certainty of access for coal users and promote efficient investment in capacity expansions. However, ARTC identified some areas of its proposed HV Access Undertaking and the Capacity Framework Arrangements which required further work to obtain the necessary level of contractual alignment.
- **Asciano –** supported interim authorisation to allow the phased implementation of the long term solution to commence, while recognising that there is more work to be completed to finalise the details of the long term coal chain solution.
- **Anglo Coal –** supported interim authorisation of the proposed Capacity Framework Arrangements.
- **Felix Resources –** supports the general thrust and overarching philosophy of long term ship or pay contracts. However, Felix Resources expressed concerns in relation to two operational changes under the amended Capacity Framework Arrangements.
- **Austar Coal Mine** – expressed concerns in relation to two operational changes under the amended Capacity Framework Arrangements.
- **Integra Coal Operations Pty Ltd –** supports the introduction of the Capacity Framework Arrangements overall. However, Integra Coal submits that certain features of the amended arrangements may have detriments to small producers.

Following the draft determination

4.6. On 28 October 2009 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation.

4.7. A conference was not requested in relation to the draft determination.

4.8. The ACCC received one public submission from ARTC in response to the draft determination. On 24 November 2009 PWCS and NPC also provided a written submission in response to the draft determination and request for further information from the ACCC. NCIG provided separate submissions on 26 November 2009 and 3 December 2009.

4.9. The views of the Applicants and interested parties are outlined where relevant in the ACCC's evaluation of the Capacity Framework Arrangements in Chapter 5 of this determination. Copies of public submissions are available from the ACCC's website **www.accc.gov.au/AuthorisationsRegister**.

5. ACCC evaluation

5.1. The ACCC's evaluation of the Capacity Framework Arrangements is in accordance with tests found in:

- section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised
- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision
- section 90(8) of the Act which states that the ACCC shall not authorise proposed conduct to which sections 45D, 45DA or 45DB apply, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

5.2. For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment F to this determination.

The market

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

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

5.5. The ACCC did not receive any submissions from interested parties directly commenting on the relevant market.

5.6. The ACCC considers the relevant areas of competition affected by the proposed Capacity Framework Arrangements include:

- the global market for coal (or at least the Asian coal market) and
- the provision of coal handling services for coal exported from the Hunter Valley, including the provision of services at the coal loading terminals at the Port of Newcastle and above and below rail services.

5.7. For the purpose of assessing the current applications, the ACCC considers it is not necessary to precisely define the market affected by the proposed Capacity Framework Arrangements.

The counterfactual

5.8. The ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.[77]

5.9. Under this test, the ACCC compares the likely public benefit and public detriment generated by arrangements in the future if the authorisation *is* granted with those generated if the authorisation *is not* granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the 'counterfactual'.

5.10. The Applicants submit that absent authorisation of the proposed Capacity Framework Arrangements, the Hunter Valley coal industry would be without:[78]

- an agreed terminal expansion framework
- agreed capacity nomination and allocation processes
- agreed basis for coal producers and other service providers to facilitate and enable contractual alignment
- increased investment certainty for terminal operators, producers and other service providers which arises from long term ship or pay contracts and clear parameters around terminal capacity expansion and compression of entitlements and

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

78 The Applicants supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 9.

- the wide-spread industry agreement represented by the Implementation Memorandum and long term solution.

5.11. The Applicants also submit that without authorisation of the proposed Capacity Framework Arrangements the vessel queue could increase to peak at levels in excess of 70 vessels, which would generate significant demurrage costs for Australian coal producers.[79]

5.12. Similarly, Coal and Allied submits that in the absence of authorisation:

> …a substantial queue of vessels will develop off the port of Newcastle.[80]

5.13. Peabody considers that demand for thermal coal from the Hunter Valley remains strong. It submits that without a system in place which enables PWCS to manage capacity, a significant vessel queue is likely to reform.[81]

ACCC's view

5.14. The ACCC has previously stated that a number of underlying structural, regulatory and contractual issues in the Hunter Valley appeared to be contributing to the ongoing capacity imbalance, including:

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

5.15. The proposed Capacity Framework Arrangements seek to establish an appropriate long term commercial framework within the Hunter Valley coal chain to address the ongoing capacity imbalance. The proposed arrangements have been developed and negotiated by the industry and NSW Government since the beginning of 2008.

5.16. Broadly, the arrangements seek to allocate coal chain capacity to producers in accordance with long term ship or pay contracts, align commercial incentives for infrastructure investment across the coal chain and facilitate the efficient operation of the coal chain.

5.17. The ACCC considers that without authorisation of the proposed Capacity Framework Arrangements, the implementation of a long term solution to the ongoing capacity constraints in the Hunter Valley would be highly uncertain. At the very least, the implementation of a long term solution is likely to be significantly delayed.

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79 The Applicant' supporting submission to applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 22.

80 Submission from Coal and Allied Industries Limited, 8 July 2009, page 2.

81 Submission from Peabody, 8 July 2009, page 1.

5.18. Among other things, this would mean that producers would not be required to demonstrate that they have sufficient available coal loading capacity across the coal chain before coal could be loaded at the port for export. As such, producers are likely to send ships to port at an earlier stage to ensure their coal gets loaded on a 'turn of arrival' basis. This is likely to result in a larger vessel queue off the Port of Newcastle than would otherwise by the case, causing producers to incur substantial demurrage charges.

5.19. The ACCC notes that a large vessel queue would be an obvious symptom of the absence of a long term solution to allocate coal chain capacity. However, the ACCC consider there are likely to be more significant, broader implications for the Hunter Valley coal chain, including delayed infrastructure investment and operational inefficiencies.

Public benefit

5.20. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

> …anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements … the achievement of the economic goals of efficiency and progress.[82]

5.21. The Applicants submit the Capacity Framework Arrangements will deliver public benefits, including:[83]

- the provision of greater contractual certainty to PWCS and NCIG, to other service providers in the Hunter Valley and to both existing and new producers though the entry into long term contracts
- facilitating greater alignment of contracted capacity across the Hunter Valley coal chain
- increased contractual certainty will facilitate major capacity expansions in the Hunter Valley, and therefore increase coal exports, export revenue and royalties payable to the NSW Government
- increased employment, particularly during major construction phases of capacity expansions and
- the management of the vessel queue off the port of Newcastle by requiring producers to have sufficient access to both terminal and track capacity before coal can be accepted for export.

5.22. In considering public benefits, the ACCC considers the extent to which the benefit has an impact on members of the community and the weight that should be given to it, having regard to its nature, characterisation and the identity of the beneficiaries. In relation to cost savings the ACCC will consider who is likely to take advantage of them and the time period over which the benefits are likely to be received.

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

83 The Applicants supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, pages 6–8.

5.23. In its draft determination of 28 October 2009 the ACCC concluded that the Capacity Framework Arrangements are likely to result in the following public benefits:

- greater contractual certainty at the port is likely to result in the terminal operators and existing and new producers being able to make more accurate and timely investment decisions
- facilitating the alignment of contractual obligations and incentives across the coal chain, thereby creating an environment more conducive to optimal operation of the coal chain and efficient investment decisions
- increased employment in the Hunter Valley region during any period of expansion activity, as well as considerable increased coal export revenue and royalties
- reduced vessel queues and associated demurrage costs
- reduced environmental and safety risks associated with vessel queues waiting offshore and
- maintaining or improving the international reputation of the Hunter Valley coal industry.

5.24. The ACCC's draft determination invited the Applicants and interested parties to provide further information about the progress of ongoing operational discussions in relation to contractual alignment, including any outstanding operational concerns.

5.25. In response to the draft determination, the ACCC received one interested party submission from ARTC and separate submissions from the Applicants.

5.26. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Increased contractual certainty for service providers and producers

5.27. The Applicants submit that the long term solution (of which the proposed Capacity Framework Arrangements form a critical part) will provide significantly greater contractual certainty in relation to coal loading entitlements at the terminals as a result of producers entering long term ship or pay contracts with the terminal operators.[84]

5.28. In addition, the Applicants submit that the contractual alignment elements of the Capacity Framework Arrangements will provide further certainty to producers and above and below rail providers in the Hunter Valley.

5.29. The Applicants submit that increased contractual certainty will have flow on benefits in the Hunter Valley, including:[85]

- fostering efficiency which will improve the international competitiveness of Hunter Valley coal and Australian coal exports

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84 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 20.

85 Ibid.

- facilitating efficient infrastructure investment and expansion decisions by participants in the Hunter Valley coal chain (that is, terminal operators, above and below rail providers and coal producers)
- facilitating increases in employment within the Hunter Valley and surrounding areas and
- increasing incentives for coal producers to invest in the Hunter Valley coal production and handling industry.

5.30. In particular, the Applicants submit that from a terminal operator's perspective, securing binding long term take or pay commitments from coal producers will be a key consideration for management and Boards in approving and undertaking any major capacity investment and expansion in the Hunter Valley. The Applicants expect this would be the same for rail service providers.[86]

5.31. Similarly, the Applicants submit that security of access to the Hunter Valley coal chain (both at the port and rail) for producers is likely to be a key consideration for any decisions to invest in mine expansion projects.[87]

5.32. Regarding the likely level of investment, the Applicants submit that increased contractual certainty will facilitate major terminal capacity expansions at the Port of Newcastle, which is also likely to provide the foundation for other major capacity expansions across the entire Hunter Valley coal chain by producers and other service providers.[88] In this regard, the Applicants estimate that approximately $1.2 billion will be spent on track and $500 million on additional train sets in the Hunter Valley over the next four years.[89]

5.33. Regarding port capacity, the Applicants submit that the proposed Capacity Framework Arrangements will enable coal loading capacity at the Port of Newcastle to be increased from the current 102 million tonnes per annum to 211 million tonnes per annum, and potentially 300 million tonnes per annum beyond that. This would potentially involve incremental expansions at PWCS' terminals in excess of $1.8 billion, $2 billion at NCIG's terminal (to Stage 2) and approximately $2–3 billion at new terminal developments at the Port of Newcastle.[90]

5.34. Further, the Applicants submit that terminal capacity expansion will be facilitated by the proposed industry levy arrangements under the Capacity Framework Arrangements. In particular, the terminal operators may impose an industry levy payable by all users of the terminals on a per tonne basis to assist them to meet the costs of any uncontracted expansion capacity.[91]

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86 Ibid.
87 Ibid.
88 Ibid, page 23.
89 Ibid, page 7.
90 Ibid.
91 Ibid, page 23.

5.35. The Applicants note that the industry levy formed part of the Minister for Ports and Waterway's long term terminal access framework announced in December 2008. They consider it will assist terminal operators fund necessary expansions, at the same time ensuring that such expansion is funded by all users, rather than the burden falling solely or disproportionately on new entrants and expanding producers in the Hunter Valley.[92]

5.36. A number of interested parties share the Applicants' view in relation to increased contractual certainty. In particular, Coal and Allied submits the proposed nomination and allocation processes under the long term Capacity Framework Arrangements will provide certainty to producers about the volume of coal they will be able to export. In turn, this will facilitate business planning for producers and service providers in order to align investment in mines and infrastructure in a timely manner.[93]

5.37. Xstrata also considers that:

> …the binding nomination and allocation process, together with the requirement to enter into long term ship-or-pay contracts with PWCS, will facilitate necessary planning and investment required for expansion of existing terminal and above and below rail capacity.[94]

5.38. Under its proposed HV Access Undertaking, ARTC is seeking to put in place long term track access agreements with coal producers and other access seekers. ARTC considers that these agreements will underwrite long term investment in track capacity and 'will depend on coal producers having in place long term capacity commitments with terminal operators.'[95]

5.39. ARTC submits that:

> …long term capacity commitments at the terminal are essential for the expansion of the Hunter Valley coal chain.[96]

ACCC's view

5.40. The ACCC considers that the ability of producers to enter into 10 year ship or pay contracts with the terminal operators under the proposed Capacity Framework Arrangements will provide greater contractual certainty at the port. In turn, this is likely to result in the terminal operators and producers being able to make more accurate and timely investment decisions, which is a public benefit.

5.41. The ACCC understands that PWCS' contracting processes are well advanced and are due for completion around mid December 2009. More specifically, PWCS and NPC advise that signed long term ship or pay contracts were submitted by producers to PWCS by the due date of 30 October 2009.[97] This was in accordance with original timeframes proposed in the applications for authorisation.

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92 Ibid.
93 Submission from Coal and Allied Industries, 8 July 2009, page 1.
94 Submission from Xstrata, 31 July 2009, page 1.
95 Submission from ARTC, 10 July, page 1.
96 Ibid, page 2.
97 Submission from PWCS and NPC, *Submission responding to ACCC information request dated 16 November 2009,* 24 November 2009, page iii.

5.42. Further, the ACCC is advised that HVCCC capacity modelling is underway based on load point demand and assumptions advised by producers. Under its terminal access protocol, PWCS contracted load point allocations by 1 December 2009 and will then issue an updated load point allocation schedule to each producer by 15 December 2009.[98]

5.43. The ACCC also understands that NCIG is in the process of finalising Stage 2 contracts with non-NCIG producers.[99] NCIG had previously entered into its Stage 1 long term ship or pay contracts with its shareholders.

5.44. NCIG also advises that it has provided the HVCCC with relevant terminal system assumptions and performance standards to enable it to develop its system modelling for Stage 1. It proposes to provide similar information to the HVCCC for Stage 2 of its terminal once it has finalised its plans for Stage 2.[100]

5.45. Absent the ability to enter into long term contracts with producers, PWCS was previously required to make investment decisions based on non-binding demand forecasts from producers. While the ACCC acknowledges there have been a number of expansion activities in the Hunter Valley over the last few years, including at the port, the ACCC has previously concluded that if an appropriate long term commercial framework had previously existed in the Hunter Valley, more timely investment is likely to have occurred across the coal chain.

5.46. In this regard, the ACCC notes that producers' signing long term contracts at the ports is considered by the industry to be the starting point from which to align commercial incentives across the entire Hunter Valley coal chain. However, the ACCC considers the extent to which the Capacity Framework Arrangements provide the foundation for efficient investment decisions across the coal chain depends on the effective alignment of contracts with other service providers. Contractual alignment is discussed separately from paragraph 5.52 below.

5.47. The ACCC also considers that increased certainty regarding coal export volumes should allow coal producers to more accurately forecast production levels and maintain optimal stockpiling, which is an additional public benefit provided by the proposed Capacity Framework Arrangements. Having said this, in the event the compression clauses within the Capacity Framework Arrangements are activated, due to a delay or shortfall in capacity expansion at the terminals, the ACCC considers this is likely to reduce producer certainty about contracted volumes.

5.48. The ACCC considers that the proposed Capacity Framework Arrangements facilitate entry to the Hunter Valley for new producers. In particular, expansion by PWCS will be triggered upon receipt of binding 10 year ship or pay commitments from new producers.

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98 Ibid, pages iii and iv.

99 Submission from NCIG, 26 November 2009, page ii.

100 Submission from NCIG, 3 December 2009, page iii.

5.49. Together with the ability to underpin capacity expansions with long term contracts, the ACCC considers that the industry levy should allow the next increment of expansion to be constructed, rather than the terminal operators delaying construction until the increment is fully contracted. This is particularly important where increments of capacity expansion are 'lumpy'. The ACCC believes this should provide greater certainty to producers that capacity should be available, which is likely to provide confidence to existing producers to expand and new producers to enter the Hunter Valley.

5.50. Having said this, the ACCC notes the additional cost of the industry levy will be borne by all producers, even those that are not seeking to expand. This issue is discussed in further detail in the 'Public detriments' section of this determination.

5.51. The ACCC considers there are likely to be flow-on employment benefits in the Hunter Valley region during any period of expansion activities, as well as considerable increased coal export revenue and royalties.

Contractual alignment

Submissions received prior to the draft determination

5.52. The Applicants submitted that the proposed Capacity Framework Arrangements will facilitate greater alignment of contracted capacity across the Hunter Valley coal chain.[101] The Applicants consider contractual alignment will deliver the following public benefits:[102]

- optimisation of the use of coal chain infrastructure in order to best meet contractual commitments and
- reducing inefficient demurrage payments by producers as a result of preventing large vessel queues from forming off the Port of Newcastle.

5.53. Broadly, the Applicants submitted that the key features of the contractual alignment solution for the Hunter Valley coal chain include:[103]

- In association with entry into long term ship or pay contracts for terminal access, producers will be required to commit to long term track access with ARTC and long term contracts with rail operators for each of their respective load points (at their mines).
- 'System Assumptions' will underpin the determination of track and terminal capacity and be distilled into contractual performance standards which will be monitored and reported on by the Hunter Valley Coal Chain Coordinator (HVCCC). Deviations from the system assumptions and performance standards will be directly incurred by individual service providers and producers as applicable.
- Access to the Hunter Valley coal chain will be based on aligned contractual rights.

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101 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 7.

102 Ibid, pages 21 and 22.

103 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91169–A91169), 30 June 2009, page 7.

5.54. By way of further background, the ACCC notes that the 'guiding principles' in relation to contractual alignment were developed by the Contractual Alignment Working group under the Implementation Memorandum, which was signed by the Applicants in April 2009. The guiding principles (as outlined at Schedule 5 to the Implementation Memorandum) include:[104]

- the onus is on coal producers to secure commercial arrangements to transport coal from the mine to the ship
- the onus is on the track and terminal service providers to ensure that they calculate their individual contractable capacities taking into account agreed 'System Assumptions'
- track and terminal service providers will ensure that access rights to their respective infrastructure are not triggered in excess of the lesser of the track and terminal system capacity
- producers can choose to hold non-aligned track and terminal access contracts, however, they will only be able to access system capacity based on the lesser of their contracted track or terminal capacity
- the responsibility of track and terminal service providers to jointly operate in accordance with System Assumptions is best achieved by planning and operating the system in a coordinated and co-operative manner (through the HVCCC)
- track and terminal access contracts will provide for actual and forecast excessive vessel queues to be addressed by ensuring, among other things, that:
  - contracted access rights to individual elements of the coal chain do not exceed the lesser of the track system capacity or terminal system capacity
  - capacity increases or decreases as a result of deviation from producers' and service providers' agreed System Assumptions will be attributable to those responsible and customers of the relevant service provider
- new and expanding producers will be provided for by track and terminal service providers operating an orderly access queue and coordinating infrastructure and investment planning via a Coal Chain Master Plan (managed by the HVCCC).

5.55. Returning to the arrangements for which authorisation is sought, the Applicants submit that the proposed Capacity Framework Arrangements involve a number of significant steps that facilitate the achievement of alignment of contracts and capacity across the coal chain, namely:[105]

- Discussions and developments in relation to System Assumptions and system standards. The Applicants submit this is the first time a comprehensive body of work has been undertaken across the coal chain to understand System Assumptions and capacity and operational constraints.
- Basing contractual entitlements on Load Point allocations which provides greater certainty in relation to the impact of coal delivered to the terminals on other parts of the coal chain.
- The introduction of long term ship or pay contracts.

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104 Ibid, Attachment 4, the *Implementation Memorandum.*

105 Submission from the Applicants, 21 September 2009, page 3.

5.56. Further, prior to the draft determination PWCS noted that it has already incorporated various measures into its long term ship or pay contracts with producers and its Terminal Access Protocols to further facilitate contractual alignment. These measures include:[106]

- each producer is required to have sufficient (rail haulage) contractual entitlements for the delivery of coal to the PWCS terminals prior to access to services being granted by PWCS
- producers will have performance standards. Lost capacity at the Terminals due to a producer not meeting its performance standards will be treated as 'quarantined allocation', meaning that producer will bear the loss of that capacity
- System Assumptions will be taken into consideration in transfers and assignments so that the impact on the capacity of the Terminals is captured and the transferred or assigned allocation appropriately adjusted and
- the development status of the relevant mine is one of the priority rules for determining the ranking of nominations at the time of issue of load point allocations.

5.57. At the time the current applications for authorisation were lodged with the ACCC, the Applicants acknowledged that further work was still required in relation to contractual alignment – including the establishment of the HVCCC, finalisation of system assumptions by the terminal operators and ARTC, and the development of a Capacity Transfer System. The ACCC understands that these activities are now all in advanced stages of completion or have been finalised.

5.58. Prior to the draft determination a number of interested parties stressed the importance of contractual alignment in achieving an effective long term solution to the ongoing capacity constraints in the Hunter Valley coal chain.

5.59. Coal and Allied considered that contractual alignment is required in order for coal chain participants to:[107]

- ensure that contractual commitment drives coal chain investment behaviours
- contractual terms drive system efficiency, and at the same time minimise potential system losses and
- effectively manage the vessel queue.

5.60. ARTC submitted that it:

> …recognises and supports the need for contractual alignment across the Hunter Valley coal chain which will assist in increasing certainty of access for coal users and promote efficient investment in capacity expansion.[108]

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106 Ibid, pages 3 and 4.
107 Submission from Coal and Allied, 22 September 2009, pages 6 and 7.
108 Submission from ARTC, 24 July 2009, page 2.

5.61. Similarly, Xstrata submitted that it:

> …is particularly supportive of the incorporation of principles that will facilitate the alignment of producers' contracted volumes across all elements of the coal chain, based on an agreed set of system assumptions…it is critical for the terms and conditions of the respective contracts to work in symmetry with one another…[109]

5.62. Xstrata believes the key requirements to ensure contractual alignment in the Hunter Valley and provide certainty for coal producers are:[110]

- a contract for a specific volume of capacity on track and at the port is based on a common understanding of capacity which reflects a realistic set of operating arrangements such that the specific volume of capacity can be hauled through the system and loaded onto vessels over the life of the contract
- producers are able to vary, swap or trade their entitlement via a mechanism which enables track and port capacity to be re-allocated. This mechanism must ensure that capacity is not lost as a result of the trade, and that entities who are not party to the trade do not have their capacity rights impacted
- the operation of contracts and consumption of capacity over time is monitored such that contractual rights are enforced and parties are held accountable for their consumption of system capacity without infringing on the contractual rights of others and
- producers wishing to gain access to future coal chain capacity have a clearly defined process through which they may trigger capacity expansions (if required) and obtain access, such that they can coordinate their start-up of new mining operations with coordinated delivery of coal chain capacity (namely, track, train and port).

5.63. While supportive of the direction of the industry in relation to contractual alignment, some interested parties considered that further coordinated work was still needed to be done by the terminal operators, ARTC and producers in order to ensure a practicable and workable level of contractual alignment is achieved across the coal chain.

5.64. Xstrata considered progress had been made towards contractual alignment by:

- creating a contractual framework which provides for producers to hold long term access agreements to track and port capacity
- the HVCCC being responsible for modelling to determine coal chain capacity and
- requiring producers to hold port and track contracts in alignment.

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109 Submission from Xstrata, 31 July 2009, page 1.

110 Submission from Xstrata, 2 October 2009, page 3.

5.65. However, Xstrata was concerned about the interface between the contractual alignment elements of the port-based Capacity Framework Arrangements and ARTC's proposed HV Access Undertaking. In particular, prior to the draft determination Xstrata expressed concern that:[111]

- there is no commitment to ensure capacity is calculated based on a common set of System Assumptions – for example, if the port service providers assume the coal chain will incur 10 days of losses due to maintenance in a year, and the track provider assumes 20 days, then it is likely that the port will be unable to deliver its committed capacity obligation if in fact it turns out that there were 20 days of losses due to maintenance.
- allocation of capacity to time periods may not align between the track and port – if parties do not receive aligned capacity each month or quarter they will need to rely on trading or flexibility provisions to ensure their basic contractual rights can be utilised
- the mechanism for trading track capacity needs to be aligned with the port mechanisms
- flexibility and tolerance limits are not aligned between the port and track, thus reducing the ability of producers to manage their entitlements across the coal chain
- PWCS' arrangements provide for coal chain capacity adjustments to be allocated to the party responsible for impacts on capacity. ARTC's track arrangements need to be consistent with this approach
- there is no obligation to maintain and develop the coordinated approach to coal chain planning, and to ensure that a producer holds aligned train, track and port contracts for every train planned through the system
- contracting periods are not aligned – the terminal agreement provides for a rolling 10 year evergreen contract, while the proposed ARTC agreement is effectively a 15 year commitment (10 years plus a 5 year notice period)
- there is no obligation on ARTC to coordinate its investment planning or time the delivery of new track capacity, to the extent possible, with the port operators and
- ARTC proposes to sell rail paths to producers but charge on a per tonne basis – this provides no incentive for producers to consume their rail paths efficiently.

5.66. Coal and Allied also considered that there were some outstanding issues that could cause producers to hold terminal contracts misaligned to other coal chain components, including:[112]

- The severity of ARTC's proposed track resumption clause in its proposed HV Access Undertaking – allowing it to remove train paths from producers if actual usage over a three month period has been less than 90 per cent.
- The proposed HV Access Undertaking provides insufficient accountability for performance on ARTC and incentives to improve – capacity allocation and charging at the port and track should incentivise the most efficient use of port and

111 Submission from Xstrata, 2 October 2009, pages 3–6.

112 Submission from Coal and Allied, 22 September 2009, pages 4–6.

track services, and those responsible for a delay in the coal chain should bear the cost of that delay.

- Lack of certainty for producers' receiving track capacity – for instance, the interface of the relevant contracting provisions between the port and track suggest that port terminal services are contracted by producers first, and then track services. There is some risk that producers could receive 10 year ship or pay commitments at the port and only then be able to receive confirmation of the availability of track capacity.
- Many provisions in the proposed HV Access Undertaking confer discretions on ARTC, including how it will distribute capacity in the event of short term delays. In industry discussions to date, ARTC has provided verbal indications about how it proposes to exercise those discretions. However, Coal and Allied notes that these verbal indications are not binding on ARTC.

5.67. Regarding the interface between port and track contractual alignment arrangements, ARTC submitted that:

> Achieving contractual alignment does not necessarily mean the contractual arrangements need to be uniform across agreements with different service providers.[113]

5.68. ARTC also recognised there were certain areas in the port and track arrangements that required further work but that it did 'not consider these concerns to be insurmountable.'[114]

5.69. The Applicants also considered that 'it is not necessary for the track and terminal arrangements to have identical capacity balancing mechanisms (which is not possible given the different nature of the infrastructure) provided that the two regimes have sufficient flexibility and transparency so that they can operate consistently and provide for practical outcomes.' The Applicants also submitted that ARTC and PWCS consider the proposed track and port arrangements already provide a large degree of working alignment.[115]

5.70. Prior to the draft determination, the Applicants advised that during August 2009, PWCS and ARTC held constructive discussions about the development and operational implementation of contractual alignment – including in relation to system assumptions, PWCS' proposed contracting arrangements and operating protocols and the proposed centralised Capacity Transfer System.[116] The ACCC notes that NCIG did not participate in the August discussions.

5.71. However, the Applicants submitted that:

> As work progresses between all parties on System Assumptions and standards between service providers and producers, contractual alignment will be further progressed and refined.[117]

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113 Submission from ARTC, 24 July 2009, page 7.
114 Ibid, page 6.
115 Submission from the Applicants, 21 September 2009, Schedule B.
116 Submission from PWCS, 27 August 2009, pages 4 and 5.
117 Submission from the Applicants, 21 September 2009, page 3.

5.72. Further, the Applicants considered that 'the majority of changes to current procedures to cater for contractual and operational alignment will be implemented through the ongoing development and refining of operating protocols',[118] rather than there being a requirement to amend the contractual alignment framework established under the proposed Capacity Framework Arrangements.

5.73. More specifically, the ACCC was advised that the key outcomes from the August contractual alignment discussions between PWCS and ARTC included:[119]

- the preparation of the Hunter Valley Coal Chain Master Plans, as well as ARTC's involvement in the HVCCC, should provide ARTC with sufficient details to maintain adequate track capacity to meet terminal capacity
- a producer cannot obtain track access rights with ARTC without corresponding evidence of 'network exit capability' (at the port). ARTC will liaise with PWCS to confirm viability of a producer's nomination.
- ARTC acknowledges the HVCCC's input into its daily planning processes
- ARTC will determine its annual maintenance schedule in consultation with the HVCCC and PWCS
- PWCS and ARTC consider that tolerance and capacity trading mechanisms should be sufficient to allow producers to manage their take or pay obligations around mine maintenance periods
- prior to receiving an application for track access, ARTC is obligated to review system requirements with HVCCC, producers and other services providers
- ARTC's contracts with producers include track related system assumptions
- regarding monthly versus quarterly allocation periods, ARTC's arrangements allow for operational tolerance, trading and utilisation of ad-hoc paths, if available and
- under the proposed HV Access Undertaking, the contract term can be negotiated by producers. In the event this does not occur, ARTC and PWCS consider there are other mechanisms which can be used to manage the different port and track contract terms – for example, the proposed HV Access Undertaking provides for long term trades to be undertaken, if track capacity is not being utilised then ARTC can resume the capacity and the producer's take or pay obligations will be relieved (subject to another producer taking on the take or pay commitment for that volume of capacity).

Submissions received following the draft determination

5.74 In response to the draft determination, ARTC reiterated its support for achieving contractual alignment across the Hunter Valley coal chain, in order to increase certainty of access to coal chain capacity for coal producers and to promote efficient investment in capacity expansion.[120]

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118 Ibid.

119 Schedule B, *Summary of contractual alignment discussions*, to the Applicants' submission, 21 October 2009.

120 Submission from ARTC, 17 November 2009, page 2.

5.75 Following the August contractual alignment discussions between PWCS and ARTC, ARTC submits that the parties have sought to address certain areas that still needed refinement. To this end, ARTC submits that it has made 'a number of adjustments to certain parts of its HV Access Undertaking, and specifically the proposed Indicative Access Agreement.'[121] Further, ARTC submits these revisions have recently been put to the industry and include the following key provisions:[122]

- Recognition and incorporation of coal chain system assumptions in definition of capacity on the network.
- Broad alignment of the term of access holder agreements with PWCS agreements.
- Recognition of the quarterly capacity allocation needs of small producers.
- Involvement of the HVCCC and terminals in the monthly path allocation process with the objective of aligning terminals and track entitlements.
- Incorporation of elective rights for ARTC to deal with persistent breaches of Service Assumptions.
- Stronger commitment to participate in the Capacity Transfer System Working Group.
- Reduction in period of notice for safe harbour trading of capacity.

5.76 PWCS and NPC also submit that since August, further constructive discussions have been held by the industry, including between ARTC and PWCS, in relation to the development and operational implementation of contractual alignment.[123]

5.77 In particular, PWCS' discussions with ARTC have focused on four key areas:[124]

- consistency in allocations
- accountability for performance
- certainty of capacity entitlements
- consistency in contractual terms.

5.78 PWCS and NPC submit that the latest revisions made by ARTC are significant steps in resolving a number of areas for potential misalignment and these discussions are continuing.[125]

5.79 NCIG advises that it met with ARTC in May 2009 to discuss contractual alignment issues. NCIG submits that:

> Producers have ship or pay agreements with NCIG that set out monthly allocations with tolerance levels. This permits alignment with the ARTC's HVAU.[126]

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121 Ibid, page 3.
122 Ibid.
123 Submission from PWCS and NPC, *Submission responding to ACCC information request dated 16 November 2009*, 24 November 2009, page ii.
124 Ibid.
125 Ibid.
126 Submission from NCIG, 26 November 2009, page i.

5.80 NCIG considers that there is a 'natural' alignment between the way in which its terminal will eventually operate and the way in which above and below rail service providers operate.[127] Therefore, NCIG consider its system – namely, a 'dedicated stockpile' terminal – provides for regular and even rail deliveries to the terminal allowing overall natural alignment of track and port for NCIG shippers. As such, the need to match day to day deliveries with vessel arrivals at the port (like at PWCS' terminals) is not as critical. [128]

5.81 NCIG also considers that:

> …NCIG shippers have a powerful incentive (because of their obligations under the long term ship or pay agreements) to ensure that their above and below rail contracts are capable of delivering the coal to the NCIG terminal.[129]

5.82 Further, NCIG notes that under the Capacity Framework Arrangements it is required to allocate 12 million tonnes of capacity from Stage 2 of its terminal to non-NCIG producers. In considering such applications from producers, NCIG submits that its nomination processes require that:

> …the Applicant must have a reasonable expectation of securing access to track infrastructure in order to transport the contracted tonnage by rail from its source mine to the NCIG terminal. That includes any necessary track access agreement to be negotiated with the rail track infrastructure provider or providers.
>
> …If an Applicant does not meet this (and other) criterion then its tender will not be successful.[130]

5.83 Regarding other ongoing work, PWCS and NPC advise that the Capacity Transfer System Working Group has made significant progress towards finalising the design of the proposed Capacity Transfer System. It is still proposed to be implemented before 1 January 2010.

5.84 The ACCC is advised that the Capacity Transfer System will take the form of an online clearing house hosted by the HVCCC (which will also be the Administrator of the system), to be implemented in two phases. Producers will have two ways to transfer capacity under the Capacity Transfer System:[131]

- producers can publish available or wanted allocation on the system on a confidential basis. The HVCCC will then put the relevant producers in contact to enable them to give effect to the transfer or
- producers can arrange bi-lateral transfers which they must register on the Capacity Transfer System.

5.85 The HVCCC will review all transfers and make recommendations with respect to the impact that the transfer will have on other producers, system capacity, planning and contractual alignment.[132]

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127 Submission from NCIG, 3 December 2009, page i.
128 Ibid, page ii.
129 Ibid, page i.
130 Ibid, page ii.
131 Submission from PWCS and NPC, *Submission responding to ACCC information request dated 16 November 2009*, 24 November 2009, page i.
132 Ibid.

5.86 The ACCC did not receive any other submissions from interested parties in relation to the operational implementation of contractual alignment in direct response to its draft determination.

5.87 In a recent submission to the ACCC's HV Access Undertaking process, the NSW Minerals Council submitted that all 14 producers support the application for authorisation in relation to the long term access to, and expansion of, the port terminals at Newcastle. As required under the arrangements for which authorisation is sought, the coal producers have now committed to long term 'take or pay port terminal access agreements' commencing on 1 January 2010.[133]

5.88 The NSW Minerals Council submits further that:

> …a suitably amended HVAU is an essential element of an aligned whole-off-coal-chain long term solution for the Hunter Valley Coal Chain.[134]

ACCC's view

5.89 The ACCC considers the achievement of contractual alignment is a key public benefit consideration in relation to the proposed Capacity Framework Arrangements. In particular, the ACCC is of the view that achieving contractual alignment in the Hunter Valley will result in a substantial benefit to the public by ensuring that producers align contracted volumes with different service providers across the coal chain. In turn, this should align service providers' commercial incentives for efficient investment across the coal chain and should facilitate the efficient operation of the coal chain.

5.90 Achieving contractual alignment should also prevent individual service providers contracting volumes which in aggregate exceed the capacity that the Hunter Valley coal chain can deliver, and hence, prevent excessive vessel queues from forming offshore. The ACCC considers this would also result in a benefit to the public. This issue is discussed in further detail later in this chapter.

5.91 The ACCC considers the proposed Capacity Framework Arrangements appear to establish an appropriate framework to incentivise producers to align contracts with other service providers in the Hunter Valley. In particular, the proposed Capacity Framework Arrangements contain the following key elements:

- producers can enter long term ship or pay contracts with terminal operators and will receive load point allocations
- producers are required to demonstrate that they have adequate entitlements to track and train haulage in relation to each vessel to be loaded at the port
- terminal operators may refuse to supply coal handling services in the event that producers have insufficient track or rail haulage entitlements and
- PWCS and NCIG will determine contractable capacity based on Hunter Valley System Assumptions prepared by the HVCCC.

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133 Submission to the ACCC's HV Access Undertaking process from NSW Minerals Council, 1 December 2009, page 1.

134 Ibid.

5.92 In this regard, the ACCC notes that NCIG will operate its terminal on a fundamentally different basis to PWCS' terminals. NCIG will have dedicated stockpiles for producers, enabling regular railing of coal to the terminal by producers all year round. PWCS operates on a cargo assembly model, whereby stockpiles are allocated to construct a cargo for nominated vessels – effectively a 'just in time' model.

5.93 As a result, NCIG submits that it is not critical for it to manage the day to day operational alignment of coal being delivered to its terminal with the loading of coal onto vessels.

5.94 Nevertheless, both NCIG and PWCS have sought authorisation to be able to refuse 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.

5.95 The ACCC understands that due to the operational differences between the terminal operators, as described above, this conduct is more likely to be relevant for PWCS than NCIG.

5.96 The ACCC considers the extent to which contractual alignment will actually be achieved, and therefore the above mentioned public benefits realised, also depends on the successful implementation of contractual alignment principles across the entire Hunter Valley coal chain.

5.97 In this regard, the ACCC recognises that the port-based Capacity Framework Arrangements for which authorisation is sought are only one part of the long term solution for the Hunter Valley coal chain. In particular, ARTC is currently undergoing a separate process in relation to its proposed HV Access Undertaking. The ACCC notes that interested parties consider that outstanding operational contractual alignment issues primarily relate to ARTC's HV Access Undertaking and as such, are more appropriately addressed through the ACCC's access undertaking process.

5.98 The ACCC notes that the achievement of contractual alignment across the Hunter Valley coal chain is still a work in progress for the industry, with operational discussions between PWCS and ARTC continuing, as well as the negotiation of track contracts between producers and ARTC. While appearing to be at an advanced stage, the Capacity Transfer System Working Group (comprising one representative from PWCS, NCIG, NPC, ARTC, HVCCC and around five producer representatives) also needs to finalise the mechanics of a centralised Capacity Transfer System before the end of 2009.

5.99 Due to delays in the provision of certain information to the ACCC by ARTC, the ACCC was required to extend its assessment of the proposed HV Access Undertaking. In this regard, the day by which the ACCC must now use its best endeavours to make a final decision is 22 April 2010.

5.100 NCIG understands that producers are unlikely to have a contract with ARTC in place by 1 January 2010.[135] The ACCC also notes the NSW Minerals Council's submission (at paragraph 3.36) which expressed uncertainty about the timing of the execution of ARTC's track contracts. The ACCC considers the absence of parallel track contracts as at 1 January 2010 may postpone the full realisation of the benefits generated by the

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135 Submission from NCIG, 26 November 2009, page ii.

successful implementation of contractual alignment principles across the entire coal chain beyond the immediate term.

5.101 Nevertheless, the ACCC considers the proposed Capacity Framework Arrangements appear to establish an appropriate contractual alignment framework at the port. This is likely to result in a public benefit by facilitating the alignment of port, track and above rail contractual arrangements in respect of existing and additional system capacity resulting in the efficient use of and investment in coal chain infrastructure.

Management of the vessel queue and minimising associated demurrage costs

5.102 The Applicants submit that the demand for coal loading services for thermal coal in the Hunter Valley is anticipated to increase towards the second half of 2009. If the Capacity Framework Arrangements are not in place, the Applicants estimate a large vessel queue is likely to re-form off the Port of Newcastle, potentially peaking at levels in excess of 70 vessels. [136]

5.103 In this regard, the Applicants submit that giving effect to the Capacity Framework Arrangements from 1 July 2009 (when the previous authorisation of the Stage 1 Allocation system expired), will ensure that the vessel queue can be managed to a level of around 20–25 vessels. The Applicants submit this represents a saving of over US$150 million.[137]

5.104 The ACCC received submissions from certain interested parties in relation to the management of the vessel queue under a long term commercial framework. In particular, Coal and Allied submits that:

> The provision of long term contracts for the various components of the coal chain is insufficient alone to ensure reduced queue size, as evidenced by the long vessel queues observed off Dalrymple Bay Coal Terminal in Queensland.[138]

5.105 Similarly, Xstrata submits that:

> The current situation in Dalrymple Bay highlights the risks of entering into long term take or pay agreements which are not aligned.[139]

5.106 Xstrata submits that if producers enter into contracts with service providers which are based on inconsistent system assumptions, even though a producer may hold a contract for the same volumes with the track owner, rail operator and terminal operator, the reality is that the system as a whole will not be capable of transporting the capacity which has been contracted.[140]

ACCC's view

5.107 The ACCC has previously authorised transitional 'capacity balancing systems' at the Port of Newcastle which involved producers receiving pro rata allocations of the available coal export capacity in the Hunter Valley.

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136 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 22.

137 Ibid.

138 Submission from Coal and Allied, 22 September 2009, page 6.

139 Submission from Xstrata, 2 October 2009, page 1.

140 Ibid, page 2.

5.108 The ACCC considers that without authorisation of the proposed Capacity Framework Arrangements, the size of the vessel queue at the Port of Newcastle is likely to be larger than would otherwise be the case. That is, producers are likely to 'stack the queue' by sending ships to port at an earlier stage to ensure their coal gets loaded on a 'turn of arrival' basis.

5.109 From 1 January 2010, at PWCS' terminal the proposed Capacity Framework Arrangements seek to allocate coal chain capacity to producers under long term ship or pay contracts. Under these arrangements, producers are required to demonstrate that they have sufficient available coal loading capacity across the coal chain before coal can be loaded at the port for export. At Stage 2 of NCIG's new terminal, producers will also be required to demonstrate that they have sufficient track and above rail capacity entitlements. As such, producers will only be able to access coal chain capacity based on the lesser of their contracted track or terminal capacity.

5.110 Regarding the management of the vessel queue at an optimal level, the proposed Capacity Framework Arrangements also allow PWCS to revise flexibility provisions or reduce contracted load point allocations on a pro rata basis from time to time should an excessive vessel queue be forecast to develop. The arrangements also provide that PWCS may refuse to accept a transfer or assignment of contracted allocations or adjust the transferred allocations taking into account the recommendations of the HVCCC, variation in PWCS System Assumptions and alignment of contractual entitlements.

5.111 The ACCC also notes that the historic optimal level of the vessel queue (around 20–25 vessels) may increase as additional coal chain capacity is delivered, including the possible construction of T4 in response to producer demand and when the new NCIG terminal commences operation. In this regard, PWCS is currently examining the possible introduction of a new 'vessel sequencing system' which aims to provide greater certainty around vessel loading times. If successful, this will decrease the size of the vessel queue from what it would otherwise be.

5.112 The Capacity Framework Arrangements provide that terminal operators will also determine contractable capacity based on defined system assumptions. The ACCC considers this should prevent 'over contracting' at the port. However, the ACCC notes that the effective management of the vessel queue also depends on other service providers having reference to consistent Hunter Valley system assumptions, which is outside the current applications for authorisation.

5.113 The ACCC considers that the proposed Capacity Framework Arrangements are likely to result in a benefit to the public by significantly reducing the likelihood of excessive vessel queues from forming off the Port of Newcastle, and hence reducing deadweight demurrage charges incurred by Australian coal producers.

Environmental and safety benefits

5.114 The Applicants submit that management of the vessel queue will reduce the safety and environmental risks associated with a large number of vessels queued off the Port of Newcastle and assist in protecting the unique reefs and historic shipwrecks surrounding Newcastle Harbour.[141]

5.115 In support of this claim, the Applicants referred to the Australian Transport Safety Bureau's report following the Pasha Bulker incident in 2007. That report stated:

> …the queue of 57 ships off Newcastle on 7 June 2007 increased the risks of collisions, groundings and other difficulties in the subsequent heavy weather.[142]

ACCC's view

5.116 The ACCC considers that to the extent the proposed Capacity Framework Arrangements result in smaller vessel queues at the Port of Newcastle, this is likely to generate a public benefit by reducing the environmental and safety risks associated with large vessel queues offshore.

Improving the international reputation of the Hunter Valley coal industry

5.117 The Applicants submit that the long term solution (of which the Capacity Framework Arrangements form a critical part) will contribute significantly to the improvement of the international reputation of the Port of Newcastle and the Hunter Valley coal industry as a reliable, efficient and competitive supplier of export coal.[143]

5.118 Without authorisation of the Capacity Framework Arrangements, the Applicants contend that any significant increase in the vessel queue and consequent delays in deliveries to international customers is likely to have a negative impact on the international reputation of Hunter Valley coal producers. International buyers, faced with uncertainty about how long it will take for their coal to be loaded at the Port of Newcastle because of a long vessel queue (and coal chain capacity constraints), may lose confidence and consider alternative sources of supply, including from other countries such as Russia and Indonesia.[144]

ACCC's view

5.119 The ACCC has previously concluded (in relation to the operation of capacity balancing systems at the port) that there are a number of factors which potentially influence the purchasing decision of coal buyers, including certainty and timeliness of delivery.

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141 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 24.

142 Ibid.

143 Ibid, page 26.

144 Ibid.

5.120 The ACCC considers that, to the extent that a large vessel queue at the Port of Newcastle discourages customers from purchasing coal from the Hunter Valley coal industry, the proposed Capacity Framework Arrangements have the potential to improve the international reputation of the Hunter Valley coal industry and the Port of Newcastle, and to maintain or increase coal sales, by managing the size of the vessel queue.

5.121 Therefore, the ACCC considers that maintaining or improving the international reputation of the Hunter Valley coal industry constitutes a public benefit arising from the Capacity Framework Arrangements.

ACCC conclusion on public benefits

5.122 The ACCC considers the proposed Capacity Framework Arrangements are likely to result in the following public benefits:

- greater contractual certainty at the port is likely to result in the terminal operators and existing and new producers being able to make more accurate and timely investment decisions
- facilitating the alignment of contractual obligations and incentives across the coal chain, thereby creating an environment more conducive to optimal operation of the coal chain and efficient investment decisions
- increased employment in the Hunter Valley region during any period of expansion activity, as well as considerable increased coal export revenue and royalties
- reduced vessel queues and associated demurrage costs
- reduced environmental and safety risks associated with vessel queues waiting offshore and
- maintaining or improving the international reputation of the Hunter Valley coal industry.

Public detriment

5.123 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

> …any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[145]

5.124 Since 2004, the Hunter Valley coal industry has developed a number of short term schemes to manage an excessive vessel queue – more recently as transitional measures while a long term solution to ongoing capacity constraints is developed.

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145 Re *7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

5.125 In assessing applications for authorisation of these schemes, the ACCC has considered the key potential public detriments to be forgone coal exports arising from ongoing delays to the resolution of the underlying causes of capacity constraints in the Hunter Valley coal chain and reduced incentives to invest in efficient expansions of capacity for service providers – the terminal operators and above and below rail providers.

5.126 The current applications relate to the long term solution itself, with the phased introduction of the port-based Capacity Framework Arrangements to be completed by 1 January 2010. At their heart, the proposed Capacity Framework Arrangements involve agreements between Hunter Valley coal chain service providers to share information and to co-ordinate the provision of services. While these agreements have some anti-competitive components, the clear intention is to seek to increase the efficiency of the operation of the coal chain and to ensure that existing and new Hunter Valley producers will be able to contract for and have access to the capacity they require to export coal. The Capacity Framework Arrangements explicitly do not prevent a new entrant constructing a coal loading terminal at the Port of Newcastle to meet demand.

5.127 For the current applications, the Applicants submit that the proposed Capacity Framework Arrangements will have a very limited, if indeed any, impact on competition in any relevant market:

- it will not limit the total volume of coal actually shipped through the Port of Newcastle. The coal chain will continue to operate at its full capacity;
- the long term solution and Capacity Framework Arrangements will provide clear triggers for terminal capacity expansions and, by enabling entry into long term ship or pay contracts and setting out agreed contractual alignment mechanisms, facilitate increases in entire coal chain capacity; and
- coal exporters will continue to compete against each other in relation to the production of coal and sales to overseas customers, as they do now and did before the previous authorisations in respect of the PWCS Terminal.[146]

5.128 Further, the Applicants submit that the arrangements will not give rise to any discernible public detriments because any exclusionary effect that the long term arrangements may have is mitigated through:

- measures to discourage the hoarding of capacity – including a capacity transfer mechanism and a limitation on the maximum fees for transfers of unused capacity allocations
- an industry levy which may be applied to fund expansion at PWCS or 12 million tonnes per annum at NCIG Stage 2 (where that capacity is not fully contracted), which will ensure new entrants are not unduly burdened with costs not payable by existing competitors.[147]

5.129 The ACCC notes that very few potential detriments from the proposed conduct have been raised in submissions by interested parties.

5.130 An assessment of the public detriment likely to result from the proposed Capacity Framework Arrangements follows.

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146 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 21.

147 Ibid, pages 9 and 10.

Distortions to efficient decision making

5.131 The ACCC considers there are certain aspects of the Capacity Framework Arrangements that are likely to distort the decisions of industry participants and may cause detriment by resulting in less efficient outcomes. This concern is raised by Coal and Allied, for example, submitting that:

> During the development of the long term Capacity Framework proposals, trade-offs were made which resulted in some terms that may not prove to be the best outcome for the industry. These include an obligation on PWCS to expand, regardless of the cost and financial feasibility of the outcome (which could result in significant increases in port charges which would have harsh consequences for all producers), and the decision that compression would only apply to producers whose contracted allocation exceeds 5 mtpa (as this results in an artificial and arbitrary market distortion and deters small producers from growing their operations through expansion or acquisition). However, C&A does not object to the application for authorisation on this basis, as it understands that these provisions were essential for the Applicants to arrive at an agreement on the Capacity Framework Documents.[148]

Imposition of an industry levy to fund expansions which are not fully contracted

5.132 The proposed Capacity Framework Arrangements contain an 'unallocated expansion capacity levy protocol'. This protocol provides for the imposition of a levy to assist terminal operators meet the cost of Unallocated Expansion Capacity at NCIG Stage 2, PWCS terminals and/or T4 through the application of a per tonne levy on all coal exported by terminal users.[149]

5.133 Regarding the objective of the industry levy, the Applicants submit that:

> The levy arrangements reflect the terms set out in Minister Tripodi's terminal access framework and are intended to ensure that terminal operators have sufficient contractual and financial certainty to expand capacity at their respective terminals. Moreover, the levy, in the limited circumstances in which it may come into effect, will apply equally to all users of the Port of Newcastle, thereby reflecting the intent that the industry as a whole funds capacity expansion, rather than this burden falling on only new entrants and expanding producers.[150]

5.134 The ACCC acknowledges that increments of capacity expansion at coal terminals can be 'lumpy' and that the imposition of the levy enables producers (including new entrants) to access expansion capacity without having to pay for the whole next increment of expansion. Nevertheless, the imposition of a levy on existing producers for an expansion of capacity that they do not seek or require will impose additional cost upon them and may cause public detriment by distorting production decisions away from efficient levels.

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148 Submission from Coal and Allied, 22 September 2009, page 1.

149 Schedule A – Levy Protocols, to the Capacity Framework Arrangements, page 1.

150 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 17.

5.135 The ACCC notes that the calculation and imposition of any levy will be in accordance with the Levy Protocol and overseen by the Administrator. The ACCC considers that the impact of the imposition of any levy is likely to be minor in terms of the overall cost of business for coal producers and as such is unlikely to result in significant detriment.

Limit on fees for capacity transfers

5.136 The Capacity Framework Arrangements propose to limit the fees a producer with contracted allocation at the PWCS and NCIG terminals may charge to another producer to use a portion of its contracted allocation. The fees are capped at no more than 5 per cent of the fee charged by the terminal operator for the relevant portion.

5.137 The Applicants submit that:

> The Implementation Memorandum provides for a maximum fee for transfers of Contracted Allocations. This maximum fee reflects the requirement set out in Minister Tripodi's terminal access framework and is intended to limit commercial incentives to hoard capacity, and limit any distortion of investment signals in relation to the need for further expansion capacity.[151]

5.138 The ACCC recognises the underlying intention of the transfer fee limit is to avoid hoarding of capacity. However, it considers that this restriction will prevent those producers that most value additional capacity from being able to bid for unused capacity in a way that reflects their valuation of it, which may result in an inefficient outcome.

5.139 Further, the ACCC considers that in an environment where producers are contracting for capacity on a ship or pay basis and where terminal operators are obliged to expand to meet additional demand, the ACCC questions the need for this anti-hoarding measure.

5.140 Having said this, the ACCC considers that any detriment that is likely to arise from the proposed capacity transfer fee cap will be mitigated in the medium term by the ability of producers that desire additional capacity to contract for it and be able to access spare or expansion capacity if required.

Issues affecting smaller producers

5.141 A number of smaller coal producers have raised concerns with the ACCC about two proposed changes to PWCS' operations contained in the Capacity Framework Arrangements. In particular:

- reducing the volumetric threshold in the definition of a 'small producer' and
- issues arising from the potential introduction of a new vessel sequencing system.

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151 Ibid, page 16.

Definition of smaller producer

5.142 PWCS has previously acknowledged that it is likely to be easier for large producers to smooth their vessel arrival requirements and manage their production and exports across multiple mines than it is for smaller producers. This has been reflected in PWCS' operating protocol, which has required large producers (effectively the four largest companies) to use their loading allocation in monthly increments. Small producers have been able to operate on a quarterly basis.

5.143 In developing the new Capacity Framework Arrangements, PWCS has included a requirement in its long term ship or pay contracts that producers use their allocations within a particular allocation period. Large producers receive a monthly allocation period and small producers receive a quarterly allocation period. PWCS initially sought to define 'small producers' as those who export less than 3 million tonnes per annum of coal through the PWCS Terminals.

5.144 Following concerns raised by some producers through a consultation process conducted by PWCS, the ACCC is advised that PWCS subsequently agreed to provide a two year transition period so that producers who export between 3 and 5 million tonnes per annum will have quarterly allocation periods from 1 January 2010 and monthly allocation periods from 1 January 2012.[152]

5.145 Certain interested parties have expressed concern that 3 million tonnes per annum is too low a threshold to force producers to use their periodic loading allocations and that 5 million tonnes per annum is a more appropriate level.

5.146 For example, Integra Coal submits that reducing the threshold to 3 million tonnes per annum will:

> …raise significant logistical issues for small producers because of their small volumes and their exposure to risks of production interruption such as long-wall movements.
>
> This change also threatens the competitiveness of smaller producers in the long term because this tighter requirement (to use allocation within a month period or lose it and face penalties) raises a significant barrier to expansion for new entrants and expanding small producers.
>
> The outcome of the PWCS change may be to simply favour the larger producers over the smaller in the longer term, which will be against system equity and efficiency.
>
> This change could also result in a reduction in the total volume of coal being shipped through the coal chain because of the smaller producers' difficulties meeting the one month allocation usage requirement.[153]

5.147 Similar concerns were also raised by Bloomfield Collieries and Felix Resources.

5.148 In response, PWCS submits that the purpose of this requirement is to:

> …reduce the risk that Producers may seek to use their entire Loading Allocation (or a large proportion of their Loading Allocation) within a short period of time which cannot be efficiently serviced by PWCS or which would result in the creation of a vessel queue and ultimately lost capacity.

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152 Submission from PWCS, 22 September 2009, page 2.

153 Submission from Integra Coal, 21 September 2009, page 3.

> …lowering the threshold of coal shipped through the PWCS Terminals from 5Mtpa to 3Mtpa from 1 January 2012 will ensure that a greater number of medium-sized Producers (involving a significant aggregate number of tonnes on an annual basis) are required to provide increased certainty to PWCS by working on the basis of monthly, rather than quarterly, Allocation Periods. This will, in turn, improve the operational efficiency of the PWCS Terminals, reduce the risk of spike in the vessel queue and, ultimately, the risk of lost export capacity.[154]

5.149 Further, PWCS considers that 3 million tonnes per annum to be the appropriate measure of a small producer and that if there is a concern that all producers should be treated equally, monthly allocation periods provide a more efficient solution.

5.150 The ACCC recognises there is a tension between reducing flexibility for smaller producers and seeking to ensure greater efficiency in the operation of the terminals and hence the Hunter Valley coal chain. There is some potential for market distortions to arise as producers' volumes approach the threshold – for example, the loss of flexibility is likely to act as a disincentive for a producer to increase its production from 2.9 million tonnes per annum to just over 3 million tonnes per annum and may impact on otherwise efficient merger or acquisition activity. The ACCC notes, however, that such a distortion will occur whether the threshold is set at 3 or 5 million tonnes per annum under the proposed Capacity Framework Arrangements.

5.151 On balance, the ACCC considers there is likely to be little detriment arising from the 3 million tonne per annum threshold, given the overriding efficiency drivers and the two year transition period provided to enable producers that fall within the 3–5 million tonne per annum band to adjust. Should it prove over time that the lower threshold is causing additional costs on producers that outweigh any efficiency benefits, the ACCC expects the producers will raise this with PWCS and the level of the threshold could be reviewed.

Vessel sequencing system

5.152 PWCS currently loads all vessels on a 'turn of arrival' basis. PWCS advises that over the last six months, it has been discussing with the industry the possible introduction of a new 'vessel sequencing system':

> …which is designed to reduce vessel waiting times, reduce demurrage and further facilitate contractual and operation alignment across the coal chain by providing greater certainty in relation to vessel load times.[155]

5.153 A number of smaller producers have expressed concern that the proposed Capacity Framework Arrangements propose to differentiate vessel nominations between 'vessel sequencing' and 'turn of arrival' applications.

5.154 In particular, clause 9(e) of the Capacity Framework Arrangements provides that if a producer is utilising the turn of arrival system for vessels, then if at any time an excessive vessel queue arises which PWCS reasonably determines is due to unutilised PWCS capacity arising from the random nature of vessel arrivals under the turn of arrival system during the relevant period, PWCS may make 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 that period.

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154 Submission from PWCS, 22 September 2009, page 4.

155 Submission from PWCS, 22 September 2009, page 2.

5.155 Some producers are concerned that they are currently unable to form a view of the new vessel sequencing system until further modelling has been undertaken and do not want future users of the turn of arrival system to be penalised.

5.156 Specifically, Austar submits that:

> The clause, as drafted, suggests that there may be circumstances where Producers using the "turn of arrival" system will be compressed while Producers using a yet to be defined system will not.
>
> An alternative model for sequencing vessels could potentially discriminate against those producers (those with allocation periods of less than or equal to 5Mtpa) that are unable to nominate vessels early and thus could be expected to suffer the brunt of demurrage costs.[156]

5.157 Similarly, Integra Coal submits that:

> …the consequence of the change is to expose those producers, who are unable or unwilling to take up the yet to be defined Contracted Sequencing System, to the risks of Allocation reductions, with no appeal rights and no alternatives to ship their coal. These risks are likely to be greatest for the smaller producers as larger producers with consistent and larger production have less production risk in meeting a vessel nominated in advance.[157]

5.158 In response to these concerns, PWCS advised the ACCC that it had indicated to the producers that it would defer the implementation of any new vessel sequencing system and undertake further modelling. In addition, a limited trial of the new system is proposed to be carried out in the second half of 2010. PWCS intends to potentially introduce the new vessel sequencing system following the conclusion of that trial, subject to further consultation with producers.[158]

5.159 PWCS notes that as capacity increases at its terminals, the size of the optimal vessel queue will also need to increase to ensure efficient operation of the terminals, unless a new system for vessel arrivals is introduced. Further, it submits that:

> Section 9(e) of Attachment 1 to the applications for authorisation reflects that, if a new system is introduced, then it may be appropriate that capacity losses which arise solely from the random nature of vessel arrivals under the turn of arrival system (ie not under the vessel sequencing system), are borne by Producers who continue to use the turn of arrival system. Whether or not this is ultimately implemented will depend on a range of factors…[159]

5.160 The ACCC recognises that the introduction of a new vessel sequencing system, coupled with clause 9(e) of the proposed Capacity Framework Arrangements, has the potential to impose additional cost on smaller producers for the reasons described above.

5.161 The ACCC does not, however, consider this to be a public detriment, as any additional cost borne by a producer would appear to reflect the additional cost it is imposing on the operation of the terminal by being unwilling or unable to present ships in a consistent and predictable way to facilitate its more efficient operation.

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156 Submission from Austar, 21 September 2009, page 2.
157 Submission from Integra Coal, 21 September 2009, page 2.
158 Submission from PWCS, 22 September 2009, page 2.
159 Submission from PWCS, 22 September 2009, page 3.

ACCC conclusion on public detriments

5.162 The ACCC considers there is likely to be some public detriment arising from the exclusive and restrictive nature of the Capacity Framework Arrangements. Further, the extensive information sharing and detailed co-ordination of the operation and expansion of the various components of the Hunter Valley coal chain is likely to result in some detriment by creating a less competitive environment.

5.163 As described above, there is also likely to be some detriment from distortions to efficient business decisions resulting from certain aspects of the arrangements. Overall, however, the ACCC considers the likely detriments will not be substantial.

Balance of public benefit and detriment

5.164 In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed Capacity Framework Arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

5.165 In the context of applying the net public benefit test at section 90(8)[160] of the Act, the Tribunal commented that:

> …something more than a negligible benefit is required before the power to grant authorisation can be exercised.[161]

5.166 For the reasons outlined in this chapter, the ACCC considers the proposed Capacity Arrangements are likely to result in significant public benefits, including:

- the terminal operators and (new and existing) producers being able to make more accurate and timely investment decisions
- facilitating the alignment of contractual obligations and incentives across the Hunter Valley coal chain, thereby creating an environment more conducive to optimal operation of the coal chain and efficient investment
- demurrage savings to Australian coal producers
- reducing the environmental and safety risks associated with vessel queues waiting offshore and
- maintaining or improving the international reputation of the Hunter Valley coal industry.

5.167 The ACCC considers that any delays in the implementation of the long term solution in the Hunter Valley, including components of the Capacity Framework Arrangements, beyond 1 January 2010, will delay the full realisation of the likely public benefits, and therefore potentially reduce the magnitude of the public benefits generated by the Capacity Framework Arrangements over the life of the authorisation period. Nevertheless, the ACCC considers the Capacity Framework Arrangements are likely to generate significant public benefits.

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

161 Re *Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

5.168 The ACCC considers there is likely to be some public detriment arising from the exclusive and restrictive nature of the Capacity Framework Arrangements. Further, the extensive information sharing and detailed co-ordination of the operation and expansion of the various components of the Hunter Valley coal chain is likely to result in some detriment by creating a less competitive environment.

5.169 The ACCC also considers that certain aspects of the Capacity Framework Arrangements are likely to generate some public detriment from distortions to efficient business decisions. Overall, however, the ACCC considers the likely detriments will not be substantial.

5.170 On balance, the ACCC considers the public benefit that is likely to result from the proposed Capacity Framework Arrangements is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(8), 90(5A) and 90(5B) are met.

Length of authorisation

5.171 The Act allows the ACCC to grant authorisation for a limited period of time.[162] The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

5.172 In this instance, the Applicants originally requested authorisation of the proposed Capacity Framework Arrangements for 15 years until 30 June 2024.[163]

Submissions received prior to the draft determination

5.173 Prior to the draft determination, the Applicants submitted the 15 year period is proposed to facilitate the entry into, and giving effect to, long term contracts, the industry levy and capacity allocation transfer arrangements required by the NSW Government.

5.174 The Applicants also submitted that a 15 year period reflects the rolling 10 year or 'evergreen' nature of nominations under the proposed long term contracts, and the requirement for regulatory certainty given the substantial level of investment in infrastructure expansion that is proposed.

5.175 The ACCC did not receive any interested party submissions specifically in relation to the length of authorisation sought before it released its draft determination.

5.176 In its draft determination the ACCC noted that under the Capacity Framework Arrangements, producers are 'entitled to contract for any tonnages up to their PWCS Base Tonnage offer and any length of contracts up to ten years.' Every year, producers may then submit a one year renewal of their existing 10 year load point allocation.

5.177 Given that producers' ship or pay contracts at the port are initially for 10 years, the ACCC considered it appropriate that the proposed authorisation at least cover the giving effect to these contracts for the full initial term of the contracts.

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162 Section 91(1).

163 The Applicants' supporting submission to the applications for authorisation (A91147–A91149 and A91168–A91169), 30 June 2009, page 11.

5.178 The ACCC therefore proposed to grant authorisation to the proposed Capacity Framework Arrangements until 30 June 2020.

Submissions received in response to the draft determination

5.179 In response to the draft determination PWCS and NPC requested:

> …that the ACCC grant authorisation for a term of at least 15 years, if not 20 years, from 1 July 2009.[164]

5.180 PWCS and NPC also now submit that as PWCS' long term ship or pay contracts are based on a calendar year, a 31 December expiry date would be preferable.[165]

5.181 PWCS and NPC further submit that under the Capacity Framework Arrangements producers can nominate for long term ship or pay contracts with 10 year load point allocations commencing up to four years from the date of nomination, or five years with approval from NPC.[166]

5.182 Therefore, PWCS and NPC submit that:

> …duration for the authorisations of at least 15 years would provide substantially greater certainty for producers who elect to submit nominations to commence in 2011 or later and whose initial 10 year terms would otherwise extend beyond the duration of the authorisation. In light of the very significant investment by producers and service providers in the Hunter Valley, this additional certainty will give rise to greater public benefits which outweigh any public detriment associated with the proposed conduct.[167]

5.183 PWCS and NPC consider that an authorisation duration of at least 15 years strikes an appropriate balance between providing sufficient certainty for producers and recognising that the ACCC will wish to review the authorisation.

5.184 Similarly, NCIG considers the duration of authorisation should be at least 15 years. In this regard, NCIG submits:

> The NCIG long term ship or pay agreements have an initial term that expires at the end of the financial year 10 years after mechanical completion date. The mechanical completion date is expected to be some 2+ years after financial close, and if it falls early in a financial year, the expiry of the initial term could be 13+ years from financial close.[168]

5.185 Further, NCIG considers that, having regard to the need for certainty for the bankability of expansion projects and the long term nature of the arrangements, a compelling case can be made for the authorisation to be for 20 years.

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164 Submission from PWCS and NPC, *Submission responding to the draft determination issued on 28 October 2009*, 24 November 2009, page ii.

165 Ibid, page iii.

166 Ibid.

167 Ibid.

168 Submission from NCIG, 26 November 2009, page ii.

ACCC view

5.186 Given that currently expanding producers or new entrants in the Hunter Valley may delay the commencement of 10 year load point commitments for up to 5 years, the ACCC considers a 15 year period of authorisation is appropriate in this instance. That is, a 15 year period of authorisation would cover the giving effect to these contracts for the full initial term of the contracts. The ACCC is of the view that this would also deliver greater certainty to producers and service providers given the significant investments involved.

5.187 The ACCC notes that 15 years is a significant period, in which the circumstances in the Hunter Valley may change.

5.188 The Capacity Framework Arrangements are a complex set of arrangements that require a number of parties to work together to ensure the Hunter Valley coal chain operates efficiently and effectively. The ACCC is granting authorisation for an extended period of time on the basis of the information before it and the commitments made by the Applicants in the Capacity Framework Arrangements.

5.189 The ACCC notes that NCIG's terminal will be operated on a fundamentally different basis than PWCS' terminals, and this is reflected in the more detailed arrangements that PWCS has in place to ensure contractual alignment. Nevertheless, the ACCC is granting authorisation on the basis that if contractual alignment issues arise in the operation of NCIG's terminal that have broader operational impacts in the Hunter Valley coal chain, NCIG will work the Hunter Valley Coal Chain Coordinator and other coal chain participants to resolve those issues and to ensure that contracts are aligned, including engaging in the conduct described in the Capacity Framework Arrangements – namely, NCIG sought authorisation to be able to refuse to supply coal handling services if a producer has inadequate track or train delivery entitlements.

5.190 If the Capacity Framework Arrangements do not operate in the way described or deliver the benefits claimed, the ACCC has the power to review this authorisation at any time.

5.191 In particular, the Act provides that if at any time after granting an authorisation, it appears to the ACCC that:

- the authorisation was granted on the basis of evidence or information that was false or misleading or
- a condition to which the authorisation was expressed to be subject has not been complied with or
- there has been a material change in circumstances since the authorisation was granted,

the ACCC may consider revoking the authorisation.[169]

5.192 The ACCC therefore grants authorisation in relation to the Capacity Framework Arrangements until 31 December 2024.

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169 Section 91B(3).

Variations to the Capacity Framework Arrangements

5.193 The ACCC notes that any amendments to the proposed Capacity Framework Arrangements during the term of this authorisation are not covered by the authorisation.

6. Determination

The application

6.1. On 29 June 2009 Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group and Newcastle Port Corporation (the 'Applicants') lodged applications for authorisation A91147–A91149 in relation to certain aspects of a long term solution to the ongoing capacity constraints of the Hunter Valley coal chain.

6.2. On 24 July 2009 the Applicants lodged further applications for authorisation A91168–A91169 in relation to a contract, arrangement or understanding which may contain a cartel provision. The additional applications were lodged with the Australian Competition and Consumer Commission (ACCC) as a result of the amendments introduced by the *Trade Practices Amendment (Cartel Conduct and Other Measures)* Act 2009, which commenced on 24 July 2009.

6.3. The conduct under the additional applications A91168–A91169 is the same conduct and is in the same terms as the Applicants' original applications for authorisation lodged with the ACCC on 29 June 2009.

6.4. On 14 September 2009 the Applicants amended the Capacity Framework Arrangements for which authorisation is sought. On 26 October 2009 the Applicants lodged further revisions to the proposed Capacity Framework Arrangements.

6.5. Application A91447 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the *Trade Practices Act 1974* (the Act) to make and give effect to a contract, arrangement or understanding, where a provision would or might be an exclusionary provision within the meaning of section 45 of the Act.

6.6. Application A91148 was made using Form B, Schedule 1 of the Trade Practices regulations 1974. The application was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

6.7. Application A91149 was made using Form D, Schedule 1 of the Trade Practices Regulations 1974. The application was made under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply. That is, to engage in conduct with other persons which may hinder or prevent a third person supplying or acquiring goods and services to, or from, a fourth person. Also, to engage in conduct with other persons that may hinder or prevent a third person from engaging in trade or commerce involving the movement of goods from Australia to places outside Australia.

6.8. Application A91168 was made under section 88(1A) of the Act to make or give effect to a contract, arrangement or understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of the Act, and which would also be, or might be, an exclusionary provision within the meaning of section 45 of the Act.

6.9. Application A91169 was made under section 88(1A) of the Act to make or give effect to a contract, arrangement or understanding, a provision of which would be, or may be a cartel provision within the meaning of Division 1 of Part IV of the Act, or which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

6.10. In particular, authorisation is sought to make and give effect to a contract, arrangement or understanding which involves the proposed conduct set out in the Capacity Framework Arrangements.

The net public benefit test

6.11. For the reasons outlined in Chapter 5 of this determination the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

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

6.13. The ACCC therefore **grants** authorisation to applications A91447–A91149 and A91168–A91169.

Conduct for which the ACCC proposes to grant authorisation

6.14. Authorisation extends to the Applicants for the proposed Capacity Framework Arrangements (at Attachment A to this determination) until 31 December 2024.

6.15. Authorisation is in respect of the Capacity Framework Arrangements as they stand at the time authorisation is granted. In particular, authorisation extends to the conduct currently described at Clause 7 of the Capacity Framework Arrangements in relation to capacity transfers. Authorisation does not extend to any conduct within the Capacity Transfer System (once finalised) that is not described in Clause 7 of the Capacity Framework Arrangements.

6.16. Further, any changes to the Capacity Framework Arrangements during the term of the authorisation will not be covered by the authorisation.

6.17. This determination is made on 9 December 2009.

6.18. Section 90(4) requires that the ACCC state in writing its reasons for a determination. The attachments to this document form part of the written reasons for this determination.

Interim authorisation

6.19. At the time of lodging the application, the Applicants requested interim authorisation of the proposed Capacity Framework Arrangements. The ACCC granted interim authorisation on 22 July 2009, subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009.

6.20. One Applicant did not comply with the condition of interim authorisation and on 1 September 2009 the ACCC revoked interim authorisation.

6.21. The remaining Capacity Framework Documents were executed on 17 September 2009. On 23 September 2009 the ACCC granted interim authorisation to the Capacity Framework Arrangements, as amended on 14 September 2009.

6.22. In its draft determination, the ACCC granted interim authorisation to the further revised Capacity Framework Arrangements received on 26 October 2009.

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

Date authorisation comes into effect

6.24. This determination is made on 9 December 2009. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 31 December 2009.

Attachment A – the Capacity Framework Arrangements

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, Hunter Valley Coal Chain Coordinator Limited (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.

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:

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 PWCS System Assumptions and contractual alignment.

(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.

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;

(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; and

(d) if HVCCC determines that there is unutilised train capacity, offering this unused Capacity to Producers who have the ability to use it, to the extent allowed by contracts between each relevant Producer and its train haulage provider.

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.

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):

(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:

(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;

(iv) provide PWCS with relevant information required for the PWCS 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 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, the PWCS System Assumptions and its expansion plans each year. To enable this review, PWCS will provide relevant information to, and obtain relevant information from, HVCCC, Producers and other coal chain service providers. In undertaking its review, PWCS will have regard to the Coal Chain master planning conducted by HVCCC and information provided by Producers and other coal chain service providers.

(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.

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:

(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.

(iii) Provide reasonable security as required by PWCS;

(iv) provide PWCS with either:

(A) a JORC Code statement; or

(B) a statement prepared generally 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 Load Point Allocations (or the Base Tonnage Offer), any Nominations, NCIG Contracted Allocations and any domestic coal supply contracts for those mines;

(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 PWCS System Assumptions and contractual alignment; and

(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.

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).

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.

(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).

(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.

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.

(h) Priority Rules

Existing Load Point Allocations will not be diluted.

(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 1st or 2nd year after the nomination is submitted then, nominations in 1st, 2nd and 3rd 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 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 PWCS System Assumptions between the transferor Producer and the transferee Producer.

(j) 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.

(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

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

(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.

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)(ii); 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

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

(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.

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.

(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).

(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

(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

(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.

(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

(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**").

(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***

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 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;

(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 12 Mtpa, 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).

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.

(b) 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.

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

(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.

4A. Long term ship or pay contracts

(a) Form of contract

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

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.

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.

(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 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.

(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:

(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.

(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:

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

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).

If the transfer is at PWCS, then PWCS may adjust the Compressed Allocation to account for any variation in the PWCS 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.

(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;

(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,

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

(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:

(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,

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

(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.

(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 1st 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.

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;

(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

(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

(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.

(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.

(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 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

(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

(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 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.

(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 PWCS System Assumptions and operating protocols, and alignment of contractual entitlements; or

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

(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.

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

(B) adjusting assigned allocations to account for any variation in the PWCS 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.

(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.

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 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,

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:

(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.

(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 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 conduct of:

(i) sharing information and coordination between the Applicants, Producers, HVCCC, above and below rail providers and others for the purpose of:

(A) determining and reviewing system capacity for any period;

(B) developing and reviewing system assumptions (including the PWCS System Assumptions);

(C) developing, measuring and reviewing Producer performance standards, such as:

(aa) Load Point standards;

(bb) train standards (sizes and cycle times);

(cc) unloading standards;

(dd) cargo assembly standards (build times, parcels per vessel, parcel size); and

(ee) vessel standards;

(D) determining and coordinating flexibility and tolerance limits in relation to capacity allocations during any period;

(E) developing and reviewing a Capacity Transfer System; and

(F) facilitating and reviewing the operational coordination and efficient operation of different parts of the coal chain;

(ii) making or giving effect to contracts with Producers based on any agreed system capacity, system assumptions, performance standards, flexibility and tolerance limits, in each case for the purpose of facilitating contractual and operational alignment across the coal chain; and

(iii) making or giving effect to any adjustment or variation to contracted allocations or determination of capacity losses, due to a Producer deviating from the system assumptions or performance standards, including:

(A) determining Quarantined Allocation; and/or

(B) offering any Capacity of the terminal that has been gained due to a Producer's performance exceeding its performance standards or variation in its system assumptions or otherwise caused by the Producer on either an ongoing or ad hoc basis.

(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.

(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.

(d) If, at any time:

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

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

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

(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.

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 PWCS System Assumptions and any recommendations made by HVCCC.

(e) Vessel queue:

(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.

(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 PWCS 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:

(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.

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).

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.

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.

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.

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;

(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 PWCS 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.

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:

(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).

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.

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

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.

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:

(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.

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:

(iii) *(i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;*

(iv) *(ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing the relevant document; and*

(v) *(iii) that party could not reasonably have avoided or overcome; and*

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

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

(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.

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 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.

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 PWCS System Assumptions and operating protocols.

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.

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.

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

(a) interface and live run losses between each element in the Hunter Valley Export Coal Chain;

(b) agreed operating mode of the Hunter Valley Export Coal Chain;

(c) surge and tolerance requirements;

(d) capacities of fixed infrastructure;

(e) rolling stock requirements; and

(f) vessel requirements,

detailed in the system assumptions document prepared by HVCCC, as varied from time to time.

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.

Quarantined Allocation means a portion of Load Point Allocation that cannot be used, transferred or assigned by any Producer because:

(a) it is lost capacity due to the Producer's performance not meeting its Producer assumptions or performance standards, or is otherwise lost capacity caused by the Producer;

(b) it is removed from the Load Point Allocation by any downward adjustment in accordance with section 9(e); or

(c) it is the subject of a downward adjustment by PWCS in accordance with section 7(v)(B) or section 7A(i)(B).

Quarantined Allocation is subject to ship or pay obligations.

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.

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.

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.

Deloitte.

This document is the form of the "Levy Protocols" referred to in each Deed of Variation of Lease between Newcastle Port Corporation and Port Waratah Coal Services Ltd dated on or about 31 August 2009.

GILBERT TOBIN LAWYERS

Initialled by **Newcastle Port Corporation** by its authorised delegate who states he has had no notice of any revocation of the delegation

Initial of delegate

GARY WEBB
Name of delegate

Initialled by **Port Waratah Coal Services Ltd** by its director/secretary

Initial of director/secretary

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Unallocated expansion capacity levy protocol

This document is the Levy Protocol referred to in the Capacity Framework Agreement between Newcastle Port Corporation, Port Waratah Coal Services Limited and Newcastle Coal Infrastructure Group Pty Limited dated on or about 31 August 2009 (CFA) and may be referred to as such in the long form documentation envisaged by the CFA.

PART 1: PRELIMINARY

1 Purpose

The unallocated expansion capacity levy ('Levy') is intended to assist Terminal Operators to meet the cost of Unallocated Expansion Capacity at NCIG Stage 2, PWCS and/or Terminal 4 through application of a per tonne levy on all coal exported by Terminal Users.

2 Modifications

Terminal Operators may jointly, with the consent of the Administrator and NPC, modify this Levy Protocol in the light of experience to the extent that it is necessary in order to more accurately satisfy the purpose of the Levy.

3 Conditions for Levy to apply

(a) The Levy will apply to an Expansion upon election by the relevant Terminal Operator.

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

i. an Expansion is Completed by a Terminal Operator; and

ii. the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion; and

iii. an Administrator has been established in accordance with Part 6 of this Levy Protocol.

4 Definitions

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.

Annual Total Expansion Cost means, in respect of an Expansion, the annual cost of owning and operating the Expansion as determined under clause 9 of this Levy Protocol.

Annual Unrecovered Expansion Cost means, in respect of an Expansion, the Annual Total Expansion Cost of that Expansion less the costs recovered from all coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne (in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract) that is actually shipped for export by Terminal Users in each case for that Levy Year.

Billing Period means the period for which the Terminal User is billed as per the terms and conditions contained in their respective Long Term Ship or Pay Contracts or Short Term Contracts to which the Levy applies.

Capacity means the coal export capacity measured in Mtpa (having regard to the mode of operation and system assumptions of the relevant terminal).

Capital Cost means any expenditure, which has been brought to account as a non-current asset in the balance sheet of the Terminal Operator's statutory accounts provided that the expenditure conforms with at least one of the following:

(a) the expenditure relates to the purchase, commissioning, development or construction of an Expansion, including all pre-commissioning costs and those costs incurred by Terminal Operator prior to notification of Expansion requirements including financing costs, or
(b) the expenditure will extend the service life of the Expansion beyond that expected when the Expansion was originally Completed.

Committed in respect of NCIG Stage 2, has the meaning given in the CFA.

Completed in respect of an Expansion, an Expansion is commissioned, available to receive coal and capable of satisfying the Contracted Allocations due to be satisfied by that Expansion.

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.

Debt Any financial indebtedness that is classified as a financial liability under the Australian accounting standards.

Debt Financing Costs means the actual interest payments and principal repayments and other fees and charges incurred by the Terminal Operator in respect of Debt used to fund the Capital Cost of the relevant Expansion, where principal repayments have regard to the quantum of Debt, useful life of the assets or the usual pattern of financing for similar assets.

Depreciation means the depreciation of the Expansion assets which has been brought to account annually in the financial statements of the Terminal Operator in accordance with Australian accounting standards.

Expansion means any or all of NCIG Stage 2, Terminal 4 and any expansion to the PWCS Terminals from time to time for which the relevant Terminal Operator elects to apply the Levy under clause 3. An Expansion may be a stage of a multiple-stage Expansion.

Expansion Capacity means the additional Capacity made available by an Expansion.

Hunter Valley Coal Chain chain of coal delivery in New South Wales from coal mines in the Hunter Valley to the Port of Newcastle.

Levy means the charge to be paid by all Terminal Users of the amount calculated under Clause 8 and payable under Clause 14 of this Levy Protocol.

Levy Account means the account controlled by the Administrator for the receipt and disbursement of Levy Proceeds.

Levy Proceeds means the monies collected from the Levy paid by all Terminal Users to the Administrator.

Levy Reset means the recalculation of the Levy prior to each Levy Year after the first year in which the Levy was applied to the Expansion.

Levy Year means the period from which the Levy may be applied until the end of that financial year, and thereafter each financial year.

Long Term Ship or Pay Contract means a minimum 10 year evergreen ship or pay contract with the relevant Terminal Operator which provides a Producer with access to Capacity that is to be allocated at the terminals according to the Nomination and Allocation Procedures.

Mtpa means million tonnes per annum.

Nomination and Allocation Procedures means:

(a) in respect of PWCS, the Nomination and Allocation Procedure for the nomination of Capacity by and allocation of Capacity to Producers at the PWCS Terminals which PWCS is required to comply with in accordance with the terms of each lease for the land on which the PWCS Terminals are located, and

(b) in respect of NCIG, the Nomination and Allocation Procedure for the nomination of 12 Mtpa of Capacity by and allocation of Capacity to Non NCIG Producers at NCIG Stage 2 which NCIG is required to comply with as a condition precedent to exercising its option to lease the land on which NCIG Stage 2 will be located.

NPC means Newcastle Port Corporation a statutory state owned corporation established under the *Ports and Maritime Administration Act 1995* (NSW).

Operating Cost means those costs which relate to the reasonable day to day operations required to make the Expansion Capacity available to Terminal Users, net of any working capital costs associated with the Expansion.

Producer means the 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 producing coal for export through the Hunter Valley Coal Chain.

Recovery Period means the period over which a Levy is to apply for each Expansion as determined under clause 5.

Return on Capital Cost means the return on the Capital Cost that is funded by equity, as determined by the Administrator with reference to relevant regulatory and other relevant precedent.

Short Term Contracts means any agreement with a Terminal Operator which provides for access to Capacity at the terminal (or terminals) operated by that Terminal other than under a Long Term Ship or Pay Contract.

Terminal Operator means each of Port Waratah Coal Services Ltd and Newcastle Coal Infrastructure Group Pty Ltd or their successors.

Terminal User means any person that utilises the services provided by a Terminal to export coal through the Port of Newcastle, including without limitation any counterparty to a Terminal Operator under a Long Term Ship or Pay Contract or a Short Term Contract such as related parties, agents, marketing companies or traders.

Total Expansion Cost means the Operating Costs, Debt Financing Costs, and Return on Capital Cost (for the portion of Capital Cost funded by equity) and Depreciation (for the portion of Capital Cost funded by equity) of the Expansion.

5 What is 'unallocated expansion capacity'?

(a) For NCIG Stage 2 "Unallocated Expansion Capacity" refers to that portion of the 12 Mtpa of Capacity that is offered for allocation at NCIG Stage 2 in accordance with the NCIG Nomination and Allocation Procedure that is not contracted in accordance with that NCIG Nomination and Allocation Procedure.

(b) For all other Expansions, Unallocated Expansion Capacity is the total Expansion Capacity for that Expansion less the total of all Contracted Allocations for that Expansion.

(c) The Unallocated Expansion Capacity for an Expansion is determined in the following manner:

i. Following satisfaction of the conditions for a Levy to apply under Clause 3, the Terminal Operator must provide to the Administrator an estimate of the Capacity and the proposed Recovery Period for that Expansion.

ii. The Administrator must form an independent view of the reasonableness of the estimate of the total Capacity and proposed Recovery Period for each Expansion and ensure all Terminal Operators and Terminal Users of the Expansion are notified of the Capacity per Expansion prior to each Levy Year.

iii. Prior to each Levy Year, having regard to the outcome of relevant Nomination and Allocation Procedures, the Administrator will declare the Unallocated Expansion Capacity for the Expansion.

(d) For avoidance of doubt, where an Expansion is developed in stages, the Administrator may aggregate Expansion stages per terminal for the purposes of declaring the total Capacity for each Expansion and declaring the Unallocated Expansion Capacity for each such Expansion.

PART 2: IMPOSITION OF LEVY

6 How is the Levy imposed

(a) The Levy is imposed on each tonne of coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne (in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract) that is actually shipped for export per Levy Year at a per tonne rate from the time that conditions for a Levy to apply under Clause 3 are satisfied.

(b) The Levy will continue until the Administrator determines in its reasonable opinion that:

i. the Total Expansion Cost of Unallocated Expansion Capacity is recovered, or

ii. all Expansion Capacity is Contracted under Long Term Ship or Pay Contracts, or

iii. 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.

(c) Any Terminal Operator or Producer may request a determination under Clause 6(b) by providing the Administrator with its reasons to make such a determination on the basis of at least one of Clause 6(b)(i) to 6(b)(iii), and the Administrator must respond to these reasons within 2 months of the request.

7 Who is liable for Levy?

All Terminal Users that contract to utilise the terminals under Long Term Ship or Pay Contract or Short Term Contracts (including those that do not utilise the Expansion) are liable to pay the Levy.

8 Calculation of Levy

(a) The Levy will be set each Levy Year by dividing the Annual Unrecovered Expansion Cost of owning and operating an Expansion by the forecast total tonnes of coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne, in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract, that is forecast to be shipped for export by Terminal Users.

(b) The Levy calculation can occur once the Administrator establishes:

i. the Annual Total Expansion Cost of owning and operating each Expansion;

ii. the Capacity of each Expansion and the date that the Capacity will become available;

iii. the total tonnage contracted to each Expansion under Long Term Ship or Pay Contracts or Short Term Contracts;

iv. the costs to be recovered by Terminal Operator from contracted Expansion Capacity;

v. the forecast total tonnes of coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract that is forecast to be shipped for export by Terminal Users;

vi. the Unallocated Expansion Capacity for each Expansion;

vii. the Recovery Period; and

viii. costs of Levy administration, including cost of Administrator operation, as estimated by the Administrator under Part 6 of this Levy Protocol.

(c) The Administrator will seek estimates for each variable listed under Clauses 8(b) and 9(a) from each relevant Terminal Operator by a specified date following conclusion of the Nomination and Allocation Procedure for each Expansion and where relevant prior to each Levy Year, and the relevant Terminal Operator will provide these estimates to the Administrator by that date.

(d) The Administrator will review the estimates, assess the reasonableness of each estimate, make amendments to an estimate where the Administrator considers the estimate to be unreasonable and advise the relevant Terminal Operator of the final estimates of each variable listed under Clauses 8(b) and 9(a) prior to calculating the Levy under Clause 8.

(e) The Administrator will calculate the Levy.

(f) The Administrator will ensure all Terminal Operators and Terminal Users are notified of the Levy for each Levy Year.

See Annex 1: Flow chart of Levy calculation

See Annex 3: Worked example of Levy calculation and reset

9 Calculation of Annual Total Expansion Cost of owning and operating the Expansion

(a) The Annual Total Expansion Cost comprises, for or in respect of each Levy Year:

i. the Debt Financing Costs;

ii. a Return on Capital Cost for that portion of the agreed Capital Cost of the Expansion that is funded by equity;

iii. the Depreciation for the portion of Capital Cost of the Expansion that is funded by equity; and

iv. the Operating Costs of the Expansion.

10 Costs of Administrator

(a) The costs incurred by the Administrator in undertaking its functions under this Levy Protocol will be recovered from Levy Proceeds up to the amount approved by Terminal Operators under Clause 10(b).

(b) At least 2 months prior to commencement of each Levy Year, the Administrator will provide an annual budgeted cost for Levy administration to Terminal Operators for approval by Terminal Operators.

(c) Any Terminal Operator or Producer may seek an independent review of the reasonableness of its annual budgeted cost to be recovered.

PART 3: VARIATION OF LEVY

11 Levy Reset

The Administrator will calculate the Levy for each Levy Year.

See Annex 2: Flow chart of Levy Reset

See Annex 3: Worked example of Levy calculation and reset

12 Over- and under-recovery of Annual Total Expansion Cost per Levy Year

(a) The total Levy Proceeds per annum may amount to more or less than the Annual Unrecovered Expansion Cost estimated for that Levy Year. As soon as possible following each Levy Year, the Administrator will compare the estimate of the Annual Unrecovered Expansion Cost in the previous Levy Year and the amount of total Levy Proceeds actually collected for that Levy Year.

(b) Any over (under) recovery of the Annual Unrecovered Expansion Cost in the prior Levy Year through Levy Proceeds collected for that Levy Year will be applied to reduce (increase) the Annual Unrecovered Expansion Cost calculated for the following Levy Year.

13 Changes in Contracted Capacity

Where Unallocated Expansion Capacity at commencement of Levy Year is subsequently allocated under new Long Term Ship or Pay Contracts or Short Term Contracts within that Levy Year, Levy Proceeds may exceed the Annual Unrecovered Expansion Cost. This over-recovery will be set off against the Annual Total Expansion Cost for the following Levy Year in the Levy Reset under Clause 12.

PART 4: COLLECTION

14 Payment

(a) The Levy is to be paid by all Terminal Users.

(b) The Levy will be separately identified as an item in the invoices issued by the Terminal Operators to Terminal Users.

(c) Invoices will be issued in accordance with the invoicing arrangements the Terminal User has with the Terminal Operator under Long Term Ship or Pay Contracts or Short Term Contracts, including Billing Period.

PART 5: DISBURSEMENT OF LEVY PROCEEDS

15 Disbursement

(a) All Levy Proceeds will be deposited into the Levy Account controlled by the Administrator.

(b) Each month the Administrator will:

i. first, retain Levy Proceeds deposited into the Levy Account up to an amount equal to one-twelfth of the annual budgeted cost of the Administrator approved under Clause 10; and

ii. second, disburse all remaining Levy Proceeds deposited into the Levy Account to each Terminal Operator(s) with Unallocated Expansion Capacity, based on the proportion of the Total Annual Expansion Cost applicable to that Terminal Operator(s) for that Levy Year (net of any adjustments calculated under Clause 12 above).

(c) At the end of each Levy Year, the Administrator will conduct a reconciliation of shipments, collections and disbursements, and conduct a final disbursement of remaining Levy Proceeds deposited into the Levy Account to:

i. first, the Administrator, an amount up to the annual budgeted cost of the Administrator approved under Clause 10 and not previously disbursed to the Administrator in that Levy Year; and

ii. second, to each Terminal Operator(s) with Unallocated Expansion Capacity within the Levy Year, the remaining Levy Proceeds collected for that Levy Year based on the proportion of the Annual Unrecovered Expansion Cost applicable to that Terminal Operator(s) for that Levy Year (net of any adjustments calculated under Clause 12 above).

PART 6: ADMINISTRATOR

16 Administrator

(a) The Administrator will be established by NCIG, PWCS and NPC in accordance with the terms of the CFA.

(b) The Administrator will continue to operate until it is determined under Clause 6(b) that the Levy should no longer continue.

(c) The Administrator acts to:

i. fulfil all functions ascribed to it under this protocol;

ii. manage the Levy Account for receipt and disbursement of Levy Proceeds; and

iii. source any expert advice it requires to fulfil its functions under this protocol.

PART 7: GENERAL

17 Availability and Allocation of Expansion Capacity

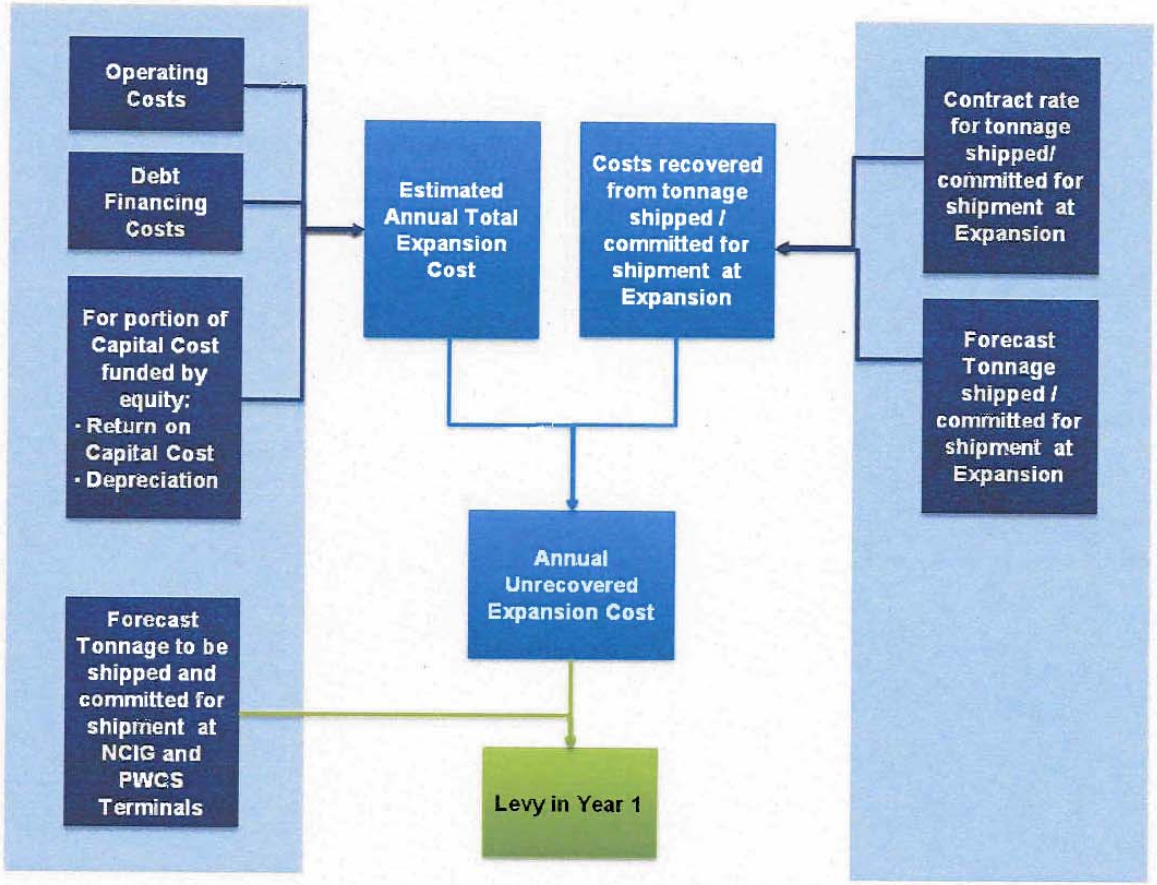
(a) Subject to paragraph (b), the Terminal Operator will use its best endeavours to allocate the Unallocated Expansion Capacity to any Producer either under a Long Term Ship or Pay Contract or under any Short Term Contract in accordance with the relevant Nomination and Allocation Procedure of that Terminal Operator.

(b) 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.

18 Undertaking to minimise use of the Levy

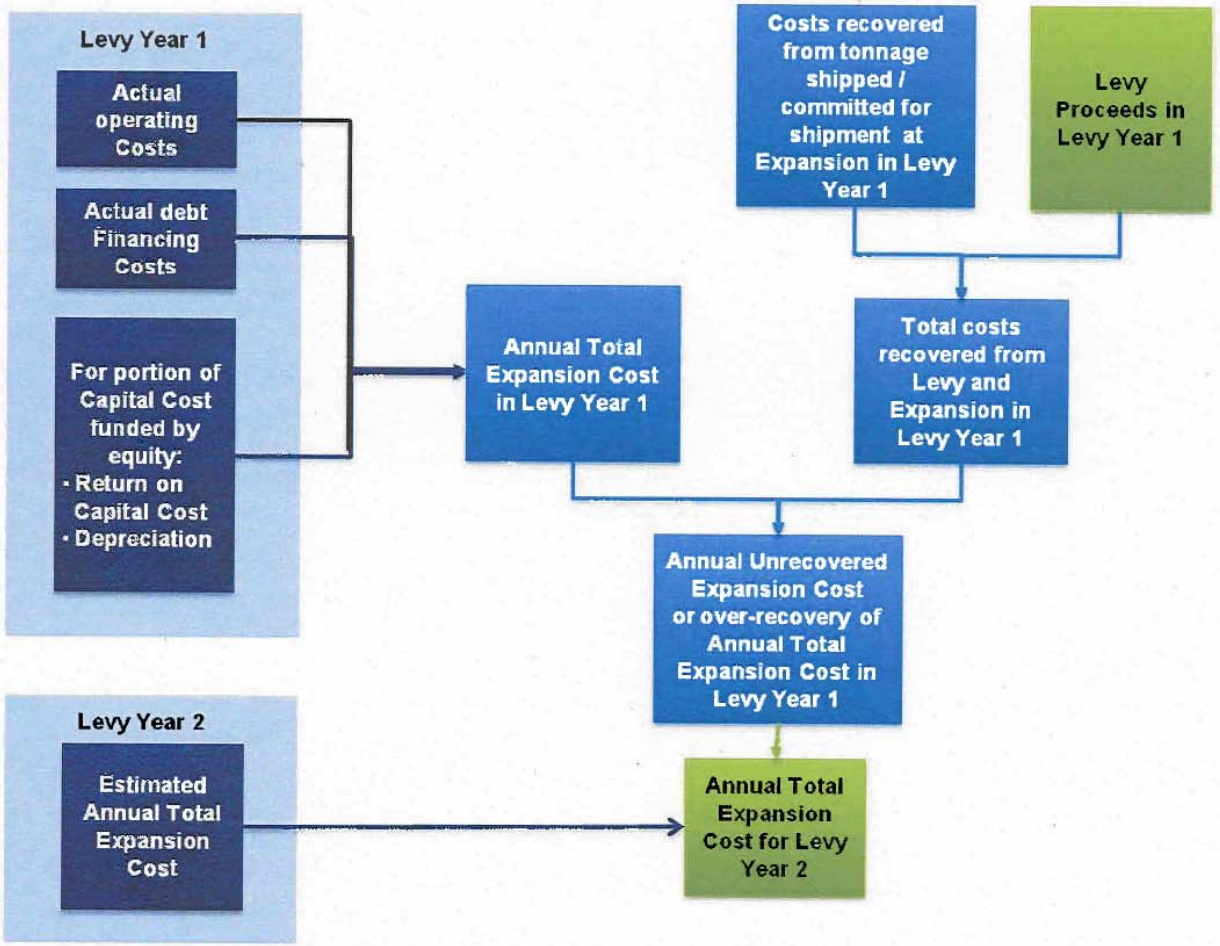
Each Terminal Operator must use all reasonable endeavours to minimise its use of the Levy, including by using reasonable endeavours to minimise the amount of Unallocated Expansion Capacity when undertaking an Expansion.

ANNEX 1: FLOW CHART OF LEVY CALCULATION IN YEAR 1



Note: The term 'tonnage shipped/committed for shipment' is abbreviated term meaning 'tonnes of coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne, in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract, that is shipped for export by Terminal Users'

ANNEX 2: FLOW CHART OF LEVY RESET



Note: The term 'tonnage shipped/committed for shipment' is abbreviated term meaning 'tonnes of coal committed for shipment for export (under a Long Term Ship or Pay Contract) and each tonne, in addition to tonnes committed for shipment under a Long Term Ship or Pay Contract, that is shipped for export by Terminal Users'

ANNEX 3: WORKED EXAMPLE OF LEVY CALCULATION AND RESET

One Expansion

Key assumptions

Cost of debt	10%	(estimate for calculation purposes)
Cost of equity	15%	(pre tax nominal)
Debt/equity ratio	90%	
Debt repayment period	30	years
Accounting asset life	30	years
Capital Cost of Expansion ($m)	$500	
Expansion Capacity (Mtpa)	35	
Ship or pay (for tonnes committed to expansion)	100%	

	Year 1	Year 2
Mtpa committed by other Terminal Users	120	120
Tonnes committed to Expansion (Mtpa)	10	15
Estimated Operating Costs per annum ($m)	$30	$31

Levy Calculation

Estimated Annual Total Expansion Cost ($m)

	Year 1	Year 2
Debt Financing Costs	$46	$46
Return on Capital Cost	$8	$7
Depreciation (on equity finance portion of Capital Cost)	$2	$2
Operating Cost	$30	$31
Annual Total Expansion Cost	$86	$86

Forecast tonnes

	Year 1	Year 2
Mtpa committed to Expansion	10	15
Mtpa committed by other (non-Expansion) Terminal Users	120	120
Mtpa committed by all Terminal Users	130	135

Summary

Annual cost of additional Capacity ($ per tonne)	$2.4	$2.5
Expected costs recovered from tonnes committed to Expansion ($m)	$24.5	$37.0
Forecast cost of unallocated expansion ($m)	$61.1	$49.3
Adjustment for previous years over (under) recovery ($m)	na	$1.2
Net cost to be recovered via the Levy ($m)	$61.1	$50.5
Levy per tonne forecast for Terminal Users	$0.47	$0.37

Annual Disbursement and Reset

	Year 1	Year 2
Actual Operating Costs ($m)	$35	$32
Actual Mtpa committed/shipped by other Terminal Users	122	126
Actual Mtpa committed/shipped through Expansion	11	16

Actual Annual Total Expansion Cost for Levy Year 1

	Year 1	Year 2
Debt Financing Costs	$46.4	$46.4
Return on Capital Cost	$7.5	$7.3
Depreciation (on equity finance portion of Capital Cost)	$1.7	$1.7
Operating Cost	$35.0	$32.0
Adjustment for previous years over (under) recovery ($m)	na	$1.2
Actual Annual Total Expansion Cost	**$90.6**	**$88.5**

Actual Levy Proceeds

	Year 1	Year 2
Expansion	$5.2	$6.0
Other Terminal Users	$57.4	$47.2
Total	$62.5	$53.1

	Year 1	Year 2
Costs recovered via Levy	$62.54	$53.15
Cost Recovered from Expansion Terminal Users	$26.9	$39.5
Total cost recovery	**$89.44**	**$92.61**

Levy Reset Summary ($m)

	Year 1	Year 2
Total cost recovery	$89.4	$92.6
Actual Annual Total Expansion Cost	$90.6	$88.5
Cost recovery excess (shortfall)	-$1.14	$4.09
Variation working capital costs (compared to annual budget)	$0.05	-$0.19
Carry forward (to next years Levy)	-$1.20	$3.89

Two Expansions

Key assumptions

Cost of debt	10%	(estimate for calculation purposes)
Cost of equity	15%	(pre-tax nominal)
Debt/equity ratio	90%	
Debt repayment period	30	years
Accounting asset life	30	years
Additional Capacity (Expansion 1)	35	mtpa
Additional Capacity (Expansion 2)	25	mtpa
Total Expansion Capital Cost (Expansion 1)	$500	$m
Total Expansion Capital Cost (Expansion 2)	$400	$m
Ship or pay (for tonnes committed to expansion)	100%	

	Year 1	Year 2
Mtpa committed by other Terminal Users	120	120
Mtpa committed Expansion 1	28	28
Mtpa committed Expansion 2	10	15
Estimated Operating Costs per annum (Expansion 1)	$30	$31
Estimated Operating Costs per annum (Expansion 2)	$20	$21

Levy Calculation

Estimated Annual Total Expansion Cost (Expansion 1) ($m)

	Year 1	Year 2
Debt Financing Costs	$46	$46
Return on Capital Cost	$8	$7
Depreciation (on equity finance portion of Capital Cost)	$2	$2
Operating Cost	$30	$31
Annual Total Expansion Cost	$86	$86

Estimated Annual Total Expansion Cost (Expansion 2) ($m)

	Year 1	Year 2
Debt Financing Costs	$37	$37
Return on Capital	$6	$6
Depreciation (on equity finance portion of Capital Cost)	$1	$1
Operating Cost	$20	$21
Annual Total Expansion Cost	$64	$65

Forecast tonnes (Mtpa)

	Year 1	Year 2
Mtpa committed Expansion 1	28	28
Mtpa committed Expansion 2	10	15
Mtpa committed by other Terminal Users	120	120
Mtpa committed by all Terminal Users	158	163

Summary - Expansion 1

	Year 1	Year 2
Annual cost of additional Capacity ($ per tonne)	$2.4	$2.5
Expected costs recovered from tonnes committed to Expansion ($m)	$68.5	$69.1
Forecast cost of unallocated expansion ($m)	$17.1	$17.3
Adjustment for previous years over (under) recovery ($m)	na	-$0.6
Net cost to be recovered via the Levy ($m)	$17.1	$16.6
Levy per tonne forecast for Terminal Users	$0.11	$0.10

Summary - Expansion 2

	Year 1	Year 2
Annual cost of additional Capacity ($ per tonne)	$2.6	$2.6
Expected costs receovered from tonnes committed to Expansion ($m)	$25.8	$39.2
Forecast cost of unallocated expansion ($m)	$38.7	$26.1
Adjustment for previous years over (under) recovery ($m)	na	$3.1
Net cost to be recovered via the Levy ($m)	$38.7	$29.2
Levy per tonne forecast for Terminal Users	$0.24	$0.18
Aggregate Levy ($ per tonne)	$0.35	$0.28

Two Expansions cont/d

Annual Disbursement and Reset

Actual Operating Costs ($m) - Expansion 1	$32	$33
Actual Operating Costs ($m) - Expansion 2	$26	$22
Actual Mtpa committed/shipped by other Terminal Users	120	120
Actual Mtpa committed/shipped at Expansion 1	29	29
Actual Mtpa committed/shipped at Expansion 2	11	16

Actual Levy Proceeds

	Year 1	Year 2
Expansion terminal 1 users	$10.2	$8.2
Expansion terminal 2 users	$3.9	$4.5
Other Terminal Users	$42.4	$33.7
Total	$56.5	$46.4

Disbursement of Levy Proceeds to Expansion Terminal Operators

	Year 1	Year 2
Expansion terminal 1	$17.3	$16.8
Expansion terminal 2	$39.2	$29.5
Total	$56.5	$46.4

Total costs recovered: Expansion terminal 1

	Year 1	Year 2
Costs recovered via Levy	$17.3	$16.8
Cost Recovered from Expansion 1 Terminal Users	$70.9	$71.5
Total costs recovered	**$88.2**	**$88.4**

Actual Annual Total Expansion Cost ($m): Expansion 1

	Year 1	Year 2
Debt Financing Costs	$46.4	$46.4
Return on Capital Cost	$7.5	$7.3
Depreciation (on equity finance portion of Capital Cost)	$1.7	$1.7
Operating Cost	$32.0	$33.0
Adjustment for previous years over (under) recovery ($m)	na	-$0.6
Actual Annual Total Expansion Cost for Expansion 1	**$87.6**	**$87.7**

Reset Summary ($m): Expansion 1

	Year 1	Year 2
Total cost recovery	$88.2	$88.4
Actual Annual Total Expansion Cost	$87.6	$87.7
Cost recovery excess (shortfall)	$0.66	$0.67
Variation working capital costs (compared to annual budget)	-$0.03	-$0.03
Carry forward (to next years Levy)	$0.63	$0.64

Total costs recovered ($m): Expansion terminal 2

	Year 1	Year 2
Costs recovered via Levy	$39.2	$29.5
Cost Recovered from Expansion 2 Terminal Users	$28.4	$41.8
Total costs recovered	**$67.5**	**$71.3**

Actual Annual Total Expansion Cost ($m): Expansion 2

	Year 1	Year 2
Debt Financing Costs	$37.1	$37.1
Return on Capital	$6.0	$5.8
Depreciation (on equity finance portion of Capital Cost)	$1.3	$1.3
Operating Cost	$26.0	$22.0
Adjustment for previous years over (under) recovery ($m)	na	$3.1
Actual Annual Total Expansion Cost for Expansion 2	**$70.5**	**$69.3**

Reset Summary ($m): Expansion 2

	Year 1	Year 2
Total cost recovery	$67.5	$71.3
Actual Annual Total Expansion Cost	$70.5	$69.3
Cost recovery excess (shortfall)	-$2.93	$1.97
Variation working capital costs (compared to annual budget)	$0.14	-$0.09
Carry forward (to next years Levy)	-$3.07	$1.88

Attachment B — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment C — chronology

The following table provides a chronology of significant dates in the consideration of these applications for authorisation. Of note, the Applicants requested to amend the proposed Capacity Framework Arrangements for which authorisation is sought on 14 September 2009 and 26 October 2009.

DATE	ACTION
29 June 2009	Applications for authorisation (A91147-A91149) lodged with the ACCC, including a request for interim authorisation.
30 June 2009	Public supporting submission to the applications received by the ACCC.
8 July 2009	Closing date for submissions from interested parties in relation to the request for interim authorisation.
13 July 2009	Submission from the Applicants in response to a request for further information from the ACCC about the request for interim authorisation.
22 July 2009	The ACCC granted conditional interim authorisation to allow the Applicants to commence the phased-in implementation of the Capacity Framework Arrangements. Interim authorisation did not extend to Section 11 of Part B of the Capacity Framework Arrangements. Interim authorisation subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009.
24 July 2009	Further applications for authorisation (A91168-A91169) lodged with the ACCC under section 88(1A) of the Act, including a request for interim authorisation.
	Closing date for submissions from interested parties in relation to the substantive applications for authorisation.
29 July 2009	For the reasons set out in its interim authorisation decision of 22 July 2009, the ACCC granted conditional interim authorisation to applications A91168-A91169.
27 August 2009	Submission received from PWCS in response to interested party submissions on the substantive applications for authorisation. PWCS advises that amendments to the proposed conduct for which authorisation is sough might be required to be lodged with the ACCC in the future.
31 August 2009	The Applicants advised that PWCS and NPC signed the 'PWCS Capacity Framework Documents'.
1 September 2009	ACCC revoked the conditional interim authorisation previously granted in relation to the Capacity Framework Arrangements.
14 September 2009	The Applicants amend the proposed conduct for which authorisation is sought.

17 September 2009	The Applicants advised NCIG and NPC signed the 'NCIG Capacity Framework Documents'. Request for interim authorisation of amended Capacity Framework Arrangements.
21 September 2009	Closing date for submissions from interested parties in relation to the amended Capacity Framework Arrangements.
23 September 2009	The ACCC granted interim authorisation to the amended Capacity Framework Arrangements.
26 October 2009	The Applicants lodge further revisions to the proposed Capacity Framework Arrangements.
28 October 2009	Draft determination issued.
11 November 2009	Closing date for interested parties and the Applicants to request a conference in relation to the draft determination. A conference was not requested.
13 November 2009	Closing date for interested parties to provide a written submission in relation to the draft determination.
24 November 2009	Submissions received from PWCS and NPC in relation to the draft determination and request for information from the ACCC.
26 November 2009	Submission received from NCIG in relation to the draft determination and request for information from the ACCC.
3 December 2009	Submission received from NCIG in response to a request for further information from the ACCC.
9 December 2009	Final determination issued.

Attachment D – PWCS Shareholders

Shareholder name	Share (per cent)
Newcastle Coal Shippers Pty Limited*	36.9491
Coal and Allied Industries Limited	16.0018
RW Miller (Holdings) Limited	13.9982
Tomen Panama Asset Management SA	10.0000
Japan Coal Development Co Ltd	4.1039
Bloomfield Collieries Pty Limited	3.4611
Nippon Steel Australia Pty Ltd	3.3171
Mitsui and Co Ltd	2.8861
Mitsubishi Corporation	1.9862
Sojitz Corporation	1.1745
JFE Steel Corporation	2.1874
Sumitomo Metal Australia Pty Ltd	1.0452
Itochu Coal Resources Australia Pty Limited	1.0171
Kobe Steel Ltd	0.6022
Nisshin Steel Co Ltd	0.2146
Taiheiyo Cement Corporation	0.1759
Kanematsu Corporation	0.1173
Marubeni Corporation	0.1173
Sumitomo Corporation	0.1173
Tokyo Boeki Steel and Materials Ltd	0.1173
Ube Industries Ltd	0.1173
Sumitomo Osaka Cement Co Ltd	0.0879
Idemitsu Kosan Co Ltd	0.0586
Mitsubishi Materials Corporation	0.0586
Nippon Oil Corporation	0.0586
Tokuyama Corporation	0.0293

* Please see over for list of shareholders

Newcastle Coal Shippers Pty Limited

Shareholder name	Share (per cent)
Oakbridge Pty Limited	20.2321
Anglo Coal (Drayton Management) Pty Limited	20.0000
Ulan Coal Mines Limited	15.9742
Coal and Allied Industries Limited	11.4102
Warkworth Coal Sales Limited	11.2681
Port Waratah Coal Services Limited	8.9640
Bloomfield Collieries Pty Limited	2.8170
Camberwell Coal Pty Limited	2.1306
Mt Arthur Coal Pty Limited	1.7479
Muswellbrook Coal Company Limited	1.6902
Powercoal Pty Limited	1.5809
Wambo Coal Pty Limited	1.1268
United Collieries Pty Limited	0.6429
Liddell Coal Marketing Pty Limited	0.1804
Cumnock No.1 Colliery Pty Limited	0.0361
Hunter Valley Coal Corporation Pty Limited	0.0361
Oceanic Coal Australia Limited	0.0361
Bengalla Coal Sales Company Pty Limited	0.0316
Centennial Coal Company Limited	0.0316
Gloucester Coal Ltd	0.0316
Namoi Mining Pty Ltd	0.0316

Attachment E – NCIG shareholders

Shareholder name	Share (per cent)
Hunter Valley Energy Coal Pty Limited	35.47
Peabody Pacific Pty Ltd	17.68
Felix Resources Ltd	15.40
Donaldson Coal Pty Ltd	11.61
Whitehaven Coal Ltd	11.06
Centennial Coal Company Ltd	8.79

Attachment F — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

(1) The Commission shall, in respect of an application for an authorisation:

(a) make a determination in writing granting such authorisation as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorisation the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision would result, or be likely to result, in a benefit to the public; and

(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and

(ii) the provision were given effect to.

(5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision has resulted, or is likely to result, in a benefit to the public; and

(b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

(6) The Commission shall not make a determination granting an authorisation under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorisation under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

(ii) an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorisation under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

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

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.[170]

However, the Tribunal has previously stated that regarding the test under section 90(6):

> [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.[171]

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar to section 90(6), this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.[172]

Future and other parties

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

- persons who become party to the contract, arrangement or understanding at some time in the future[173]
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.[174]

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170 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

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

172 Section 91(3).

173 Section 88(10).

174 Section 88(6).

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation[175]. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.[176] The Act limits applications for minor variation to applications for:

> …a single variation that does not involve a material change in the effect of the authorisation.[177]

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revoking an authorisation and revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.[178] The ACCC may also review an authorisation with a view to revoking it in certain circumstances.[179]

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.[180] The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.[181]

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175 Section 90(10A)
176 Subsection 91A(1)
177 Subsection 87ZD(1).
178 Subsection 91B(1)
179 Subsection 91B(3)
180 Subsection 91C(1)
181 Subsection 91C(3)