

MALLESONS STEPHEN JAQUES

For public register

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

31 March 2009

Dear Mr Chadwick

**Authorisations A91110-A91112
Implementation Memorandum signed by Port Waratah Coal Services Limited and Newcastle
Port Corporation**

1 Purpose of letter

- 1.1 This letter is submitted on behalf of Port Waratah Coal Services Limited ("PWCS"). Newcastle Port Corporation ("NPC") has consented to its lodgement and publication together with attachments.
- 1.2 We enclose a copy of the Implementation Memorandum which has been executed by PWCS and NPC.
- 1.3 As the Commission is aware, it had previously been contemplated that the Implementation Memorandum would be executed on or before 31 March 2009 by each of PWCS, NPC and Newcastle Coal Infrastructure Group Pty Limited ("NCIG"). However, NPC has been advised this afternoon that, although NCIG supports the majority of the Implementation Memorandum, there remain certain issues that NCIG wishes to resolve with the NSW Government before it is able to sign the Implementation Memorandum.
- 1.4 We understand that NCIG has provided a separate letter to the Commission outlining its position today.
- 1.5 The purpose of this letter is to acknowledge the best efforts of all parties and the Commission in seeking to progress this matter and to set out a factual position.

2 The Implementation Memorandum

- 2.1 Notwithstanding that not all parties have been able to sign it, the Implementation Memorandum signed by PWCS and NPC clearly demonstrates the vast amount of work that has been undertaken by a large number of participants in the coal industry in working towards developing the framework for a meaningful and enduring long term solution in the Hunter Valley.

2.2 The Implementation Memorandum also demonstrates the significant amount of progress that has been achieved in moving towards an agreed framework. This is clearly evidenced by the level of support that has been achieved by all parties in relation to a very large number of the complex issues raised by the Implementation Memorandum, and which involve contracts for very substantial capital expenditure over the next 5-10 years.

2.3 Both PWCS and NPC remain fully committed to implementing a long term solution for access to and expansion of export capacity at the Port of Newcastle.

3 Proposed next steps

3.1 Given that the key focus for PWCS and NPC over the past few weeks has been on developing and finalising the Implementation Memorandum, PWCS and NPC would request the opportunity to meet with the Commission to discuss the proposed next steps in order to enable the implementation of a long term solution, including dealing with issues in relation to the interim authorisation in these circumstances.

If the Commission has any further questions in relation to the Implementation Memorandum, PWCS and NPC would be pleased to assist.

Yours sincerely



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Implementation Memorandum

in relation to the implementation of a long term solution for access to and expansion of export capacity at the Port of Newcastle

**Newcastle Port Corporation
Port Waratah Coal Services Ltd
Newcastle Coal Infrastructure Group Pty Ltd**

Execution version

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Date:

Parties

- 1 **Newcastle Port Corporation**, a statutory corporation established under the Ports Corporatisation and Waterways Management Act 1995 (NSW) of the cnr Scott Street & Newcomen Street, Newcastle NSW 2300 (**NPC**)
 - 2 **Port Waratah Coal Services Ltd ABN 99 001 363 828** of Curlew Street, Kooragang Island, NSW 2304 (**PWCS**)
 - 3 **Newcastle Coal Infrastructure Group Pty Ltd ABN 35 111 228 221** of Level 7, 167 Macquarie Street, Sydney NSW 2000 (**NCIG**)
-

1 Defined terms and interpretation

- (a) A term or expression starting with a capital letter:
 - (i) which is defined in the Dictionary in Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary;
 - (ii) which is defined in the Corporations Act but is not defined in the Dictionary, has the meaning given to it in the Corporations Act; and
 - (iii) which is defined in the GST Law but is not defined in the Dictionary or the Corporations Act, has the meaning given to it in the GST Law.
 - (b) The interpretation clause in Schedule 1 (**Interpretation**) sets out rules of interpretation for this document.
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2 Nature of this document

- (a) The purpose of this document is to record the key agreed principles for and a framework for the implementation of, a long term solution for access to and expansion of export capacity at the Port of Newcastle (**Capacity Framework**).
- (b) Subject to paragraph (c), this document is not a legally binding or enforceable document and does not constitute an offer by any party that is capable of acceptance by any other party.
- (c) The parties agree that clause 12 of this document will be legally binding and enforceable on execution of this document by all parties.
- (d) Notwithstanding clause 12 of this document (including but not limited to the obligation under that clause for the parties to comply with the Implementation Procedure set out in Schedule 4):
 - (i) nothing in this document constitutes (or is intended to constitute) a contract, arrangement or understanding between the parties within the meaning of section 45 of the Trade Practices Act 1974 (Cth) in respect of the implementation of the Capacity Framework; and
 - (ii) the parties must not execute, act in accordance with, or otherwise give effect to, a contract, arrangement or understanding in respect of the implementation of the Capacity Framework, including through the execution of any of the documents described in the Implementation Procedure in Schedule 4 or otherwise, without first obtaining authorisation from the

Australian Competition and Consumer Commission pursuant to section 88 of the Trade Practices Act 1974 (Cth) (to the extent required).

- (e) Nothing in this document will be taken as a representation by a Terminal Operator that it has the authority, or otherwise, acts as agent, of any Producer or group of Producers, in relation to those provisions of this document which purport to impose obligations on that Producer or group.

3 Nomination and allocation

3.1 Nomination and allocation procedure

- (a) PWCS must ensure that the PWCS Nomination and Allocation Procedure is consistent with the PWCS Nomination and Allocation Principles set out in part 1 of Schedule 2.
- (b) NCIG must ensure that the NCIG Nomination and Allocation Procedure is consistent with the NCIG Nomination and Allocation Principles set out in part 2 of Schedule 2.
- (c) Before conducting the NCIG Nomination and Allocation Procedure, NCIG must notify PWCS and must coordinate with PWCS 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.

3.2 Allocation of Non-NCIG Producers 12 Mtpa in NCIG Stage 2

- (a) NCIG will offer 12 Mtpa of Capacity at NCIG Stage 2 to Non-NCIG Producers in accordance with clause 7 and the NCIG Nomination and Allocation Procedure.
- (b) If, as at the conclusion of the NCIG Nomination and Allocation Procedure, less than 12 Mtpa of Capacity has been allocated to Non-NCIG Producers, the remaining allocation shall be available for nomination by all Producers (including NCIG Producers) in accordance with the NCIG Nomination and Allocation Procedure.

3.3 Allocation of base tonnage at PWCS (including 24.413 Mtpa for NCIG Producers)

- (a) **Offer of base tonnage at PWCS:** In accordance the PWCS Nomination and Allocation Principles, PWCS will make an offer to each Producer from 1 July 2009 that is equivalent to their:
 - (i) 2009 PWCS Base Tonnage for the period 1 July 2009 to 31 December 2009; and
 - (ii) 2010 PWCS Base Tonnage for 2010, on an annual basis, for a period of up to ten years commencing on 1 January 2010.
- (b) **Aggregate base tonnage of all Producers at PWCS is 97.4 Mtpa:** For the purposes of this clause, the aggregate 2010 PWCS Base Tonnage of all Producers as at the date of this document is 97.4 Mtpa.
- (c) **Aggregate base tonnage of NCIG Producers at PWCS is 24.413 Mtpa:** For the purposes of this clause, the aggregate 2010 PWCS Base Tonnage of the NCIG Producers as at the date of this document is 24.413 Mtpa.

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3.4 Long term ship or pay contracts

- (a) Subject to clauses 7.5 and 8.1(c), a Producer that wishes to obtain access to Capacity that is to be allocated at the terminals according to the Nomination and Allocation Procedures must be offered a 10 year evergreen long term ship or pay contract (**Long Term Ship or Pay Contracts**) with the relevant Terminal Operator, provided that nothing in this paragraph (a) prevents the Terminals Operators from also offering other contracts with shorter terms to Producers.
- (b) The parties acknowledge that the terms and conditions of the Long Term Ship or Pay Contracts for each Terminal Operator:
 - (i) must be consistent with the requirements of the Capacity Framework set out in this document; and
 - (ii) will be developed in conjunction with the development of the Nomination and Allocation Procedures.

4 Expansion by PWCS

4.1 When is obligation to expand triggered?

- (a) Subject to paragraph (b) and clause 4.3, if:
 - (i) the Aggregate PWCS Contracted Allocations from time to time exceeds the Aggregate PWCS Available Capacity at that time (**Capacity Shortfall**); and
 - (ii) 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.

- (b) Subject to clause 4.3, 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 clause 4 precludes any person other than PWCS from undertaking a project to construct a new terminal.
- (c) If at any time PWCS is required to build a new terminal under paragraph (b) (other than Terminal 4, which is specifically addressed in clause 9), then:
 - (i) PWCS must use its best endeavours to identify and acquire appropriate sites for that new terminal; and
 - (ii) 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.

4.2 Time for completion

- (a) If PWCS is required to expand a PWCS Terminal under clause 4.1(a) then, subject to clause 4.3, that expansion must be Completed:

- (i) in the case of Master Plan Completion Phase 1, two years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises;
 - (ii) in the case of Master Plan Completion Phase 2, two years after the later of:
 - (A) the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises; and
 - (B) the date on which PWCS is able to access the Hunter River following completion of the relevant part of the BHP Billiton Hunter River Remediation project; and
 - (iii) in any other case, within 2 years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises.
- (b) If PWCS is required to build a new terminal under clause 4.1(b) then, subject to clause 4.3, 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.
 - (c) Without limiting clause 4.3, 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:
 - (i) PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion, in which case PWCS must provide all information, records and personnel that the Minister requires in order to consider such request; and
 - (ii) 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.

4.3 Process for review

- (a) If clause 4.2(a)(iii) applies then PWCS may trigger a review under this clause 4.3 of the time in which a PWCS Expansion is required to be Completed under that clause by submitting a request to NPC prior to contracting allocations.
- (b) Subject to paragraph (c), the obligation to undertake a PWCS Expansion under clause 4.1 will be suspended if:
 - (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents); and
 - (B) notwithstanding PWCS's efforts, PWCS has been unable to obtain, or is unlikely to obtain, the relevant Development Consents; or
 - (ii) a Force Majeure Event prevents that PWCS Expansion being undertaken.
- (c) If the obligation to undertake a PWCS Expansion under clause 4.1 is suspended under paragraph (b), that obligation will recommence at a time determined by the Reviewer or:

- (i) in the case of paragraph (b)(i), when the relevant Development Consents are subsequently obtained; and
 - (ii) in the case of paragraph (b)(ii), when the relevant Force Majeure Event ceases to prevent PWCS from undertaking the PWCS Expansion.
- (d) The time for Completion of a PWCS Expansion under clause 4.2 will be extended if:
- (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) there are Engineering Limitations that will delay Completion of that PWCS Expansion beyond the scheduled time of Completion; or
 - (B) notwithstanding that PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake that PWCS Expansion will not be obtained within a time that would reasonably allow PWCS to Complete the PWCS Expansion in accordance with the relevant timeframe for the PWCS Expansion specified in clause 4.2; or
 - (ii) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (e) The length of any extension of time to be given under paragraph (d) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
- (i) 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;
 - (ii) 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
 - (iii) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.
- (f) It is a condition of any extension of time that is granted under paragraph (d) that:
- (i) PWCS 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 PWCS Expansion (including the time for Completion of that Expansion); and
 - (ii) if Capacity can be realised from the PWCS Expansion it must be made available to Producers, notwithstanding that such Capacity may not fully satisfy the relevant Capacity Shortfall which triggered that PWCS Expansion.
- (g) Subject to paragraphs (h), (i) and (j), PWCS must:
- (i) provide the Reviewer with all relevant information that is requested by the Reviewer for the purposes of making a determination under paragraphs (b),

- (d) or (e) (including by preparing and presenting submissions to the Reviewer);
- (ii) if the Reviewer requests, provide relevant personnel to meet the Reviewer for the purposes of the Reviewer making a determination under paragraphs (b), (d) or (e);
 - (iii) provide the Reviewer with access to all of its relevant records and premises for the purposes of the Reviewer making a determination under paragraphs (b), (d) or (e); and
 - (iv) meet all of the reasonable costs and expenses incurred by the Reviewer in conducting a review under this clause 4.3.
- (h) If PWCS is prevented from disclosing information under paragraph (g) because it is legally bound to maintain the confidentiality of that information, PWCS will not be required to disclose that information, provided it has used all reasonable endeavours to obtain the consents required to disclose that information in accordance with this clause 4.3.
- (i) Any information provided by PWCS to the Reviewer under paragraph (g) which is marked as confidential must not be disclosed by the Reviewer to any person except:
- (i) with the prior written consent of PWCS;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer conducting a review and making a determination under this clause 4.3 provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides PWCS with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that PWCS or the owner of the confidential information may take appropriate steps to protect such information;
 - (iv) where that information is already known to the Reviewer at the time it is disclosed by PWCS and the Reviewer is not otherwise prevented from disclosing it; and
 - (v) where that information is developed independently by the Reviewer.
- (j) Whilst located at the premises of PWCS pursuant to paragraph (g)(iii), the Reviewer must ensure that its representatives comply with PWCS's security and health and safety policies.
- (k) PWCS or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this clause 4.3 by notifying the other party and the Minister. Upon receipt of such notice the Minister will:



- (i) 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
- (ii) by agreement with PWCS, appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 4.3 will apply to the review to be conducted by that person (with such changes as are necessary).

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) 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 paragraph (m) will be extended by the period of the delay.

4.4 Delay or shortfall in expansion

- (a) If there is a PWCS Expansion Delay or a PWCS Expansion Shortfall, the provisions of clause 5 will apply.
- (b) PWCS must notify all affected Producers in writing of any expected PWCS Expansion Delay or PWCS Expansion Shortfall within 7 Business Days of becoming aware of that expected PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable).
- (c) If a notice is given under paragraph (b), PWCS must ensure that Producers are promptly informed of the following information in respect of the relevant expected PWCS Expansion Delay or PWCS Expansion Shortfall as it becomes known from time to time:
 - (i) the expected date on which the PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable) will come into existence;
 - (ii) the time that PWCS expects the PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable) will come to an end;
 - (iii) the extent to which that Producer will be required to compress under clause 5.

5 Interim solution for capacity shortfalls at PWCS

5.1 Obligation to compress

- (a) Subject to clause 5.2, if there is a PWCS Expansion Delay or a PWCS Expansion Shortfall at any time giving rise to a Capacity Shortfall, the Contracted Allocation 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 Contracted Allocation bears to the aggregate 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 Contracted Allocation 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 paragraph (a)(i) does not satisfy the Capacity Shortfall, 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 paragraph (a)(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:
 - (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the relevant Capacity Shortfall; and
- (iii) third, if the compression referred to in paragraphs (a)(i) and (a)(ii) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer (including Producers who have compressed under paragraphs (a)(i) and (a)(ii)) will be compressed pro rata in the proportion that their Contracted Allocation bears to the aggregate 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 paragraph (a)(i) and this paragraph (a)(iii) (but not under paragraph (a)(ii)) is equal to the General Compression Limit of that Producer.
- (b) If the relevant Capacity Shortfall referred to in paragraph (a) cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the 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.

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5.2 Limitations on obligation to compress

- (a) Clause 5.1(a)(ii) and clause 7.4(a)(ii) will not apply to a Producer if the Reviewer (acting reasonably and in good faith) is satisfied that:
- (i) **delays:** the failure of that Producer to meet the Utilisation Threshold in the relevant period is caused by a delay in the development of:
 - (A) a new project of that Producer;
 - (B) the expansion of an existing project of that Producer; or
 - (C) the expansion of associated track facilities or channel works, which is outside the reasonable control of that Producer; or
 - (ii) **NCIG Excluded Stage 2 Capacity:** in respect of any NCIG Producer:
 - (A) the Contracted Allocation of that NCIG Producer is no greater than the projected maximum production of that NCIG Producer from new and existing mines;
 - (B) at the time that NCIG Stage 2 is Committed, that NCIG Producer has specified 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 of the extension 2 years prior to the end of the initial Nominated Deferral Period; and
 - (C) during the Nominated Deferral Period, the NCIG Producer has used its best efforts to transfer the Relevant Allocation, including by making a bona fide open offer to the market to transfer the Relevant Allocation on customary terms.
- (b) Clause 5.1(a)(iii) only applies to a Producer whose Group Contracted Allocation at the time the relevant Capacity Shortfall arises is 5 Mtpa or more.
- (c) If a Producer is an NCIG Producer then, for the purposes of calculating:
- (i) the pro rata proportion of the PWCS Contracted Allocation of that Producer to be compressed under clause 5.1(a)(iii);
 - (ii) the extent to which the compression of that Producer's PWCS Contracted Allocation will be reduced under clause 5.3(a)(ii); and
 - (iii) 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.
- (d) If:
- (i) there is a PWCS Expansion Shortfall; and
 - (ii) 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 made under clause 3.3 will not be subject to compression under clause 5.1(a)(iii) in respect of that PWCS Expansion Shortfall.

5.3 Reducing compression

- (a) Subject to clause 5.2, if the Capacity Shortfall that is caused by a PWCS Expansion Delay or a PWCS Expansion Shortfall is reduced then compression will reduce accordingly such that:
 - (i) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under clause 5.1(a)(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 subparagraph (a)(i) in the proportion that their Voluntary Compressed Allocation (as may be reduced under paragraph (b)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
 - (ii) second, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(iii) will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(ii) will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocations of all such Producers.
- (b) For the purposes paragraph (a)(i), 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 clause 5.1(a)(ii) had that Producer not elected to compress under clause 5.1(a)(i).

5.4 Cessation of compression

The obligation to compress will come to an end at the same time that the relevant PWCS Expansion Delay or PWCS Expansion Shortfall which triggered that obligation under clause 5.1 comes to an end.

5.5 Calculating compression and decompression

- (a) The Reviewer will be responsible for calculating the extent to which each Producer is required to compress and decompress under this clause 5 and under clause 7.4.
- (b) Subject to paragraph (c), the Terminal Operators must:
 - (i) 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 under this clause 5 and under clause 7.4; and
 - (ii) 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 clause 5 and under clause 7.4.
- (c) Any information provided by Terminal Operators to the Reviewer under paragraph (b) which is marked as confidential must not be disclosed by the Reviewer to any person except:
 - (i) with the prior written consent of the relevant Terminal Operator;

- (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer calculating the extent to which each Producer is required to compress or decompress under this clause 5 and under clause 7.4, provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
- (iii) where the Reviewer is compelled by law to disclose that information provided that the Reviewer:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides relevant Terminal Operator with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that Terminal Operator or the owner of the confidential information may take appropriate steps to protect such information;
- (iv) where that information is already known to the Reviewer at the time it is disclosed by the relevant Terminal Operator and the Reviewer is not otherwise prevented from disclosing it; and
- (v) where that information is developed independently by the Reviewer.
- (d) A Producer or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under clause 5.5(a) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (i) 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
 - (ii) appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 5.5 will apply to the review to be conducted by that person (with such changes as are necessary).

- (e) Subject to paragraph (f), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (f) If a review that is conducted under this paragraph (d) 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 paragraph (f) will be extended by the period of the delay.

6 Transfer charges

6.1 Transfer of allocations at NCIG Terminals

Producers must not charge fees for another to use a portion of its Contracted Allocation at NCIG Terminals (**Relevant Portion**) if those fees exceed the fees which are charged to that Producer for the Relevant Portion by NCIG by more than 5%. Producers must not implement a fee structure which is designed to circumvent this clause 6.1.

6.2 Transfer of allocations at PWCS Terminals

The maximum fee that a Producer may charge to transfer any or all of its Contracted Allocation at PWCS Terminals (**Relevant Portion**) to another Producer is 5% of the fee charged by PWCS for the Relevant Portion. Producers must not implement a fee structure which is designed to circumvent this clause 6.2.

7 NCIG Stage 2

7.1 Development of NCIG Stage 2

- (a) 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.
- (b) In January and July of each year, NCIG must update PWCS and NPC of its progress for Commitment of NCIG Stage 2 and advise whether it intends or reasonably expects to commence the NCIG Nomination and Allocation Procedure within the next 6 months.
- (c) NCIG confirms that, pursuant to the shareholders arrangements for NCIG, each individual member of NCIG is entitled to trigger a feasibility study for the construction of NCIG Stage 2 and, if the feasibility study principles are met (being the principles set out in the shareholders agreement), the board of NCIG must not unreasonably withhold its approval to commence the process for the construction of NCIG Stage 2.

7.2 Time for completion of NCIG Stage 2

- (a) 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:
 - (i) 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
 - (ii) otherwise, within 2 years (or such other time period determined in accordance with clause 7.3) after the date on which NCIG Stage 2 is Committed.
- (b) For the purposes of paragraph (a), NCIG must notify each of NPC and PWCS of the date on which NCIG Stage 2 is Committed within 7 days after that date.

7.3 Process for review

- (a) Subject to paragraph (b), the obligation to Complete NCIG Stage 2 under clause 7.2 will be suspended if a Force Majeure Event prevents NCIG Stage 2 being Completed.
- (b) If the obligation to Complete NCIG Stage 2 is suspended under paragraph (a), that obligation will recommence at a time determined by the Reviewer or when the relevant Force Majeure Event ceases to prevent NCIG from Completing NCIG Stage 2.
- (c) If clause 7.2(a)(ii) applies then, at any time prior to the date on which NCIG Stage 2 is Committed, NCIG may trigger a review under this clause 7.3 of the time in which NCIG Stage 2 is required to be Completed under that clause by submitting a request to NPC.



- (d) The time for Completion of NCIG Stage 2 under clause 7.2 will be extended if:
 - (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) there are Engineering Limitations that will delay Completion of NCIG Stage 2 beyond the scheduled time for Completion; or
 - (B) notwithstanding that NCIG has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake NCIG Stage 2 in a timely manner (including by taking steps to identify ways of redesigning NCIG Stage 2 in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake NCIG Stage 2 will not be obtained within a time that would reasonably allow NCIG to Complete NCIG Stage 2 in accordance with the relevant timeframe specified in clause 7.2; or
 - (ii) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (e) The length of any extension of time to be given under paragraph (d) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
 - (i) 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;
 - (ii) 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
 - (iii) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.
- (f) It is a condition of any extension of time that is granted under paragraph (d) that:
 - (i) NCIG 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 implementation of NCIG Stage 2 (including the time for Completion of NCIG Stage 2); and
 - (ii) 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 the Capacity required under clause 7.1.
- (g) Subject to paragraphs (h), (i) and (j), NCIG must:
 - (i) provide the Reviewer with all relevant information that is requested by the Reviewer for the purposes of making a determination under paragraphs (d) or (e) (including by preparing and presenting submissions to the Reviewer);
 - (ii) if the Reviewer requests, provide relevant personnel to meet the Reviewer for the purposes of the Reviewer making a determination under paragraphs (d) or (e);
 - (iii) provide the Reviewer with access to all of its records and premises for the purposes of the Reviewer making a determination under paragraphs (d) or (e); and

- (iv) meet all of the reasonable costs and expenses incurred by the Reviewer in conducting a review under this clause 7.3.
- (h) If NCIG is prevented from disclosing information under paragraph (g) because it is legally bound to maintain the confidentiality of that information, NCIG will not be required to disclose that information, provided it has used all reasonable endeavours to obtain the consents required to disclose that information in accordance with this clause 7.3.
- (i) Any information provided by NCIG to the Reviewer under paragraph (g) which is marked as confidential must not be disclosed by the Reviewer to any person except:
 - (i) with the prior written consent of NCIG;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer conducting a review and making a determination under this clause 7.3 provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information provided that the Reviewer:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides NCIG with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that NCIG or the owner of the confidential information may take appropriate steps to protect such information;
 - (iv) where that information is already known to the Reviewer at the time it is disclosed by NCIG and the Reviewer is not otherwise prevented from disclosing it; and
 - (v) where that information is developed independently by the Reviewer.
- (j) Whilst located at the premises of NCIG pursuant to paragraph (g)(iii), the Reviewer must ensure that its representatives comply with NCIG's security and health and safety policies.
- (k) NCIG or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this clause 7.3 by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (i) 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
 - (ii) by agreement with NCIG, appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 7.3 will apply to the review to be conducted by that person (with such changes as are necessary).

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) 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 paragraph (m) will be extended by the period of the delay.

7.4 Delay or shortfall in Stage 2

- (a) If there is an NCIG Stage 2 Delay or an NCIG Stage 2 Shortfall the Contracted Allocation of the 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 Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Non-NCIG Stage 2 Allocations; and
 - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Non-NCIG Stage 2 Allocations, 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 paragraph (a)(i) does not satisfy the Non-NCIG Stage 2 Allocations, subject to clause 5.2(a) 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 paragraph (a)(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:
 - (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the Non-NCIG Stage 2 Allocations.

- (b) If the Non-NCIG Stage 2 Allocations cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the NCIG Producers (pro rata to their share of NCIG Stage 1 capacity) must transfer to Non-NCIG Producers such amount of their Contracted Allocation as is necessary to satisfy the Non-NCIG Stage 2 Allocations in accordance with the following timetable:

Period of delay or shortfall	Amount of Contract Allocations to be transferred
Up to 6 months	3 Mtpa
Up to 9 months	6 Mtpa
Up to 12 months	9 Mtpa
Over 12 months	12 Mtpa

- (c) NCIG must notify all affected Producers in writing of any expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall within 7 Business Days of becoming aware of that expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable).
- (d) If a notice is given under paragraph (c), NCIG must ensure that Producers are promptly informed of the following information in respect of the relevant expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall as it becomes known from time to time:
- (i) the expected date on which the NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable) will come into existence;
 - (ii) the time that NCIG expects the NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable) will come to an end;
 - (iii) the extent to which that Producer will be required to compress under this clause 7.4; and
 - (iv) the relevant Contracted Allocation of the NCIG Producers which will be transferred as required under paragraph (b).
- (e) If Contracted Allocations are compressed or otherwise transferred under paragraphs (a) and (b) and Capacity becomes available at NCIG Stage 2 for Non-NCIG Producers then:
- (i) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under paragraph (a)(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 subparagraph (e)(i) in the proportion that their Voluntary Compressed Allocation (as may be reduced under paragraph (f)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
 - (ii) second, the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b) will be reduced pro rata amongst those NCIG Producers in the same proportion that the NCIG Producers initially transferred their Contracted Allocations; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under paragraph (a)(ii) will be reduced pro rata amongst the Producers to whom that paragraph applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers.

- (f) For the purposes paragraph (e), 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 paragraph (a)(ii) had that Producer not elected to compress under paragraph (a)(i).
- (g) At the time that the relevant NCIG Stage 2 Delay or NCIG Stage 2 Shortfall which triggered the obligation to compress or transfer Contracted Allocations under paragraphs (a) and (b) comes to an end:
 - (i) compression under paragraph (a); and
 - (ii) the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b),
 will also come to an end.
- (h) If NCIG Producers do not transfer to Non-NCIG Producers the relevant amount of Contracted Allocations that is required under paragraph (b) within the time that is required, the PWCS Contracted Allocation of the NCIG Producers will be reduced to cover the shortfall on a pro rata basis in the proportion that the PWCS Contracted Allocation of each NCIG Producer bears to the aggregate PWCS Contracted Allocation of all NCIG Producers. However, nothing in this paragraph (h) limits the obligation of the NCIG Producers to transfer the required Contracted Allocations.

7.5 Period before commitment of NCIG Stage 2

Subject to clause 8.1(c), each NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage unless NCIG Stage 2 is Committed.

8 Levy and unallocated expansion capacity

8.1 Conditions for Levy to apply

- (a) A Terminal Operator may elect to apply the Levy whenever:
 - (i) that Terminal Operator Completes an Expansion; and
 - (ii) the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion (**Unallocated Expansion Capacity**),
 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 any Unallocated Expansion Capacity, the Levy will cease to apply when that Unallocated Expansion Capacity is subsequently allocated under a Long Term Ship or Pay Contract.

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

8.2 Purpose of the Levy

The Levy is intended to assist to meet the cost of any Unallocated Expansion Capacity.

8.3 Levy protocols

The Terminal Operators will work together and coordinate in good faith to develop the Levy Protocols. The Levy Protocols will, among other things, contain the details of how the Levy will be calculated, charged and collected. For this purpose, it is acknowledged that the Levy will apply on a per tonne basis across all coal exported from the NCIG and PWCS Terminals.

9 Terminal 4

9.1 Agreement for Lease

NPC and PWCS will negotiate the terms of an agreement for lease for Terminal 4.

9.2 Ensuring integrity of Capacity Framework

PWCS acknowledges that the structure of the ownership and control of Terminal 4 must be such that the provisions of this document 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 and that for that purpose NPC will be entitled to require that the terms of the agreement for lease for Terminal 4 will include such provisions as NPC (acting reasonably) believes are necessary to give effect to this principle.

9.3 Governing principles for Terminal 4

Without limiting clause 9.2, NPC and PWCS will ensure that the terms of the agreement for lease for the land on which Terminal 4 is to be constructed are consistent with the following principles:

- (a) in making decisions regarding the design, construction and mode of operation of Terminal 4, PWCS must consult with and have regard to the interests of all Producers and that to be informed of those interests it will establish a suitably constituted sub committee of the board of PWCS which will:
 - (i) have an independent person appointed as its chair;
 - (ii) include persons who represent an appropriate cross section of Producers; and
 - (iii) have a role in the process for making decisions about the design, construction and mode of operation of Terminal 4;
- (b) unless discriminatory treatment is expressly contemplated in this document, access to capacity at Terminal 4 will be open to all Producers on a non-discriminatory basis; and
- (c) in circumstances where PWCS is unwilling or unable to construct Terminal 4, the land on which Terminal 4 is to be constructed may be made available for lease to another party.

10 Coal Chain Coordination

10.1 Information

- (a) The Terminal Operators must share information and coordinate with the HVCCC with a view to optimising coal chain capacity.
- (b) Information that is provided to the HVCCC by the Terminal Operators will be subject to customary confidentiality obligations and exceptions.

10.2 Interference

- (a) Terminal Operators acknowledge that construction works in the coal chain, including at the Terminals, may impact on others using the coal chain during integration of expansion works.
- (b) PWCS will:
 - (i) take all reasonable steps to ensure that the design, construction and operation of Terminal 4 does not interfere with the ability of NCIG to construct and efficiently operate its fully constructed facility;
 - (ii) where there is any such interference, use its best efforts to minimise that interference; and
 - (iii) consult with NCIG regarding any potential interference.

11 Contractual alignment

- (a) The parties acknowledge that the principles set out in Schedule 5 have been developed and agreed by the members of the Contractual Alignment Working Group. The parties will ensure that the Capacity Framework is implemented in a manner that is consistent with these principles.
- (b) The parties also acknowledge that the Contractual Alignment Working Group has identified that a program of works to support the guiding principles is required and that this is currently under development.

12 Process for final agreement

- (a) Each party to this document must:
 - (i) comply with the Implementation Procedure set out in Schedule 4;
 - (ii) in good faith, attend and participate in scheduled discussions and negotiations with a view to agreeing the documentation that is required to implement the Capacity Framework documented by this memorandum;
 - (iii) act at all times, as fair as reasonably possible, so as to facilitate the speedy and effective development of, and agreement on, the terms of the documentation that is required to implement the Capacity Framework documented by this memorandum; and
 - (iv) use all reasonable endeavours to resolve any disputes in an efficient and professional manner.

- (b) The Terminal Operators must work together and cooperate with all other relevant industry participants to facilitate development of a solution to achieve contractual alignment.
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13 Long form documents

- (a) For the purposes of clause 12, Schedule 3 provides an indicative overview of the documents that will be required to implement the Capacity Framework.
- (b) The parties acknowledge that the long form documentation will include an appropriate dispute resolution regime to address disputes which arise in respect of matters which are relevant to the Capacity Framework. For the avoidance of doubt, such dispute resolution provisions will not apply in respect of any dispute regarding the decision of the Reviewer or any expert appointed to review the decision of the Reviewer.
- (c) To the extent that the long form documentation comprises bilateral arrangements between Government and one of the Terminal Operators, Government will not agree to make any material amendment to the provisions of those arrangements that are relevant to the Capacity Framework without first:
 - (i) engaging in a transparent process with industry participants regarding the proposed amendments; and
 - (ii) considering the submissions of industry participants regarding whether Government ought to agree to the proposed amendments.

ATD

Schedule 1 — Dictionary

1 Dictionary

In this deed:

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.

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.

Business Day means a day on which banks are open for business excluding Saturdays, Sundays and public holidays in Newcastle.

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

Capacity Framework has the meaning given in clause 2(a).

Capacity Shortfall has the meaning give in clause 4.1(a)(i).

Committed means, in respect of NCIG Stage 2, the point in time when NCIG is contractually bound to make available Capacity to Non-NCIG Producers (as referred to in clause 7.1) pursuant to executed and binding Long Term Ship or Pay Contracts.

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 clause 5 and clause 7.4 at that time; and
- (b) in respect of all Producers at any time, the extent to which the Contracted Allocations of all Producers has been compressed under clause 5 and clause 7.4 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.

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) that Producer's use of any 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 under clause 5.1 and under clause 7.4 during the 18 month period immediately prior to that time; and
- (c) 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.

Corporations Act means the *Corporations Act 2001* (Cth).

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.

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 this 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 executing this document;
- (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).

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 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 clause 7.1.

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

Force Majeure Event means an event or circumstance which:

- (a) in relation to a party:
 - (i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;
 - (ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing this document; and
 - (iii) that party could not reasonably have avoided or overcome; and
- (b) is not substantially attributable to any breach of this 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 it 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 Contracted Allocation in the calendar year in which that Producer's Contracted Allocation is first compressed for a PWCS Expansion Delay or PWCS Expansion Shortfall under clause 5.1(a)(iii); 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 Contracted Allocation.

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

GST Law has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

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

Implementation Procedure means the procedure set out in Schedule 4.

Levy means the levy referred to in clause 8.

Long Term Ship or Pay Contracts has the meaning given in clause 3.4(a).

Mtpa means million tonnes per annum.

Minister means the Minister for Ports in the New South Wales Government and, in the absence of such Minister, the Minister in the New South Wales Government who has responsibility for the Port of Newcastle.

NCIG Member means each shareholder of NCIG from time to time.

NCIG Nomination and Allocation Principles means the Nomination and Allocation Principles set out in part 2 of Schedule 2.

NCIG Nomination and Allocation Procedure means the detailed procedure to be developed by NCIG for the nomination of 12 Mtpa of Capacity by and allocation of that Capacity to Producers at NCIG Stage 2.

NCIG Producer means each NCIG Member and any Producer who is an Associate of that NCIG Member.

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 NCIG Stage 2 is not capable of meeting the Capacity referred to in clause 7.2 within the time required under clause 7.2 (subject to any extension of time permitted under clause 7.3).

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.

Nomination and Allocation Principles means the PWCS Nomination and Allocation Principles and the NCIG Nomination and Allocation Principles.

Nomination and Allocation Procedures means the PWCS Nomination and Allocation Procedure and the NCIG Nomination and Allocation Procedure.

Non-NCIG Producer means a Producer who is not an NCIG Producer.

Non-NCIG Stage 2 Allocations means an amount equal to the aggregate Contracted Allocations of all Non-NCIG Producers at NCIG Stage 2.

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 producing 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 allocated to Producers at the PWCS Terminals in the year 2009 and 2010 (respectively) in accordance with the PWCS Nomination and Allocation Principles.

PWCS Expansion means an expansion of existing PWCS Terminals or the building of a new terminal by PWCS (as applicable) as required under clause 4.

PWCS Expansion Delay means a PWCS Expansion is not Completed within the time required under clause 4.2 (subject to any extension of time permitted under clause 4.3 and includes any PWCS Expansion that is suspended under clause 4.3(b)).

PWCS Expansion Shortfall means the extent to which a PWCS Expansion falls short of meeting the Capacity Shortfall which triggered the obligation to undertake that PWCS Expansion.

PWCS Contracted Allocation means, in respect of a Producer at any time, the Contracted Allocation of that Producer at the PWCS Terminals at that time.

PWCS Nomination and Allocation Principles means the Nomination and Allocation Principles set out in part 1 of Schedule 2.

PWCS Nomination and Allocation Procedure means the detailed procedure to be developed by PWCS for the nomination of Capacity by and allocation of Capacity to Producers at the PWCS Terminals.

PWCS Terminal means each terminal operated by PWCS.

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

Terminal Operators means each of PWCS and NCIG.

Unallocated Expansion Capacity has the meaning given in clause 8.1(a)(ii).

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.

Voluntary Compressed Allocation has the meaning given in clause 5.1(a)(i) and clause 7.4(a)(i) (as applicable).

2 Interpretation

In this document the following rules of interpretation apply unless the contrary intention appears:

- (a) headings are for convenience only and do not affect the interpretation of this document;
- (b) the singular includes the plural and vice versa;
- (c) words that are gender neutral or gender specific include each gender;
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (e) the words 'such as', 'including', 'particularly' and similar expressions are not used as nor are intended to be interpreted as words of limitation;
- (f) a reference to:
 - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;

- (ii) a thing (including but not limited to a chose in action or other right) includes a part of that thing;
- (iii) a party includes its successors and permitted assigns;
- (iv) a document includes all amendments or supplements to that document;
- (v) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this document;
- (vi) this document includes all schedules and attachments to it;
- (vii) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity or a rule of an applicable Financial Market and is a reference to that law as amended, consolidated or replaced;
- (viii) an agreement other than this document includes an undertaking, or legally enforceable arrangement or understanding whether or not in writing; and
- (ix) a monetary amount is in Australian dollars;
- (g) an agreement on the part of two or more persons binds them jointly and severally;
- (h) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day;
- (i) in determining the time of day where relevant to this document, the relevant time of day is:
 - (i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located; or
 - (ii) for any other purpose under this document, the time of day in the place where the party required to perform an obligation is located;
- (j) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or any part of it; and
- (k) if there is any conflict between the body of this document and its schedules, the terms of the main body of this document will prevail and the remaining documents will prevail over each other in the following order:
 - (i) Schedule 1;
 - (ii) Schedule 2;
 - (iii) Schedule 3;
 - (iv) Schedule 4; and
 - (v) Schedule 5.

Schedule 2 — Nomination and Allocation Principles

1 PWCS Nomination and Allocation Principles

Contracting Principles

- A These principles set out the methodology by which PWCS will provide Contracted Allocations to Producers at the PWCS Terminals from 1 July 2009. Each Producer's Contracted Allocations must comprise individual Load Point Allocations.
- B All existing Producers will be required to sign a new Long Term Ship or Pay Contract (**CHSA**) with PWCS to commence on 1 July 2009. New Producers will be required to sign a CHSA when submitting their initial nomination. Each CHSA will be on the same terms for all Producers (except where the Implementation Memorandum expressly contemplates discriminatory treatment) and there will be no scope for individual negotiation.
- C The CHSA will contain Terminal Access Protocols (including PWCS' Annual Capacity Nomination and Allocation Protocols) and a schedule of the Producer's Load Point Allocations and total PWCS Contracted Allocation.
- D Only 10 year Load Point Allocations will carry renewal and extension rights.
- E All Load Point Allocations will be subject to any contractual alignment rules developed through the program identified in Schedule 5 of the Implementation Memorandum.

Base Tonnages

- F PWCS Base Tonnage for 2009
 - (i) The PWCS Base Tonnage for 2009 will total 96.7 Mt.
 - (ii) Each Producer's PWCS Base Tonnage for 2009 is calculated as:
 - a. The Producer's 2008 binding Nomination at PWCS (inclusive of new mines) proportionally reduced to 95Mt (**2008 Tonnage**); and
 - b. Where a Producer's 2008 Tonnage is less than the Producer's highest actual allocation usage between 2004 and 2007, the Producer will also receive an agreed share of an additional 1.7Mt as detailed in the PWCS Tonnage Allocation Stage 1 set out in the ACCC Application.
- G PWCS Base Tonnage for 2010
 - (i) The PWCS Base Tonnage for 2010 will total 97.4 Mt.

- (ii) Each Producer's PWCS Base Tonnage for 2010 is calculated such that every Producer receives the maximum of either their 2008 Tonnage or their highest actual allocation usage between 2004 and 2007.

H Base Tonnage Offer

- (i) PWCS will offer to each existing Producer a long term contract for:
 - a. their individual share of the 2009 PWCS Base Tonnage (ie individual share of 96.7 Mtpa) in respect of the period 1 July 2009 to 31 December 2009; and
 - b. their individual share of the 2010 PWCS Base Tonnage (ie individual share of 97.4 Mtpa) from 1 January 2010 for a period of 10 years.

For the avoidance of doubt, the aggregate PWCS Base Tonnage for NCIG Producers totals 24.413 Mtpa.

- (ii) The Producer may contract for any tonnage up to their PWCS Base Tonnage offer and for any length of contract up to 10 years.

I Base Tonnage Acceptance

- (i) To accept the Base Tonnage offer, Producers must:
 - a. Advise a constant annual tonnage for each Load Point Allocation, unless there is a ramp down in respect of the Load Point;
 - b. Provide reasonable security as required by PWCS;
 - c. Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, coal production is feasible with respect to the Load Point Allocation for the term sought at PWCS; and
 - d. Provide relevant information required for system assumptions and contractual alignment.
- (ii) Any Base Tonnage offer not accepted by the due date will lapse and become available to Producer's in accordance with this nomination and allocation process.

Allocation of Capacity for 2010

- J. Any additional capacity above that required to satisfy the Base allocation will be offered for allocation in the year 2010 only to all existing Producers at PWCS on a pro rata basis based on their respective Base Allocation.

Allocation of Capacity for 2011 and beyond

- K. Allocation of capacity above that required to satisfy the Base allocation for 2011 and beyond will occur in accordance with the Annual Capacity Nomination and Allocation Process set out below.

Annual Capacity Nomination and Allocation Process

L Expansion Planning

- (i) PWCS will review its Capacity, system assumptions and expansion plans each year in conjunction with Coal Chain master planning conducted by the HVCCC.

M 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.

N Nominations

- (i) Expansion Capacity at PWCS existing Terminals will be available for nomination to Non-NCIG Producers exclusively until 1 January 2010.
- (ii) In accordance with clause 7.5 of the Implementation Memorandum, NCIG Producers will only be able to submit nominations after the date that NCIG Stage 2 is Committed.
- (iii) Nominations for Load Point Allocations must:
- a. Advise a constant annual tonnage for each Load Point Allocation;
 - b. Nominate a commencement date which:
 - (1) is 1 January in either the 1st, 2nd, 3rd or 4th year after the nomination is submitted ; or
 - (2) with the approval of NPC, is 1 January in the 5th year after the nomination is submitted, provided that NPC is satisfied that:

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- (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.
- c. Provide reasonable security as required by PWCS;
 - d. Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, at least 10 years of coal production is feasible with respect to the Load Point Allocation sought at PWCS;
 - e. Provide information relating to the development status of the source mine, including development consent and other approvals to operate;
 - f. Provide a timeline for coal production, where the nomination relates to a new or expansion project;
 - g. Provide relevant information required for system assumptions and contractual alignment; and
 - h. Provide a duly executed CHSA, if the Producer has not already done so.
- (iv) In order for the PWCS Board to make an early decision to commit to the expansion known as Master Plan Completion Phase 1, PWCS will conduct an expression of interest process for the Base Tonnage Offer and nominations from Non-NCIG Producers. The expressions of interest will be made under a binding heads of agreement for the long term ship or pay contracts. The heads of agreement will require a security bond.

O Renewal and Extension

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

P Voluntary Reduction Offer

- (i) 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.

Q Capacity Assessment and Review

- (i) 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 will be conducted in accordance with clause 4.3 of the Implementation Memorandum. This assessment will take into consideration contractual alignment. Allocation
- (ii) 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 clause 4.2 of the Implementation unless, a Review has been undertaken with the Reviewer and an alternative date for the delivery of capacity is established. If PWCS cannot satisfy the nominations in full, priority rules will apply.

R Priority Rules

- (i) Existing Load Point Allocations will not be diluted;
- (ii) 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;
- (iii) Where nominations are made in the same year to start at the same time, nominations will be prioritised according to development status and first coal production. Provided that nominations for which an expression of interest was submitted under clause N(iv) above, take priority over nominations for which no expression of interest was submitted;
- (iv) Nominations submitted in the same year take priority over nominations submitted in later years;
- (v) Each priority group is satisfied in full before the next priority group; and
- (vi) If nominations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.

S Capacity Delivery

- (i) PWCS will deliver Capacity within the contracted timeframe.

- (ii) If necessary, a review will be conducted during an expansion in accordance with clause 4.3 of the Implementation Memorandum.
- (iii) If capacity is delivered part way through a year the Load Point Allocation will reflect the partial year.
- (iv) If there is a PWCS Expansion Delay or a PWCS Expansion Shortfall compression will apply in accordance with clause 5 of the Implementation Memorandum.
- (v) Compressed Allocation will be reallocated to Producers who have Load Point Allocations impacted by the PWCS Expansion Delay or a PWCS Expansion Shortfall.
- (vi) Where the Compressed Allocation is insufficient to satisfy the impacted Producers, 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.

Excess Capacity

T Excess Capacity Announcement

- (i) PWCS will make an announcement when it has any Unallocated Expansion Capacity and invite nominations for that Unallocated Expansion Capacity. Nominations must not exceed the amount of Unallocated Expansion 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 Unallocated Expansion Capacity, the following priority rules will apply:

- 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; and
- c. If nominations within a priority group cannot be satisfied:
 - i. If NCIG Stage 2 has not been Committed, nominations by Non-NCIG Producers 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.

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2 NCIG Nomination and Allocation Principles for 12 Mtpa at NCIG Stage 2

The NCIG Nomination and Allocation process for allocations of capacity for 12 Mtpa at NCIG Stage 2 for Non-NCIG Producers will go through a number of steps:

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 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 12Mtpa, go to Step 5.

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

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 and Bid Bond will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 in excess of the 12 Mtpa). 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.

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Schedule 3 — Documents matrix

The following table is an indicative summary of the documents which the parties consider necessary for the effective implementation of the Capacity Framework.

Document	Parties	Description
Deed of Amendment to PWCS Lease	Government PWCS	<p>The Deed of Amendment will amend the PWCS Lease as necessary to give effect to the agreed Capacity Framework, including provisions which expressly:</p> <ul style="list-style-type: none"> • remove or suspend the common user provision; • state that a breach of the provisions of the lease which reflect the provisions of this Implementation Memorandum will give rise to a default under the lease; and • state that it will not be unreasonable for the Government to withhold its consent to an assignment, sub-lease or other dealing of the lease if that dealing would undermine the practical effect of the Capacity Framework in respect of the terminal the subject of the lease.
Deed of Amendment to NCIG Lease	Government NCIG	<p>The Deed of Amendment will amend the NCIG Lease as necessary to give effect to the agreed Capacity Framework, including provisions which expressly state that:</p> <ul style="list-style-type: none"> • a breach of the provisions of the lease which reflect the provisions of this Implementation Memorandum will give rise to a default under the lease; and • it will not be unreasonable for the Government to withhold its consent to an assignment, sub-lease or other dealing of the lease if that dealing would undermine the practical effect of the Capacity Framework in respect of the terminal the subject of the lease.
Long Term Ship or Pay Contracts for PWCS Terminals	PWCS Producers	<p>The LT SoPs will include provisions that are necessary to give effect to the agreed Capacity Framework and must be consistent with this Implementation Memorandum.</p>

Document	Parties	Description
Long Term Ship or Pay Contracts for NCIG Terminals	NCIG Producers	The LT SoPs will include provisions that are as necessary to give effect to the agreed Capacity Framework and must be consistent with this Implementation Memorandum.
Agreement for Lease for Terminal 4	Government PWCS	The lease will set out the terms of the lease for land on which Terminal 4 is to be located.
PWCS Nomination and Allocation Procedure	PWCS Producers	This document must be consistent with this Implementation Memorandum and, in particular, the PWCS Nomination and Allocation Principles set out in in part 1 of Schedule 2. This document will detail the procedure for nominating and allocating capacity to Producers at the PWCS Terminals. It will be incorporated into the PWCS Lease, Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the procedure.
NCIG Nomination and Allocation Procedure	NCIG Producers	This document must be consistent with this Implementation Memorandum and, in particular, the PWCS Nomination and Allocation Principles set out in part 2 Schedule 2. This document will detail the procedure for nominating and allocating the 12 mtpa of capacity to be made available at NCIG Stage 2It will be incorporated into the NCIG Lease, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the procedure.
PWCS Terminal Access Protocols	PWCS Producers	This document must be consistent with this Implementation Memorandum and will provide the agreed arrangements for access to the PWCS Terminals (including the PWCS Nomination and Allocation Procedures). It will be incorporated into the PWCS Lease, the Capacity Framework Agreement and/or the LTSOPs as necessary to give effect to this document.
NCIG Terminal Access Protocols	NCIG Producers	This document must be consistent with this Implementation Memorandum and will provide the agreed arrangements for access to NCIG Stage 2 (including the NCIG Nomination and Allocation Procedures). It will be incorporated into the NCIG Leases, the Capacity Framework Agreement and/or the LTSOPs as necessary to give effect to this document.
Coal Chain Access Protocols	Terminal Operators Producers	This document will address the contractual alignment between terminal access, track access and above rail and must be consistent with the contractual alignment principles set out in part 1 of Schedule 5. The document will be incorporated into the

Document	Parties	Description
		Leases, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the Coal Chain Access Protocols.
Levy Protocols	Terminal Operators Producers	This document will include the details set out in clause 8 of this Implementation Memorandum and will also address matters relevant to the calculation, charging and collection of the Levy. The document will be incorporated into the Leases, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the Levy Protocols.
Capacity Framework Agreement	NPC PWCS NCIG	The Capacity Framework Agreement will contain the provisions of this Implementation Memorandum which cannot be dealt with through amendments to the Leases or other bilateral arrangements between Government and each Terminal Operator.

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**Schedule 4 —
Implementation procedure**

Item#	Task	Responsibility	Time for completion
1	Deed of Amendment to PWCS Lease	NPC, PWCS	15 June 2009
2	Deed of Amendment to NCIG Lease	NPC, NCIG	15 June 2009
3	Long Term Ship or Pay Contracts for PWCS Terminals	PWCS	15 June 2009
4	Long Term Ship or Pay Contracts for NCIG Terminals	NCIG	15 June 2009
5	Lease for Terminal 4	NPC, PWCS	15 June 2009
6	PWCS Nomination and Allocation Procedure	PWCS	15 June 2009
7	NCIG Nomination and Allocation Procedure	NCIG	15 June 2009
8	PWCS Terminal Access Protocols	PWCS	15 June 2009
9	NCIG Terminal Access Protocols	NCIG	15 June 2009
10	Coal Chain Access Protocols	PWCS, NCIG	15 June 2009
11	Levy Protocols	PWCS, NCIG	15 June 2009
12	Capacity Framework Agreement	NPC, PWCS, NCIG	15 June 2009

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Schedule 5 — Contractual alignment

Contractual Alignment between Terminal Capacity, Track Capacity and Above Rail Capacity for export coal through the Port of Newcastle.

Producers who export coal from Newcastle under new long-term Ship or Pay or other new term contracts will be required to have sufficient access to both terminal capacity and access to track capacity before coal can be accepted for export. The track capacity will be measured from load point to exit point and must include the losses that will be incurred in servicing that part of the track system.

It is only when both sufficient track and terminal system capacities are available that contracts can be aligned.

If there is imbalance between the track and terminal system capacities then contractual alignment is not achieved and the "effective" contracted capacity will cover the lowest capacity entitlement under the track and terminal access until such time as additional capacity is built to achieve alignment.

In the event that there is insufficient system capacity at the terminals or track to enable contractual alignment for new contracts to support expansion, then existing contracts will have priority.

It is the responsibility of individual producers to establish above rail contracts to match the "effective" capacity of the terminal and track.

These Guiding Principles encourage Producers to hold aligned access contracts with Track and Terminal service providers such that the total Access Rights do not exceed the capacity of the coal chain as a whole. This limits the risk of over-contracting and provides certainty of coal chain access for Producers.

1. The onus is on the Producer to secure commercial arrangements to transport coal from the mine to the ship. If the Producer has appropriate access contracts in place to transport its coal to the ship, then what other Producers do should not infringe on that Producer's right to have its contracted services delivered.
2. 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. The system assumptions should include realistic interface losses between each element of the coal chain, agreed operating mode(s) of the system (recognising the different operating modes of PWCS and NCIG) and the associated flexibility requirements, live-run losses, agreed capacities of fixed infrastructure and rolling-stock specifications and operating parameters. While service providers may engage the yet to be established independent HVCCC and/or third-parties to assist to determine these assumptions and capacities, the primary responsibility and accountability resides with each of the Track and Terminal service providers. The contractable capacity of each of the Track and Terminal service providers is defined as the Track/Terminal System Capacity and is derived as follows:

Terminal Unconstrained Capacity Adjusted for all System Assumptions = Terminal System Capacity (Mtpa)

Track Unconstrained Capacity Adjusted for all System Assumptions = Track System Capacity (Mtpa)

A requirement exists for Terminal capacity of PWCS and NCIG to be clearly established.

A requirement exists for track system capacity of ARTC to be clearly established.

3. 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 with access contracts will also be able to opportunistically access ad-hoc capacity where available and on the basis that it does not infringe on the contracted access rights of other Producers). Producers will have a right to have the Track System Capacity and Terminal System Capacity audited against aggregate Access Rights.

Producer's Access Rights = Lesser of Producers Terminal System Capacity and Track System Capacity

The only reason that Terminal System Capacity and Track System Capacity may be different is when there is a misalignment in the timing of when Terminal and Track infrastructure is delivered compared to the System Assumptions.

4. Producers can choose to hold non-aligned access contracts on track and terminal, however will only be able to access system capacity based on the lesser of their contracted Track System Capacity or Terminal System Capacity
5. The responsibility of the Track and Terminal Service Providers to jointly operate in accordance with the System Assumptions is best achieved by planning and operating the system in a coordinated and co-operative manner. This is anticipated to be the primary role of the yet to be established independent HVCCC.
6. Track and Terminal access contracts will provide for actual and forecast excessive ship queues to be addressed by ensuring:
 1. Contracted Access Rights to their respective elements do not exceed the lesser of the Track System Capacity or Terminal System Capacity.
 2. Those using any ad-hoc Access Rights do not contribute to the creation of an excessive ship queue or infringe on the contracted and aligned Access Rights of other Producers (in the event an adjustment to contracted access is required to reduce a vessel queue, Producers accessing capacity on an ad-hoc basis are the first to be constrained before any aligned access contracts are adjusted)
 3. Producers whose performance varies from their agreed System Assumptions which form the basis of their contracted Access Rights directly and individually incur the capacity increase or decrease as a result of their individual performance. Each Producer's performance may be monitored and determined by the HVCCC (subject to HVCCC being established and agreed rules being in place). The Producer's performance also includes the performance of that Producer's Above-Rail Haulage service provider with regard to the agreed System Assumptions.
 4. Track or Terminal service provider's performance which varies from the agreed System Assumptions distribute and isolate the resulting capacity increase or decrease to its customers. The Track and Terminal service providers' performance may be monitored and published by the envisaged HVCCC.
7. New and expanding Producers (Access Seekers) will be provided for by each of the Track and Terminal service providers operating an orderly Access Queue and coordinating infrastructure and investment planning via a Coal Chain Master Planning function (envisaged to be performed by an independent HVCCC). Access Seekers will obtain Access Rights to Track and Terminal capacity upon the delivery of the respective Track and/or Terminal System Capacity. The order within the Access Queue will be based primarily on the time of application, but reviewed and modified as required so as to ensure that delivered mine export capacity can access available System Capacity ahead of mines that may be delayed or still under development.

To give effect to the above Alignment Principles, the following additional documents are envisaged:

1. **System Assumptions:** A document containing the underlying agreed System Assumptions underpinning the determination of Track and Terminal System Capacity. This could become a schedule to all Access Contracts
2. **Hunter Valley Coal Chain Starting Point:** A statement as to how the initial Access Rights will be granted under the first Track and Terminal access contracts
3. **Access Protocols and Process:** The process through which Access Seekers join the Access Queue and the mechanism by which Track and Terminal Access is managed until an Access Seeker becomes an Access Holder
4. **Contract Performance Management:** The process and mechanism by which system capacity is managed and performance and consumption of system capacity is reported and any adjustments to contracted Access Rights are made.

Execution page

Signed and delivered by **Newcastle Port Corporation** by:

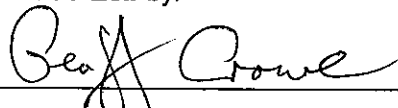
Signature of witness

Signature of authorised representative

Name of witness (print)

Name of authorised representative (print)


Signed and delivered by **Port Waratah Coal Services Ltd** by:



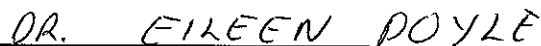
Signature of witness



Signature of authorised representative



Name of witness (print)



Name of authorised representative (print)

Signed and delivered by **Newcastle Coal Infrastructure Group Pty Ltd** by:

Signature of witness

Signature of authorised representative

Name of witness (print)

Name of authorised representative (print)

Implementation Memorandum

in relation to the implementation of a long term solution for access to and expansion of export capacity at the Port of Newcastle

Newcastle Port Corporation
Port Waratah Coal Services Ltd
Newcastle Coal Infrastructure Group Pty Ltd

Execution version

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Date:

Parties

- 1 **Newcastle Port Corporation**, a statutory corporation established under the Ports Corporatisation and Waterways Management Act 1995 (NSW) of the cnr Scott Street & Newcomen Street, Newcastle NSW 2300 (**NPC**)
 - 2 **Port Waratah Coal Services Ltd ABN 99 001 363 828** of Curlew Street, Kooragang Island, NSW 2304 (**PWCS**)
 - 3 **Newcastle Coal Infrastructure Group Pty Ltd ABN 35 111 228 221** of Level 7, 167 Macquarie Street, Sydney NSW 2000 (**NCIG**)
-

1 Defined terms and interpretation

- (a) A term or expression starting with a capital letter:
 - (i) which is defined in the Dictionary in Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary;
 - (ii) which is defined in the Corporations Act but is not defined in the Dictionary, has the meaning given to it in the Corporations Act; and
 - (iii) which is defined in the GST Law but is not defined in the Dictionary or the Corporations Act, has the meaning given to it in the GST Law.
 - (b) The interpretation clause in Schedule 1 (**Interpretation**) sets out rules of interpretation for this document.
-

2 Nature of this document

- (a) The purpose of this document is to record the key agreed principles for and a framework for the implementation of, a long term solution for access to and expansion of export capacity at the Port of Newcastle (**Capacity Framework**).
- (b) Subject to paragraph (c), this document is not a legally binding or enforceable document and does not constitute an offer by any party that is capable of acceptance by any other party.
- (c) The parties agree that clause 12 of this document will be legally binding and enforceable on execution of this document by all parties.
- (d) Notwithstanding clause 12 of this document (including but not limited to the obligation under that clause for the parties to comply with the Implementation Procedure set out in Schedule 4):
 - (i) nothing in this document constitutes (or is intended to constitute) a contract, arrangement or understanding between the parties within the meaning of section 45 of the Trade Practices Act 1974 (Cth) in respect of the implementation of the Capacity Framework; and
 - (ii) the parties must not execute, act in accordance with, or otherwise give effect to, a contract, arrangement or understanding in respect of the implementation of the Capacity Framework, including through the execution of any of the documents described in the Implementation Procedure in Schedule 4 or otherwise, without first obtaining authorisation from the

- (e) Nothing in this document will be taken as a representation by a Terminal Operator that it has the authority, or otherwise, acts as agent, of any Producer or group of Producers, in relation to those provisions of this document which purport to impose obligations on that Producer or group.

3 Nomination and allocation

3.1 Nomination and allocation procedure

- (a) PWCS must ensure that the PWCS Nomination and Allocation Procedure is consistent with the PWCS Nomination and Allocation Principles set out in part 1 of Schedule 2.
- (b) NCIG must ensure that the NCIG Nomination and Allocation Procedure is consistent with the NCIG Nomination and Allocation Principles set out in part 2 of Schedule 2.
- (c) Before conducting the NCIG Nomination and Allocation Procedure, NCIG must notify PWCS and must coordinate with PWCS 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.

3.2 Allocation of Non-NCIG Producers 12 Mtpa in NCIG Stage 2

- (a) NCIG will offer 12 Mtpa of Capacity at NCIG Stage 2 to Non-NCIG Producers in accordance with clause 7 and the NCIG Nomination and Allocation Procedure.
- (b) If, as at the conclusion of the NCIG Nomination and Allocation Procedure, less than 12 Mtpa of Capacity has been allocated to Non-NCIG Producers, the remaining allocation shall be available for nomination by all Producers (including NCIG Producers) in accordance with the NCIG Nomination and Allocation Procedure.

3.3 Allocation of base tonnage at PWCS (including 24.413 Mtpa for NCIG Producers)

- (a) **Offer of base tonnage at PWCS:** In accordance the PWCS Nomination and Allocation Principles, PWCS will make an offer to each Producer from 1 July 2009 that is equivalent to their:
 - (i) 2009 PWCS Base Tonnage for the period 1 July 2009 to 31 December 2009; and
 - (ii) 2010 PWCS Base Tonnage for 2010, on an annual basis, for a period of up to ten years commencing on 1 January 2010.
- (b) **Aggregate base tonnage of all Producers at PWCS is 97.4 Mtpa:** For the purposes of this clause, the aggregate 2010 PWCS Base Tonnage of all Producers as at the date of this document is 97.4 Mtpa.
- (c) **Aggregate base tonnage of NCIG Producers at PWCS is 24.413 Mtpa:** For the purposes of this clause, the aggregate 2010 PWCS Base Tonnage of the NCIG Producers as at the date of this document is 24.413 Mtpa.

3.4 Long term ship or pay contracts

- (a) Subject to clauses 7.5 and 8.1(c), a Producer that wishes to obtain access to Capacity that is to be allocated at the terminals according to the Nomination and Allocation Procedures must be offered a 10 year evergreen long term ship or pay contract (**Long Term Ship or Pay Contracts**) with the relevant Terminal Operator, provided that nothing in this paragraph (a) prevents the Terminals Operators from also offering other contracts with shorter terms to Producers.
- (b) The parties acknowledge that the terms and conditions of the Long Term Ship or Pay Contracts for each Terminal Operator:
 - (i) must be consistent with the requirements of the Capacity Framework set out in this document; and
 - (ii) will be developed in conjunction with the development of the Nomination and Allocation Procedures.

4 Expansion by PWCS

4.1 When is obligation to expand triggered?

- (a) Subject to paragraph (b) and clause 4.3, if:
 - (i) the Aggregate PWCS Contracted Allocations from time to time exceeds the Aggregate PWCS Available Capacity at that time (**Capacity Shortfall**); and
 - (ii) 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.

- (b) Subject to clause 4.3, 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 clause 4 precludes any person other than PWCS from undertaking a project to construct a new terminal.
- (c) If at any time PWCS is required to build a new terminal under paragraph (b) (other than Terminal 4, which is specifically addressed in clause 9), then:
 - (i) PWCS must use its best endeavours to identify and acquire appropriate sites for that new terminal; and
 - (ii) 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.

4.2 Time for completion

- (a) If PWCS is required to expand a PWCS Terminal under clause 4.1(a) then, subject to clause 4.3, that expansion must be Completed:

- (i) in the case of Master Plan Completion Phase 1, two years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises;
 - (ii) in the case of Master Plan Completion Phase 2, two years after the later of:
 - (A) the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises; and
 - (B) the date on which PWCS is able to access the Hunter River following completion of the relevant part of the BHP Billiton Hunter River Remediation project; and
 - (iii) in any other case, within 2 years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises.
- (b) If PWCS is required to build a new terminal under clause 4.1(b) then, subject to clause 4.3, 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.
- (c) Without limiting clause 4.3, 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:
- (i) PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion, in which case PWCS must provide all information, records and personnel that the Minister requires in order to consider such request; and
 - (ii) 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.

4.3 Process for review

- (a) If clause 4.2(a)(iii) applies then PWCS may trigger a review under this clause 4.3 of the time in which a PWCS Expansion is required to be Completed under that clause by submitting a request to NPC prior to contracting allocations.
- (b) Subject to paragraph (c), the obligation to undertake a PWCS Expansion under clause 4.1 will be suspended if:
- (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents); and
 - (B) notwithstanding PWCS's efforts, PWCS has been unable to obtain, or is unlikely to obtain, the relevant Development Consents; or
 - (ii) a Force Majeure Event prevents that PWCS Expansion being undertaken.
- (c) If the obligation to undertake a PWCS Expansion under clause 4.1 is suspended under paragraph (b), that obligation will recommence at a time determined by the Reviewer or:

- (i) in the case of paragraph (b)(i), when the relevant Development Consents are subsequently obtained; and
 - (ii) in the case of paragraph (b)(ii), when the relevant Force Majeure Event ceases to prevent PWCS from undertaking the PWCS Expansion.
- (d) The time for Completion of a PWCS Expansion under clause 4.2 will be extended if:
- (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) there are Engineering Limitations that will delay Completion of that PWCS Expansion beyond the scheduled time of Completion; or
 - (B) notwithstanding that PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake that PWCS Expansion will not be obtained within a time that would reasonably allow PWCS to Complete the PWCS Expansion in accordance with the relevant timeframe for the PWCS Expansion specified in clause 4.2; or
 - (ii) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (e) The length of any extension of time to be given under paragraph (d) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
- (i) 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;
 - (ii) 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
 - (iii) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.
- (f) It is a condition of any extension of time that is granted under paragraph (d) that:
- (i) PWCS 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 PWCS Expansion (including the time for Completion of that Expansion); and
 - (ii) if Capacity can be realised from the PWCS Expansion it must be made available to Producers, notwithstanding that such Capacity may not fully satisfy the relevant Capacity Shortfall which triggered that PWCS Expansion.

- (g) Subject to paragraphs (h), (i) and (j), PWCS must:
 - (i) provide the Reviewer with all relevant information that is requested by the Reviewer for the purposes of making a determination under paragraphs (b), (d) or (e) (including by preparing and presenting submissions to the Reviewer);
 - (ii) if the Reviewer requests, provide relevant personnel to meet the Reviewer for the purposes of the Reviewer making a determination under paragraphs (b), (d) or (e);
 - (iii) provide the Reviewer with access to all of its relevant records and premises for the purposes of the Reviewer making a determination under paragraphs (b), (d) or (e); and
 - (iv) meet all of the reasonable costs and expenses incurred by the Reviewer in conducting a review under this clause 4.3.
- (h) If PWCS is prevented from disclosing information under paragraph (g) because it is legally bound to maintain the confidentiality of that information, PWCS will not be required to disclose that information, provided it has used all reasonable endeavours to obtain the consents required to disclose that information in accordance with this clause 4.3.
- (i) Any information provided by PWCS to the Reviewer under paragraph (g) which is marked as confidential must not be disclosed by the Reviewer to any person except:
 - (i) with the prior written consent of PWCS;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer conducting a review and making a determination under this clause 4.3 provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides PWCS with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that PWCS or the owner of the confidential information may take appropriate steps to protect such information;
 - (iv) where that information is already known to the Reviewer at the time it is disclosed by PWCS and the Reviewer is not otherwise prevented from disclosing it; and
 - (v) where that information is developed independently by the Reviewer.

- (j) Whilst located at the premises of PWCS pursuant to paragraph (g)(iii), the Reviewer must ensure that its representatives comply with PWCS's security and health and safety policies.
- (k) PWCS or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this clause 4.3 by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (i) 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
 - (ii) by agreement with PWCS, appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 4.3 will apply to the review to be conducted by that person (with such changes as are necessary).

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) 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 paragraph (m) will be extended by the period of the delay.

4.4 Delay or shortfall in expansion

- (a) If there is a PWCS Expansion Delay or a PWCS Expansion Shortfall, the provisions of clause 5 will apply.
- (b) PWCS must notify all affected Producers in writing of any expected PWCS Expansion Delay or PWCS Expansion Shortfall within 7 Business Days of becoming aware of that expected PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable).
- (c) If a notice is given under paragraph (b), PWCS must ensure that Producers are promptly informed of the following information in respect of the relevant expected PWCS Expansion Delay or PWCS Expansion Shortfall as it becomes known from time to time:
 - (i) the expected date on which the PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable) will come into existence;
 - (ii) the time that PWCS expects the PWCS Expansion Delay or PWCS Expansion Shortfall (as applicable) will come to an end;
 - (iii) the extent to which that Producer will be required to compress under clause 5.

5 Interim solution for capacity shortfalls at PWCS

5.1 Obligation to compress

- (a) Subject to clause 5.2, if there is a PWCS Expansion Delay or a PWCS Expansion Shortfall at any time giving rise to a Capacity Shortfall, the Contracted Allocation 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 Contracted Allocation bears to the aggregate 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 Contracted Allocation 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 paragraph (a)(i) does not satisfy the Capacity Shortfall, 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 paragraph (a)(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:
- (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
- (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the relevant Capacity Shortfall; and
- (iii) third, if the compression referred to in paragraphs (a)(i) and (a)(ii) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer (including Producers who have compressed under paragraphs (a)(i) and (a)(ii)) will be compressed pro rata in the proportion that their Contracted Allocation bears to the aggregate 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 paragraph (a)(i) and this paragraph (a)(iii) (but not under paragraph (a)(ii)) is equal to the General Compression Limit of that Producer.
- (b) If the relevant Capacity Shortfall referred to in paragraph (a) cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the 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.

5.2 Limitations on obligation to compress

- (a) Clause 5.1(a)(ii) and clause 7.4(a)(ii) will not apply to a Producer if the Reviewer (acting reasonably and in good faith) is satisfied that:
- (i) **delays:** the failure of that Producer to meet the Utilisation Threshold in the relevant period is caused by a delay in the development of:
 - (A) a new project of that Producer;
 - (B) the expansion of an existing project of that Producer; or
 - (C) the expansion of associated track facilities or channel works, which is outside the reasonable control of that Producer; or
 - (ii) **NCIG Excluded Stage 2 Capacity:** in respect of any NCIG Producer:
 - (A) the Contracted Allocation of that NCIG Producer is no greater than the projected maximum production of that NCIG Producer from new and existing mines;
 - (B) at the time that NCIG Stage 2 is Committed, that NCIG Producer has specified 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 of the extension 2 years prior to the end of the initial Nominated Deferral Period; and
 - (C) during the Nominated Deferral Period, the NCIG Producer has used its best efforts to transfer the Relevant Allocation, including by making a bona fide open offer to the market to transfer the Relevant Allocation on customary terms.
- (b) Clause 5.1(a)(iii) only applies to a Producer whose Group Contracted Allocation at the time the relevant Capacity Shortfall arises is 5 Mtpa or more.
- (c) If a Producer is an NCIG Producer then, for the purposes of calculating:
- (i) the pro rata proportion of the PWCS Contracted Allocation of that Producer to be compressed under clause 5.1(a)(iii);

- (ii) the extent to which the compression of that Producer's PWCS Contracted Allocation will be reduced under clause 5.3(a)(ii); and
 - (iii) 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.
- (d) If:
- (i) there is a PWCS Expansion Shortfall; and
 - (ii) 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 made under clause 3.3 will not be subject to compression under clause 5.1(a)(iii) in respect of that PWCS Expansion Shortfall.

5.3 Reducing compression

- (a) Subject to clause 5.2, if the Capacity Shortfall that is caused by a PWCS Expansion Delay or a PWCS Expansion Shortfall is reduced then compression will reduce accordingly such that:
- (i) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under clause 5.1(a)(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 subparagraph (a)(i) in the proportion that their Voluntary Compressed Allocation (as may be reduced under paragraph (b)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
 - (ii) second, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(iii) will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(ii) will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocations of all such Producers.
- (b) For the purposes paragraph (a)(i), 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 clause 5.1(a)(ii) had that Producer not elected to compress under clause 5.1(a)(i).

5.4 Cessation of compression

The obligation to compress will come to an end at the same time that the relevant PWCS Expansion Delay or PWCS Expansion Shortfall which triggered that obligation under clause 5.1 comes to an end.

5.5 Calculating compression and decompression

- (a) The Reviewer will be responsible for calculating the extent to which each Producer is required to compress and decompress under this clause 5 and under clause 7.4.

- (b) Subject to paragraph (c), the Terminal Operators must:
- (i) 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 under this clause 5 and under clause 7.4; and
 - (ii) 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 clause 5 and under clause 7.4.
- (c) Any information provided by Terminal Operators to the Reviewer under paragraph (b) which is marked as confidential must not be disclosed by the Reviewer to any person except:
- (i) with the prior written consent of the relevant Terminal Operator;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer calculating the extent to which each Producer is required to compress or decompress under this clause 5 and under clause 7.4, provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information provided that the Reviewer:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides relevant Terminal Operator with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that Terminal Operator or the owner of the confidential information may take appropriate steps to protect such information;
 - (iv) where that information is already known to the Reviewer at the time it is disclosed by the relevant Terminal Operator and the Reviewer is not otherwise prevented from disclosing it; and
 - (v) where that information is developed independently by the Reviewer.
- (d) A Producer or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under clause 5.5(a) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
- (i) 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
 - (ii) appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 5.5 will apply to the review to be conducted by that person (with such changes as are necessary).

- (e) Subject to paragraph (f), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (f) If a review that is conducted under this paragraph (d) 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 paragraph (f) will be extended by the period of the delay.

6 Transfer charges

6.1 Transfer of allocations at NCIG Terminals

Producers must not charge fees for another to use a portion of its Contracted Allocation at NCIG Terminals (**Relevant Portion**) if those fees exceed the fees which are charged to that Producer for the Relevant Portion by NCIG by more than 5%. Producers must not implement a fee structure which is designed to circumvent this clause 6.1.

6.2 Transfer of allocations at PWCS Terminals

The maximum fee that a Producer may charge to transfer any or all of its Contracted Allocation at PWCS Terminals (**Relevant Portion**) to another Producer is 5% of the fee charged by PWCS for the Relevant Portion. Producers must not implement a fee structure which is designed to circumvent this clause 6.2.

7 NCIG Stage 2

7.1 Development of NCIG Stage 2

- (a) 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.
- (b) In January and July of each year, NCIG must update PWCS and NPC of its progress for Commitment of NCIG Stage 2 and advise whether it intends or reasonably expects to commence the NCIG Nomination and Allocation Procedure within the next 6 months.
- (c) NCIG confirms that, pursuant to the shareholders arrangements for NCIG, each individual member of NCIG is entitled to trigger a feasibility study for the construction of NCIG Stage 2 and, if the feasibility study principles are met (being the principles set out in the shareholders agreement), the board of NCIG must not unreasonably withhold its approval to commence the process for the construction of NCIG Stage 2.

7.2 Time for completion of NCIG Stage 2

- (a) 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:
 - (i) 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

- (ii) otherwise, within 2 years (or such other time period determined in accordance with clause 7.3) after the date on which NCIG Stage 2 is Committed.
- (b) For the purposes of paragraph (a), NCIG must notify each of NPC and PWCS of the date on which NCIG Stage 2 is Committed within 7 days after that date.

7.3 Process for review

- (a) Subject to paragraph (b), the obligation to Complete NCIG Stage 2 under clause 7.2 will be suspended if a Force Majeure Event prevents NCIG Stage 2 being Completed.
- (b) If the obligation to Complete NCIG Stage 2 is suspended under paragraph (a), that obligation will recommence at a time determined by the Reviewer or when the relevant Force Majeure Event ceases to prevent NCIG from Completing NCIG Stage 2.
- (c) If clause 7.2(a)(ii) applies then, at any time prior to the date on which NCIG Stage 2 is Committed, NCIG may trigger a review under this clause 7.3 of the time in which NCIG Stage 2 is required to be Completed under that clause by submitting a request to NPC.
- (d) The time for Completion of NCIG Stage 2 under clause 7.2 will be extended if:
 - (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) there are Engineering Limitations that will delay Completion of NCIG Stage 2 beyond the scheduled time for Completion; or
 - (B) notwithstanding that NCIG has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake NCIG Stage 2 in a timely manner (including by taking steps to identify ways of redesigning NCIG Stage 2 in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake NCIG Stage 2 will not be obtained within a time that would reasonably allow NCIG to Complete NCIG Stage 2 in accordance with the relevant timeframe specified in clause 7.2; or
 - (ii) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (e) The length of any extension of time to be given under paragraph (d) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
 - (i) 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;
 - (ii) 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
 - (iii) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.

- (f) It is a condition of any extension of time that is granted under paragraph (d) that:
 - (i) NCIG 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 implementation of NCIG Stage 2 (including the time for Completion of NCIG Stage 2); and
 - (ii) 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 the Capacity required under clause 7.1.
- (g) Subject to paragraphs (h), (i) and (j), NCIG must:
 - (i) provide the Reviewer with all relevant information that is requested by the Reviewer for the purposes of making a determination under paragraphs (d) or (e) (including by preparing and presenting submissions to the Reviewer);
 - (ii) if the Reviewer requests, provide relevant personnel to meet the Reviewer for the purposes of the Reviewer making a determination under paragraphs (d) or (e);
 - (iii) provide the Reviewer with access to all of its records and premises for the purposes of the Reviewer making a determination under paragraphs (d) or (e); and
 - (iv) meet all of the reasonable costs and expenses incurred by the Reviewer in conducting a review under this clause 7.3.
- (h) If NCIG is prevented from disclosing information under paragraph (g) because it is legally bound to maintain the confidentiality of that information, NCIG will not be required to disclose that information, provided it has used all reasonable endeavours to obtain the consents required to disclose that information in accordance with this clause 7.3.
- (i) Any information provided by NCIG to the Reviewer under paragraph (g) which is marked as confidential must not be disclosed by the Reviewer to any person except:
 - (i) with the prior written consent of NCIG;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer conducting a review and making a determination under this clause 7.3 provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information provided that the Reviewer:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides NCIG with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant

information so that NCIG or the owner of the confidential information may take appropriate steps to protect such information;

- (iv) where that information is already known to the Reviewer at the time it is disclosed by NCIG and the Reviewer is not otherwise prevented from disclosing it; and
- (v) where that information is developed independently by the Reviewer.
- (j) Whilst located at the premises of NCIG pursuant to paragraph (g)(iii), the Reviewer must ensure that its representatives comply with NCIG's security and health and safety policies.
- (k) NCIG or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this clause 7.3 by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (i) 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
 - (ii) by agreement with NCIG, appoint one of those persons to review the decision of the Reviewer.

The provisions of this clause 7.3 will apply to the review to be conducted by that person (with such changes as are necessary).

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) 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 paragraph (m) will be extended by the period of the delay.

7.4 Delay or shortfall in Stage 2

- (a) If there is an NCIG Stage 2 Delay or an NCIG Stage 2 Shortfall the Contracted Allocation of the 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 Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Non-NCIG Stage 2 Allocations; and
 - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Non-NCIG Stage 2 Allocations, 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 paragraph (a)(i) does not satisfy the Non-NCIG Stage 2 Allocations, subject to clause 5.2(a) 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 paragraph (a)(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:
 - (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the Non-NCIG Stage 2 Allocations.

- (b) If the Non-NCIG Stage 2 Allocations cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the NCIG Producers (pro rata to their share of NCIG Stage 1 capacity) must transfer to Non-NCIG Producers such amount of their Contracted Allocation as is necessary to satisfy the Non-NCIG Stage 2 Allocations in accordance with the following timetable:

Period of delay or shortfall	Amount of Contract Allocations to be transferred
Up to 6 months	3 Mtpa
Up to 9 months	6 Mtpa
Up to 12 months	9 Mtpa
Over 12 months	12 Mtpa

- (c) NCIG must notify all affected Producers in writing of any expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall within 7 Business Days of becoming aware of that expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable).
- (d) If a notice is given under paragraph (c), NCIG must ensure that Producers are promptly informed of the following information in respect of the relevant expected NCIG Stage 2 Delay or NCIG Stage 2 Shortfall as it becomes known from time to time:
 - (i) the expected date on which the NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable) will come into existence;

- (ii) the time that NCIG expects the NCIG Stage 2 Delay or NCIG Stage 2 Shortfall (as applicable) will come to an end;
 - (iii) the extent to which that Producer will be required to compress under this clause 7.4; and
 - (iv) the relevant Contracted Allocation of the NCIG Producers which will be transferred as required under paragraph (b).
- (e) If Contracted Allocations are compressed or otherwise transferred under paragraphs (a) and (b) and Capacity becomes available at NCIG Stage 2 for Non-NCIG Producers then:
- (i) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under paragraph (a)(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 subparagraph (e)(i) in the proportion that their Voluntary Compressed Allocation (as may be reduced under paragraph (f)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
 - (ii) second, the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b) will be reduced pro rata amongst those NCIG Producers in the same proportion that the NCIG Producers initially transferred their Contracted Allocations; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under paragraph (a)(ii) will be reduced pro rata amongst the Producers to whom that paragraph applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers.
- (f) For the purposes paragraph (e), 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 paragraph (a)(ii) had that Producer not elected to compress under paragraph (a)(i).
- (g) At the time that the relevant NCIG Stage 2 Delay or NCIG Stage 2 Shortfall which triggered the obligation to compress or transfer Contracted Allocations under paragraphs (a) and (b) comes to an end:
- (i) compression under paragraph (a); and
 - (ii) the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b),
- will also come to an end.
- (h) If NCIG Producers do not transfer to Non-NCIG Producers the relevant amount of Contracted Allocations that is required under paragraph (b) within the time that is required, the PWCS Contracted Allocation of the NCIG Producers will be reduced to cover the shortfall on a pro rata basis in the proportion that the PWCS Contracted Allocation of each NCIG Producer bears to the aggregate PWCS Contracted Allocation of all NCIG Producers. However, nothing in this paragraph (h) limits the obligation of the NCIG Producers to transfer the required Contracted Allocations.

7.5 Period before commitment of NCIG Stage 2

Subject to clause 8.1(c), each NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage unless NCIG Stage 2 is Committed.

8 Levy and unallocated expansion capacity

8.1 Conditions for Levy to apply

- (a) A Terminal Operator may elect to apply the Levy whenever:
 - (i) that Terminal Operator Completes an Expansion; and
 - (ii) the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion (**Unallocated Expansion Capacity**),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 any Unallocated Expansion Capacity, the Levy will cease to apply when that Unallocated Expansion Capacity is subsequently allocated under a Long Term Ship or Pay Contract.
- (e) Where the relevant Unallocated Expansion Capacity is allocated under any short term contractual arrangement the Levy will be adjusted accordingly.

8.2 Purpose of the Levy

The Levy is intended to assist to meet the cost of any Unallocated Expansion Capacity.

8.3 Levy protocols

The Terminal Operators will work together and coordinate in good faith to develop the Levy Protocols. The Levy Protocols will, among other things, contain the details of how the Levy will be calculated, charged and collected. For this purpose, it is acknowledged that the Levy will apply on a per tonne basis across all coal exported from the NCIG and PWCS Terminals.

9 Terminal 4

9.1 Agreement for Lease

NPC and PWCS will negotiate the terms of an agreement for lease for Terminal 4.

9.2 Ensuring integrity of Capacity Framework

PWCS acknowledges that the structure of the ownership and control of Terminal 4 must be such that the provisions of this document 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 and that for that purpose NPC will be entitled to require that the terms of the agreement for lease for Terminal 4 will include such provisions as NPC (acting reasonably) believes are necessary to give effect to this principle.

9.3 Governing principles for Terminal 4

Without limiting clause 9.2, NPC and PWCS will ensure that the terms of the agreement for lease for the land on which Terminal 4 is to be constructed are consistent with the following principles:

- (a) in making decisions regarding the design, construction and mode of operation of Terminal 4, PWCS must consult with and have regard to the interests of all Producers and that to be informed of those interests it will establish a suitably constituted sub committee of the board of PWCS which will:
 - (i) have an independent person appointed as its chair;
 - (ii) include persons who represent an appropriate cross section of Producers; and
 - (iii) have a role in the process for making decisions about the design, construction and mode of operation of Terminal 4;
- (b) unless discriminatory treatment is expressly contemplated in this document, access to capacity at Terminal 4 will be open to all Producers on a non-discriminatory basis; and
- (c) in circumstances where PWCS is unwilling or unable to construct Terminal 4, the land on which Terminal 4 is to be constructed may be made available for lease to another party.

10 Coal Chain Coordination

10.1 Information

- (a) The Terminal Operators must share information and coordinate with the HVCCC with a view to optimising coal chain capacity.
- (b) Information that is provided to the HVCCC by the Terminal Operators will be subject to customary confidentiality obligations and exceptions.

10.2 Interference

- (a) Terminal Operators acknowledge that construction works in the coal chain, including at the Terminals, may impact on others using the coal chain during integration of expansion works.
- (b) PWCS will:
 - (i) take all reasonable steps to ensure that the design, construction and operation of Terminal 4 does not interfere with the ability of NCIG to construct and efficiently operate its fully constructed facility;

- (ii) where there is any such interference, use its best efforts to minimise that interference; and
 - (iii) consult with NCIG regarding any potential interference.
-

11 Contractual alignment

- (a) The parties acknowledge that the principles set out in Schedule 5 have been developed and agreed by the members of the Contractual Alignment Working Group. The parties will ensure that the Capacity Framework is implemented in a manner that is consistent with these principles.
 - (b) The parties also acknowledge that the Contractual Alignment Working Group has identified that a program of works to support the guiding principles is required and that this is currently under development.
-

12 Process for final agreement

- (a) Each party to this document must:
 - (i) comply with the Implementation Procedure set out in Schedule 4;
 - (ii) in good faith, attend and participate in scheduled discussions and negotiations with a view to agreeing the documentation that is required to implement the Capacity Framework documented by this memorandum;
 - (iii) act at all times, as fair as reasonably possible, so as to facilitate the speedy and effective development of, and agreement on, the terms of the documentation that is required to implement the Capacity Framework documented by this memorandum; and
 - (iv) use all reasonable endeavours to resolve any disputes in an efficient and professional manner.
 - (b) The Terminal Operators must work together and cooperate with all other relevant industry participants to facilitate development of a solution to achieve contractual alignment.
-

13 Long form documents

- (a) For the purposes of clause 12, Schedule 3 provides an indicative overview of the documents that will be required to implement the Capacity Framework.
- (b) The parties acknowledge that the long form documentation will include an appropriate dispute resolution regime to address disputes which arise in respect of matters which are relevant to the Capacity Framework. For the avoidance of doubt, such dispute resolution provisions will not apply in respect of any dispute regarding the decision of the Reviewer or any expert appointed to review the decision of the Reviewer.
- (c) To the extent that the long form documentation comprises bilateral arrangements between Government and one of the Terminal Operators, Government will not agree to make any material amendment to the provisions of those arrangements that are relevant to the Capacity Framework without first:

- (i) engaging in a transparent process with industry participants regarding the proposed amendments; and
- (ii) considering the submissions of industry participants regarding whether Government ought to agree to the proposed amendments.

Schedule 1 — Dictionary

1 Dictionary

In this deed:

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.

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.

Business Day means a day on which banks are open for business excluding Saturdays, Sundays and public holidays in Newcastle.

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

Capacity Framework has the meaning given in clause 2(a).

Capacity Shortfall has the meaning give in clause 4.1(a)(i).

Committed means, in respect of NCIG Stage 2, the point in time when NCIG is contractually bound to make available Capacity to Non-NCIG Producers (as referred to in clause 7.1) pursuant to executed and binding Long Term Ship or Pay Contracts.

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 clause 5 and clause 7.4 at that time; and
- (b) in respect of all Producers at any time, the extent to which the Contracted Allocations of all Producers has been compressed under clause 5 and clause 7.4 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.

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) that Producer's use of any 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 under clause 5.1 and under clause 7.4 during the 18 month period immediately prior to that time; and
- (c) 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.

Corporations Act means the *Corporations Act 2001* (Cth).

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.

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 this 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 executing this document;
- (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).

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 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 clause 7.1.

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

Force Majeure Event means an event or circumstance which:

- (a) in relation to a party:
 - (i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;
 - (ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing this document; and
 - (iii) that party could not reasonably have avoided or overcome; and
- (b) is not substantially attributable to any breach of this 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 Contracted Allocation in the calendar year in which that Producer's Contracted Allocation is first compressed for a PWCS Expansion Delay or PWCS Expansion Shortfall under clause 5.1(a)(iii); 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 Contracted Allocation.

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

GST Law has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

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

Implementation Procedure means the procedure set out in Schedule 4.

Levy means the levy referred to in clause 8.

Long Term Ship or Pay Contracts has the meaning given in clause 3.4(a).

Mtpa means million tonnes per annum.

Minister means the Minister for Ports in the New South Wales Government and, in the absence of such Minister, the Minister in the New South Wales Government who has responsibility for the Port of Newcastle.

NCIG Member means each shareholder of NCIG from time to time.

NCIG Nomination and Allocation Principles means the Nomination and Allocation Principles set out in part 2 of Schedule 2.

NCIG Nomination and Allocation Procedure means the detailed procedure to be developed by NCIG for the nomination of 12 Mtpa of Capacity by and allocation of that Capacity to Producers at NCIG Stage 2.

NCIG Producer means each NCIG Member and any Producer who is an Associate of that NCIG Member.

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 NCIG Stage 2 is not capable of meeting the Capacity referred to in clause 7.2 within the time required under clause 7.2 (subject to any extension of time permitted under clause 7.3).

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.

Nomination and Allocation Principles means the PWCS Nomination and Allocation Principles and the NCIG Nomination and Allocation Principles.

Nomination and Allocation Procedures means the PWCS Nomination and Allocation Procedure and the NCIG Nomination and Allocation Procedure.

Non-NCIG Producer means a Producer who is not an NCIG Producer.

Non-NCIG Stage 2 Allocations means an amount equal to the aggregate Contracted Allocations of all Non-NCIG Producers at NCIG Stage 2.

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 producing 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 allocated to Producers at the PWCS Terminals in the year 2009 and 2010 (respectively) in accordance with the PWCS Nomination and Allocation Principles.

PWCS Expansion means an expansion of existing PWCS Terminals or the building of a new terminal by PWCS (as applicable) as required under clause 4.

PWCS Expansion Delay means a PWCS Expansion is not Completed within the time required under clause 4.2 (subject to any extension of time permitted under clause 4.3 and includes any PWCS Expansion that is suspended under clause 4.3(b)).

PWCS Expansion Shortfall means the extent to which a PWCS Expansion falls short of meeting the Capacity Shortfall which triggered the obligation to undertake that PWCS Expansion.

PWCS Contracted Allocation means, in respect of a Producer at any time, the Contracted Allocation of that Producer at the PWCS Terminals at that time.

PWCS Nomination and Allocation Principles means the Nomination and Allocation Principles set out in part 1 of Schedule 2.

PWCS Nomination and Allocation Procedure means the detailed procedure to be developed by PWCS for the nomination of Capacity by and allocation of Capacity to Producers at the PWCS Terminals.

PWCS Terminal means each terminal operated by PWCS.

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

Terminal Operators means each of PWCS and NCIG.

Unallocated Expansion Capacity has the meaning given in clause 8.1(a)(ii).

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.

Voluntary Compressed Allocation has the meaning given in clause 5.1(a)(i) and clause 7.4(a)(i) (as applicable).

2 Interpretation

In this document the following rules of interpretation apply unless the contrary intention appears:

- (a) headings are for convenience only and do not affect the interpretation of this document;
- (b) the singular includes the plural and vice versa;
- (c) words that are gender neutral or gender specific include each gender;
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (e) the words 'such as', 'including', 'particularly' and similar expressions are not used as nor are intended to be interpreted as words of limitation;
- (f) a reference to:

- (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
 - (ii) a thing (including but not limited to a chose in action or other right) includes a part of that thing;
 - (iii) a party includes its successors and permitted assigns;
 - (iv) a document includes all amendments or supplements to that document;
 - (v) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this document;
 - (vi) this document includes all schedules and attachments to it;
 - (vii) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity or a rule of an applicable Financial Market and is a reference to that law as amended, consolidated or replaced;
 - (viii) an agreement other than this document includes an undertaking, or legally enforceable arrangement or understanding whether or not in writing; and
 - (ix) a monetary amount is in Australian dollars;
- (g) an agreement on the part of two or more persons binds them jointly and severally;
 - (h) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day;
 - (i) in determining the time of day where relevant to this document, the relevant time of day is:
 - (i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located; or
 - (ii) for any other purpose under this document, the time of day in the place where the party required to perform an obligation is located;
 - (j) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or any part of it; and
 - (k) if there is any conflict between the body of this document and its schedules, the terms of the main body of this document will prevail and the remaining documents will prevail over each other in the following order:
 - (i) Schedule 1;
 - (ii) Schedule 2;
 - (iii) Schedule 3;
 - (iv) Schedule 4; and
 - (v) Schedule 5.

Schedule 2 — Nomination and Allocation Principles

1 PWCS Nomination and Allocation Principles

Contracting Principles

- A These principles set out the methodology by which PWCS will provide Contracted Allocations to Producers at the PWCS Terminals from 1 July 2009. Each Producer's Contracted Allocations must comprise individual Load Point Allocations.
- B All existing Producers will be required to sign a new Long Term Ship or Pay Contract (**CHSA**) with PWCS to commence on 1 July 2009. New Producers will be required to sign a CHSA when submitting their initial nomination. Each CHSA will be on the same terms for all Producers (except where the Implementation Memorandum expressly contemplates discriminatory treatment) and there will be no scope for individual negotiation.
- C The CHSA will contain Terminal Access Protocols (including PWCS' Annual Capacity Nomination and Allocation Protocols) and a schedule of the Producer's Load Point Allocations and total PWCS Contracted Allocation.
- D Only 10 year Load Point Allocations will carry renewal and extension rights.
- E All Load Point Allocations will be subject to any contractual alignment rules developed through the program identified in Schedule 5 of the Implementation Memorandum.

Base Tonnages

- F PWCS Base Tonnage for 2009
 - (i) The PWCS Base Tonnage for 2009 will total 96.7 Mt.
 - (ii) Each Producer's PWCS Base Tonnage for 2009 is calculated as:
 - a. The Producer's 2008 binding Nomination at PWCS (inclusive of new mines) proportionally reduced to 95Mt (**2008 Tonnage**); and
 - b. Where a Producer's 2008 Tonnage is less than the Producer's highest actual allocation usage between 2004 and 2007, the Producer will also receive an agreed share of an additional 1.7Mt as detailed in the PWCS Tonnage Allocation Stage 1 set out in the ACCC Application.
- G PWCS Base Tonnage for 2010

- (i) The PWCS Base Tonnage for 2010 will total 97.4 Mt.
- (ii) Each Producer's PWCS Base Tonnage for 2010 is calculated such that every Producer receives the maximum of either their 2008 Tonnage or their highest actual allocation usage between 2004 and 2007.

H Base Tonnage Offer

- (i) PWCS will offer to each existing Producer a long term contract for:
 - a. their individual share of the 2009 PWCS Base Tonnage (ie individual share of 96.7 Mtpa) in respect of the period 1 July 2009 to 31 December 2009; and
 - b. their individual share of the 2010 PWCS Base Tonnage (ie individual share of 97.4 Mtpa) from 1 January 2010 for a period of 10 years.

For the avoidance of doubt, the aggregate PWCS Base Tonnage for NCIG Producers totals 24.413 Mtpa.

- (ii) The Producer may contract for any tonnage up to their PWCS Base Tonnage offer and for any length of contract up to 10 years.

I Base Tonnage Acceptance

- (i) To accept the Base Tonnage offer, Producers must:
 - a. Advise a constant annual tonnage for each Load Point Allocation, unless there is a ramp down in respect of the Load Point;
 - b. Provide reasonable security as required by PWCS;
 - c. Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, coal production is feasible with respect to the Load Point Allocation for the term sought at PWCS; and
 - d. Provide relevant information required for system assumptions and contractual alignment.
- (ii) Any Base Tonnage offer not accepted by the due date will lapse and become available to Producer's in accordance with this nomination and allocation process.

Allocation of Capacity for 2010

- J. Any additional capacity above that required to satisfy the Base allocation will be offered for allocation in the year 2010 only to all existing Producers at PWCS on a pro rata basis based on their respective Base Allocation.

Allocation of Capacity for 2011 and beyond

- K. Allocation of capacity above that required to satisfy the Base allocation for 2011 and beyond will occur in accordance with the Annual Capacity Nomination and Allocation Process set out below.

Annual Capacity Nomination and Allocation Process

L Expansion Planning

- (i) PWCS will review its Capacity, system assumptions and expansion plans each year in conjunction with Coal Chain master planning conducted by the HVCCC.

M 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.

N Nominations

- (i) Expansion Capacity at PWCS existing Terminals will be available for nomination to Non-NCIG Producers exclusively until 1 January 2010.
- (ii) In accordance with clause 7.5 of the Implementation Memorandum, NCIG Producers will only be able to submit nominations after the date that NCIG Stage 2 is Committed.
- (iii) Nominations for Load Point Allocations must:
- a. Advise a constant annual tonnage for each Load Point Allocation;
 - b. Nominate a commencement date which:
 - (1) is 1 January in either the 1st, 2nd, 3rd or 4th year after the nomination is submitted ; or

- (2) 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.

- c. Provide reasonable security as required by PWCS;
- d. Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, at least 10 years of coal production is feasible with respect to the Load Point Allocation sought at PWCS;
- e. Provide information relating to the development status of the source mine, including development consent and other approvals to operate;
- f. Provide a timeline for coal production, where the nomination relates to a new or expansion project;
- g. Provide relevant information required for system assumptions and contractual alignment; and
- h. Provide a duly executed CHSA, if the Producer has not already done so.

- (iv) In order for the PWCS Board to make an early decision to commit to the expansion known as Master Plan Completion Phase 1, PWCS will conduct an expression of interest process for the Base Tonnage Offer and nominations from Non-NCIG Producers. The expressions of interest will be made under a binding heads of agreement for the long term ship or pay contracts. The heads of agreement will require a security bond.

O Renewal and Extension

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

P Voluntary Reduction Offer

- (i) 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.

Q Capacity Assessment and Review

- (i) 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 will be conducted in accordance with clause 4.3 of the Implementation Memorandum. This assessment will take into consideration contractual alignment. Allocation
- (ii) 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 clause 4.2 of the Implementation unless, a Review has been undertaken with the Reviewer and an alternative date for the delivery of capacity is established. If PWCS cannot satisfy the nominations in full, priority rules will apply.

R Priority Rules

- (i) Existing Load Point Allocations will not be diluted;
- (ii) 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;
- (iii) Where nominations are made in the same year to start at the same time, nominations will be prioritised according to development status and first coal production. Provided that nominations for which an expression of interest was submitted under clause N(iv) above, take priority over nominations for which no expression of interest was submitted;
- (iv) Nominations submitted in the same year take priority over nominations submitted in later years;
- (v) Each priority group is satisfied in full before the next priority group; and

- (vi) If nominations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.

S Capacity Delivery

- (i) PWCS will deliver Capacity within the contracted timeframe.
- (ii) If necessary, a review will be conducted during an expansion in accordance with clause 4.3 of the Implementation Memorandum.
- (iii) If capacity is delivered part way through a year the Load Point Allocation will reflect the partial year.
- (iv) If there is a PWCS Expansion Delay or a PWCS Expansion Shortfall compression will apply in accordance with clause 5 of the Implementation Memorandum.
- (v) Compressed Allocation will be reallocated to Producers who have Load Point Allocations impacted by the PWCS Expansion Delay or a PWCS Expansion Shortfall.
- (vi) Where the Compressed Allocation is insufficient to satisfy the impacted Producers, 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.

Excess Capacity

T Excess Capacity Announcement

- (i) PWCS will make an announcement when it has any Unallocated Expansion Capacity and invite nominations for that Unallocated Expansion Capacity. Nominations must not exceed the amount of Unallocated Expansion 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 Unallocated Expansion Capacity, the following priority rules will apply:

- 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; and
- c. If nominations within a priority group cannot be satisfied:
 - i. If NCIG Stage 2 has not been Committed, nominations by Non-NCIG Producers 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.

2 NCIG Nomination and Allocation Principles for 12 Mtpa at NCIG Stage 2

The NCIG Nomination and Allocation process for allocations of capacity for 12 Mtpa at NCIG Stage 2 for Non-NCIG Producers will go through a number of steps:

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 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 12Mtpa, go to Step 5.

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

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 and Bid Bond will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 in excess of the 12 Mtpa). 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.

Schedule 3 — Documents matrix

The following table is an indicative summary of the documents which the parties consider necessary for the effective implementation of the Capacity Framework.

Document	Parties	Description
Deed of Amendment to PWCS Lease	Government PWCS	<p>The Deed of Amendment will amend the PWCS Lease as necessary to give effect to the agreed Capacity Framework, including provisions which expressly:</p> <ul style="list-style-type: none"> remove or suspend the common user provision; state that a breach of the provisions of the lease which reflect the provisions of this Implementation Memorandum will give rise to a default under the lease; and state that it will not be unreasonable for the Government to withhold its consent to an assignment, sub-lease or other dealing of the lease if that dealing would undermine the practical effect of the Capacity Framework in respect of the terminal the subject of the lease.
Deed of Amendment to NCIG Lease	Government NCIG	<p>The Deed of Amendment will amend the NCIG Lease as necessary to give effect to the agreed Capacity Framework, including provisions which expressly state that:</p> <ul style="list-style-type: none"> a breach of the provisions of the lease which reflect the provisions of this Implementation Memorandum will give rise to a default under the lease; and it will not be unreasonable for the Government to withhold its consent to an assignment, sub-lease or other dealing of the lease if that dealing would undermine the practical effect of the Capacity Framework in respect of the terminal the subject of the lease.
Long Term Ship or Pay Contracts for PWCS Terminals	PWCS Producers	<p>The LT SoPs will include provisions that are necessary to give effect to the agreed Capacity Framework and must be consistent with this Implementation Memorandum.</p>

Document	Parties	Description
Long Term Ship or Pay Contracts for NCIG Terminals	NCIG Producers	The LT SoPs will include provisions that are as necessary to give effect to the agreed Capacity Framework and must be consistent with this Implementation Memorandum.
Agreement for Lease for Terminal 4	Government PWCS	The lease will set out the terms of the lease for land on which Terminal 4 is to be located.
PWCS Nomination and Allocation Procedure	PWCS Producers	This document must be consistent with this Implementation Memorandum and, in particular, the PWCS Nomination and Allocation Principles set out in in part 1 of Schedule 2. This document will detail the procedure for nominating and allocating capacity to Producers at the PWCS Terminals. It will be incorporated into the PWCS Lease, Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the procedure.
NCIG Nomination and Allocation Procedure	NCIG Producers	This document must be consistent with this Implementation Memorandum and, in particular, the PWCS Nomination and Allocation Principles set out in part 2 Schedule 2. This document will detail the procedure for nominating and allocating the 12 mtpa of capacity to be made available at NCIG Stage 2It will be incorporated into the NCIG Lease, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the procedure.
PWCS Terminal Access Protocols	PWCS Producers	This document must be consistent with this Implementation Memorandum and will provide the agreed arrangements for access to the PWCS Terminals (including the PWCS Nomination and Allocation Procedures). It will be incorporated into the PWCS Lease, the Capacity Framework Agreement and/or the LTSOPs as necessary to give effect to this document.
NCIG Terminal Access Protocols	NCIG Producers	This document must be consistent with this Implementation Memorandum and will provide the agreed arrangements for access to NCIG Stage 2 (including the NCIG Nomination and Allocation Procedures). It will be incorporated into the NCIG Leases, the Capacity Framework Agreement and/or the LTSOPs as necessary to give effect to this document.
Coal Chain Access Protocols	Terminal Operators Producers	This document will address the contractual alignment between terminal access, track access and above rail and must be consistent with the contractual alignment principles set out in part 1 of Schedule 5.

Document	Parties	Description
		The document will be incorporated into the Leases, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the Coal Chain Access Protocols.
Levy Protocols	Terminal Operators Producers	This document will include the details set out in clause 8 of this Implementation Memorandum and will also address matters relevant to the calculation, charging and collection of the Levy. The document will be incorporated into the Leases, the Capacity Framework Agreement and/or the LT SoPs as necessary to give effect to the Levy Protocols.
Capacity Framework Agreement	NPC PWCS NCIG	The Capacity Framework Agreement will contain the provisions of this Implementation Memorandum which cannot be dealt with through amendments to the Leases or other bilateral arrangements between Government and each Terminal Operator.

**Schedule 4 —
Implementation procedure**

Item#	Task	Responsibility	Time for completion
1	Deed of Amendment to PWCS Lease	NPC, PWCS	15 June 2009
2	Deed of Amendment to NCIG Lease	NPC, NCIG	15 June 2009
3	Long Term Ship or Pay Contracts for PWCS Terminals	PWCS	15 June 2009
4	Long Term Ship or Pay Contracts for NCIG Terminals	NCIG	15 June 2009
5	Lease for Terminal 4	NPC, PWCS	15 June 2009
6	PWCS Nomination and Allocation Procedure	PWCS	15 June 2009
7	NCIG Nomination and Allocation Procedure	NCIG	15 June 2009
8	PWCS Terminal Access Protocols	PWCS	15 June 2009
9	NCIG Terminal Access Protocols	NCIG	15 June 2009
10	Coal Chain Access Protocols	PWCS, NCIG	15 June 2009
11	Levy Protocols	PWCS, NCIG	15 June 2009
12	Capacity Framework Agreement	NPC, PWCS, NCIG	15 June 2009

Schedule 5 — Contractual alignment

Contractual Alignment between Terminal Capacity, Track Capacity and Above Rail Capacity for export coal through the Port of Newcastle.

Producers who export coal from Newcastle under new long-term Ship or Pay or other new term contracts will be required to have sufficient access to both terminal capacity and access to track capacity before coal can be accepted for export. The track capacity will be measured from load point to exit point and must include the losses that will be incurred in servicing that part of the track system.

It is only when both sufficient track and terminal system capacities are available that contracts can be aligned.

If there is imbalance between the track and terminal system capacities then contractual alignment is not achieved and the “effective” contracted capacity will cover the lowest capacity entitlement under the track and terminal access until such time as additional capacity is built to achieve alignment.

In the event that there is insufficient system capacity at the terminals or track to enable contractual alignment for new contracts to support expansion, then existing contracts will have priority.

It is the responsibility of individual producers to establish above rail contracts to match the “effective” capacity of the terminal and track.

These Guiding Principles encourage Producers to hold aligned access contracts with Track and Terminal service providers such that the total Access Rights do not exceed the capacity of the coal chain as a whole. This limits the risk of over-contracting and provides certainty of coal chain access for Producers.

1. The onus is on the Producer to secure commercial arrangements to transport coal from the mine to the ship. If the Producer has appropriate access contracts in place to transport its coal to the ship, then what other Producers do should not infringe on that Producer’s right to have its contracted services delivered.
2. 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. The system assumptions should include realistic interface losses between each element of the coal chain, agreed operating mode(s) of the system (recognising the different operating modes of PWCS and NCIG) and the associated flexibility requirements, live-run losses, agreed capacities of fixed infrastructure and rolling-stock specifications and operating parameters. While service providers may engage the yet to be established independent HVCCC and/or third-parties to assist to determine these assumptions and capacities, the primary responsibility and accountability resides with each of the Track and Terminal service providers. The contractable capacity of each of the Track and Terminal service providers is defined as the Track/Terminal System Capacity and is derived as follows:

Terminal Unconstrained Capacity Adjusted for all System Assumptions = Terminal System Capacity (Mtpa)

Track Unconstrained Capacity Adjusted for all System Assumptions = Track System Capacity (Mtpa)

A requirement exists for Terminal capacity of PWCS and NCIG to be clearly established.

A requirement exists for track system capacity of ARTC to be clearly established.

3. 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 with access contracts will also be able to opportunistically access ad-hoc capacity where available and on the basis that it does not infringe on the contracted access rights of other Producers). Producers will have a right to have the Track System Capacity and Terminal System Capacity audited against aggregate Access Rights.

Producer's Access Rights = Lesser of Producers Terminal System Capacity and Track System Capacity

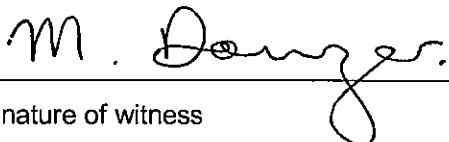
The only reason that Terminal System Capacity and Track System Capacity may be different is when there is a misalignment in the timing of when Terminal and Track infrastructure is delivered compared to the System Assumptions.

4. Producers can choose to hold non-aligned access contracts on track and terminal, however will only be able to access system capacity based on the lesser of their contracted Track System Capacity or Terminal System Capacity
5. The responsibility of the Track and Terminal Service Providers to jointly operate in accordance with the System Assumptions is best achieved by planning and operating the system in a coordinated and co-operative manner. This is anticipated to be the primary role of the yet to be established independent HVCCC.
6. Track and Terminal access contracts will provide for actual and forecast excessive ship queues to be addressed by ensuring:
 1. Contracted Access Rights to their respective elements do not exceed the lesser of the Track System Capacity or Terminal System Capacity.
 2. Those using any ad-hoc Access Rights do not contribute to the creation of an excessive ship queue or infringe on the contracted and aligned Access Rights of other Producers (in the event an adjustment to contracted access is required to reduce a vessel queue, Producers accessing capacity on an ad-hoc basis are the first to be constrained before any aligned access contracts are adjusted)
 3. Producers whose performance varies from their agreed System Assumptions which form the basis of their contracted Access Rights directly and individually incur the capacity increase or decrease as a result of their individual performance. Each Producer's performance may be monitored and determined by the HVCCC (subject to HVCCC being established and agreed rules being in place). The Producer's performance also includes the performance of that Producer's Above-Rail Haulage service provider with regard to the agreed System Assumptions.
 4. Track or Terminal service provider's performance which varies from the agreed System Assumptions distribute and isolate the resulting capacity increase or decrease to its customers. The Track and Terminal service providers' performance may be monitored and published by the envisaged HVCCC.
7. New and expanding Producers (Access Seekers) will be provided for by each of the Track and Terminal service providers operating an orderly Access Queue and coordinating infrastructure and investment planning via a Coal Chain Master Planning function (envisaged to be performed by an independent HVCCC). Access Seekers will obtain Access Rights to Track and Terminal capacity upon the delivery of the respective Track and/or Terminal System Capacity. The order within the Access Queue will be based primarily on the time of application, but reviewed and modified as required so as to ensure that delivered mine export capacity can access available System Capacity ahead of mines that may be delayed or still under development.

To give effect to the above Alignment Principles, the following additional documents are envisaged:

Execution page

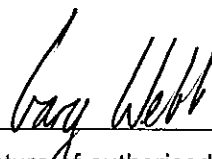
Signed and delivered by **Newcastle Port Corporation** by:



Signature of witness

MICHAEL DAWZER

Name of witness (print)



Signature of authorised representative

GARY WEBB

Name of authorised representative (print)

Signed and delivered by **Port Waratah Coal Services Ltd** by:

Signature of witness

Name of witness (print)

Signature of authorised representative

Name of authorised representative (print)

Signed and delivered by **Newcastle Coal Infrastructure Group Pty Ltd** by:

Signature of witness

Name of witness (print)

Signature of authorised representative

Name of authorised representative (print)

1. **System Assumptions:** A document containing the underlying agreed System Assumptions underpinning the determination of Track and Terminal System Capacity. This could become a schedule to all Access Contracts
2. **Hunter Valley Coal Chain Starting Point:** A statement as to how the initial Access Rights will be granted under the first Track and Terminal access contracts
3. **Access Protocols and Process:** The process through which Access Seekers join the Access Queue and the mechanism by which Track and Terminal Access is managed until an Access Seeker becomes an Access Holder
4. **Contract Performance Management:** The process and mechanism by which system capacity is managed and performance and consumption of system capacity is reported and any adjustments to contracted Access Rights are made.