



Australian
Competition &
Consumer
Commission

Determination

Applications for authorisation

lodged by

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

in respect of

the PWCS Tonnage Allocation Stage 1

Date: 13 May 2009

Commissioners: Samuel
Kell
Schaper
Court
Dimasi

Authorisation no.: A91110-A91112

Public Register no.: C2008/1890

Summary

The Australian Competition and Consumer Commission (ACCC) **grants** authorisation to the 'PWCS Tonnage Allocation Stage 1' (Stage 1 Allocation system) until 30 June 2009.

During the ACCC's consideration of this matter, the industry has made significant progress and appears to be close to finalising a long term solution to the capacity issues in the Hunter Valley coal chain. Accordingly, the ACCC considers that sufficient progress towards the implementation of a long term solution has been made by the parties to warrant authorisation of the Stage 1 Allocation system until 30 June 2009.

Having said this, there is still a considerable volume of work to be done by the industry to implement the long term solution by its target date of 30 June 2009, particularly in relation to contractual alignment and system capacity issues.

The ACCC considers the industry has had sufficient time to develop and finalise an appropriate long term commercial framework for efficient investment in the Hunter Valley, which should remove the need for transitional 'capacity balancing systems' to operate at the Port of Newcastle beyond 30 June 2009.

The Applicants submit that the Stage 1 Allocation system seeks to provide Hunter Valley coal producers' access to terminal capacity at the Port of Newcastle and manage the coal vessel queue while the long term arrangements are developed and implemented.

The need for a vessel queue management system arises from an imbalance between the volume of coal that producers want to export and the capacity of the Hunter Valley coal chain. A large queue of coal vessels first formed off the Port of Newcastle in early 2004 in response to a surge in global demand for coal. Producers incurred significant demurrage costs while vessels waited in the queue for days to be loaded with coal.

Since 2004 the industry has developed a number of short term schemes to manage the vessel queue. These systems, referred to as capacity balancing systems, essentially involve producers receiving a pro-rata allocation of the available coal export capacity in the Hunter Valley while capacity expansions are undertaken.

Over time, the ACCC became increasingly concerned that the underlying issues contributing to the capacity imbalance within the Hunter Valley coal chain were not being addressed by the industry.

In April 2008 the ACCC granted authorisation to a capacity balancing system until 31 December 2008, to provide a transition period that would allow the industry to develop a long term solution to address the ongoing capacity constraints within the Hunter Valley coal chain. Without evidence of a long term solution being developed, the ACCC questioned whether authorisation of capacity balancing systems beyond 2008 would continue to be in the public interest.

The situation in 2008

Producers participated in the Greiner Review of the Hunter Valley coal chain during the first half of the year. An industry proposal for long term access to the coal loading terminals at the Port of Newcastle formed part of the report that was provided to the NSW Government on 1 July 2008.

During the second half of 2008, ongoing discussions were held between coal industry representatives and the NSW Government. In particular, the NSW Government indicated that it required any long term proposal to clearly provide access to export capacity for new entrants to the Hunter Valley.

In December 2008 the NSW Minister for Ports and Waterways, the Hon. Joe Tripodi MP, announced a proposed terminal access framework to resolve outstanding issues between the coal industry and government. Some of the key elements of this proposal included: triggers requiring terminals to build new capacity on demand; long term contracts to underpin investment in terminal capacity; and a proposal for a fourth coal terminal at the Port of Newcastle.

Following the NSW Government's announcement of its proposed terminal access framework, the industry formed several working groups to consider specific issues and facilitate implementation of a long term solution.

Interim authorisation

When the current application was lodged on 19 November 2008, the Applicants also requested urgent interim authorisation so that Port Waratah Coal Services could commence the necessary steps to implement the Stage 1 Allocation system.

On 17 December 2008 the ACCC granted interim authorisation to the Stage 1 Allocation system until 31 March 2009, conditional upon the ACCC being satisfied that work to finalise the long term solution continued, with monthly progress reports to be provided by the parties. The ACCC noted that any delays to the finalisation of a long term solution are likely to result in substantial detriment.

In its draft determination of 26 February 2009 proposing to grant authorisation to the Stage 1 Allocation system, the ACCC also decided to extend interim authorisation beyond the end of March, provided the industry continued to make substantial progress in developing the long term solution – evidence of such progress would be the signing of a detailed Implementation Memorandum.

On 31 March 2009 the ACCC received a copy of an Implementation Memorandum signed by the Newcastle Port Corporation and Port Waratah Coal Services. On 6 April 2009 the ACCC received a revised Implementation Memorandum signed by the Newcastle Port Corporation and Port Waratah Coal Services. On 8 April 2009 the Newcastle Coal Infrastructure Group also signed the revised Implementation Memorandum.

Ongoing work towards a long term solution

The signing of the Implementation Memorandum in April 2009 represents a significant milestone for the Hunter Valley coal industry – particularly concerning terminal access issues and expansion of terminal capacity at the Port of Newcastle. The industry continues to develop the details of a contractual alignment mechanism across the entire Hunter Valley coal chain.

To be effective, any long term solution must extend beyond terminal capacity allocation to ensure all coal chain contracts, including above and below rail, are properly aligned and reflect whole of coal chain system capacity, rather than just stand-alone capacity of individual components of the coal chain.

The Applicants and the Newcastle Port Corporation have committed to preparing necessary documents that implement the long term solution by 15 June 2009 – including amendments to the terminal leases with the NSW Government, preparation of long term ship or pay contracts with producers, capacity allocation procedures at the coal loading terminals, coal chain access protocols and the lease between the NSW Government and Port Waratah Coal Services for a new terminal (T4) at the Port of Newcastle.

The ACCC is advised that a separate application for authorisation covering relevant aspects of the long term solution will be lodged with the ACCC in the near future.

Balance of public benefits and detriments

The ACCC may only grant authorisation to proposed conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC considers the Stage 1 Allocation system is likely to result in public benefits, including demurrage savings for producers and reducing the environmental and safety risks associated with a vessel queue offshore.

Any delays in finalising a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain would generate substantial detriment in the form of foregone exports. However, the ACCC is satisfied that significant progress has been made by the industry and NSW Government towards implementing a long term solution.

Period of authorisation

The ACCC grants authorisation to the Stage 1 Allocation system until 30 June 2009, as requested. Interim authorisation of the Stage 1 Allocation system remains in place until the date this final determination comes into effect.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
the Act	<i>Trade Practices Act 1974</i>
ARTC	Australian Rail Track Corporation Ltd
HVCCLT	Hunter Valley Coal Chain Logistics Team
Long Term Terminal Access Protocols	Long Term Protocols
NCIG	Newcastle Coal Infrastructure Group Pty Limited
NPC	Newcastle Port Corporation
PWCS	Port Waratah Coal Services Limited
PWCS Tonnage Allocation Stage 1	Stage 1 Allocation system

1. Introduction

Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

The applications for authorisation

- 1.8 On 19 November 2008 Port Waratah Coal Services Limited (PWCS) and the Newcastle Coal Infrastructure Group Pty Limited (NCIG) lodged applications for authorisation A91110 – A91112 with the ACCC.

1.9 In particular, PWCS and NCIG (hereafter referred to as the ‘the Applicants’) sought authorisation of:

- the PWCS Tonnage Allocation Stage 1 (Stage 1 Allocation system) and
- any Long Term Terminal Access Protocols (the Long Term Protocols) which are developed and agreed in the future by producers, the Applicants and/or any Hunter Valley coal chain participant, and which are submitted to the ACCC for approval.

1.10 The Applicants submit that the Stage 1 Allocation system is designed to provide coal producers with access to terminal capacity and manage the coal vessel queue while the long term arrangements for access and capacity expansion of coal terminal infrastructure are developed and implemented by the industry.

1.11 In the initial application, the Applicants proposed that any authorisation be conditional upon the development and finalisation of the Long Term Protocols in accordance with the following timetable:¹

- The Applicants will submit a Memorandum of Understanding and associated Terms Sheet (MOU) to the ACCC setting out the likely terms of any Long Term Terminal Access Protocols which will be an element of the potential long term solution on or before 31 March 2009.

Should the Applicants not be able to submit the MOU to the ACCC on or before 31 March 2009, they submit that the ACCC and the Applicants would work together (both ‘acting reasonably and in good faith’) to determine any later date that should apply.

- Prior to 31 March 2009, the Applicants will provide monthly reports to the ACCC on progress made by the Producers’ Steering Committee and the Applicants towards developing the MOU.
- The Applicants will submit the new Long Term Protocols to the ACCC by 30 June 2009 which, subject to ACCC approval, the Applicants propose will form part of the authorised arrangements.
- Between 31 March 2009 and 30 June 2009, the Applicants will provide monthly reports to the ACCC on progress made by the Producers’ Steering Committee and the Applicants in developing the Long Term Protocols.
- The Applicants will implement contractual arrangements which give effect to such Long Term Protocols as are submitted to the ACCC for approval by a date which is *no later than 6 weeks* after the date on which the Long Term Protocols are approved by the ACCC. If accepted by the ACCC, any Long Term Terminal Protocols will apply retrospectively from 1 July 2009, or such later date as agreed by the Terminal Operators and the ACCC.

1.12 The Applicants sought authorisation of the Stage 1 Allocation system and any Long Term Protocols for ten years.

¹ The Applicants’ supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, pp 2, 3.

Amendment to the applications for authorisation

- 1.13 On 11 February 2009 the Applicants amended the applications for authorisation so that authorisation is now sought for the Stage 1 Allocation system only. Authorisation is sought for six months, from 1 January 2009 to 30 June 2009.
- 1.14 Details of the proposed Stage 1 Allocation system are the same as set out in the Applicants' original supporting submission to the applications of 19 November 2008. It is proposed that the Stage 1 Allocation will be implemented by amending the Coal Handling Services Agreement that PWCS has in place with its customers. The rules for the operation of the proposed Stage 1 Allocation are detailed in *PWCS Tonnage Allocation Stage 1* (provided at Appendix A to this determination).²
- 1.15 The Stage 1 Allocation system is described in further detail in Chapter 3 of this determination.
- 1.16 At the time of amending the application, the Applicants advised that the industry and NSW Government was progressing the development of the long term solution to ongoing capacity constraints in the Hunter Valley coal chain. In particular, the Applicants advised that an Implementation Memorandum, which details how the long term solution will be implemented, was being prepared and expected to be completed by mid to late March 2009.³
- 1.17 Further, the Applicants initially envisaged that relevant aspects of the long term solution (including the Long Term Terminal Access Protocols) will form the subject of a separate application for authorisation to be provided to the ACCC in March 2009.⁴ The ACCC is yet to receive an application for authorisation covering the long term solution.

Draft determination

- 1.18 On 26 February 2009 the ACCC issued a draft determination proposing to grant authorisation to the Stage 1 Allocation system until 30 June 2009.
- 1.19 The proposed authorisation was conditional upon the parties finalising an Implementation Memorandum which set out an agreed framework and detailed how the long term solution will be implemented on a timely basis, and providing a copy of it to the ACCC by 31 March 2009. The draft determination also stated that the Implementation Memorandum must be sufficiently detailed to enable the parties to enter long term contracts to give effect to the long term solution, and in so doing, underpin efficient investment.
- 1.20 The ACCC reconsidered interim authorisation as part of its draft determination and decided to extend interim authorisation until the date its final determination comes into effect, unless the ACCC otherwise decides to revoke interim authorisation.

² Attachment 1 to the Applicants' applications for authorisation (A91110-A91112), 19 November 2008.

³ Letter from Applicants varying applications for authorisation (A91110-A91112), 11 February 2009, p 2.

⁴ Ibid, p 1.

1.21 The ACCC considered that ongoing progress by the Hunter Valley coal industry towards implementing a 'whole of coal chain' long term solution is critical to the arrangements continuing to be in the public interest. The draft determination noted that if at any time the ACCC is not satisfied that sufficient progress continues to be made, it will consider revoking the interim authorisation and not granting authorisation in its final determination. In particular, the ACCC would consider whether interim authorisation should continue in light of the content of the Implementation Memorandum.

Interim authorisation

1.22 On 17 December 2008 the ACCC granted interim authorisation to the Stage 1 Allocation system until 31 March 2009, conditional upon the ACCC being satisfied that work to finalise the long term solution continues, with monthly progress reports to be provided by the parties.

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

- The NSW Government's proposed terminal access framework of 11 December 2008, coupled with the agreement of all producers, is a significant step towards the development of a long term solution, but more needs to be done.
- Without interim authorisation, a larger vessel queue is likely to form at the Port of Newcastle, with consequential increased demurrage costs, environmental risks and potential reputational harm.
- Ongoing delays in addressing the underlying issues causing excessive queuing are imposing costs on participants in the Hunter Valley coal chain. Further, incentives to efficiently invest in capacity expansions across the coal chain are distorted, with consequential losses from significant volumes of foregone exports – at a value that is likely to far exceed potential demurrage savings.

1.24 A complete copy of the ACCC's Reasons in relation to the request for interim authorisation is available from its website www.accc.gov.au (by following the 'Public registers' and 'Authorisations and notifications' links).

1.25 In accordance with the ACCC's interim authorisation decision, the Applicants provided monthly progress reports to the ACCC on 16 January 2009, 13 February 2009 and 13 March 2009.

1.26 On 31 March 2009 the ACCC received a copy of an Implementation Memorandum signed by the Newcastle Port Corporation (NPC) and PWCS. Following further negotiations between NCIG and the NSW Government, the ACCC received a copy of a revised Implementation Memorandum that had been executed by NPC and PWCS on 6 April 2009. NCIG later signed the revised Implementation Memorandum and provided a copy to the ACCC on 8 April 2009.

1.27 On 9 April 2009 the ACCC advised the Applicants that the Implementation Memorandum appears to set out a sufficiently detailed framework and processes as to how the long term solution will be implemented on a timely basis. As such, the ACCC advised that interim authorisation of the Stage 1 Allocation system will remain in place until the date the ACCC's determination comes into effect, unless otherwise revoked.

Chronology

1.28 Table 1.1 provides a chronology of significant dates in the consideration of this application. Of note, on 11 February 2009 the Applicants amended the application to seek authorisation of the Stage 1 Allocation system only.

Table 1.1: Chronology of applications for authorisation A91110-A91112

DATE	ACTION
19 November 2008	Applications for authorisation lodged with the ACCC, including an application for interim authorisation.
20 November 2008	ACCC commences consultation process with interested parties.
5 December 2008	Closing date for submissions from interested parties in relation to the request for interim authorisation.
17 December 2008	The ACCC granted interim authorisation to the Stage 1 Allocation system until 31 March 2008, conditional upon the ACCC being satisfied that work to finalise the long term solution continues, with monthly progress reports to be provided to the ACCC.
19 December 2008	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
16 January 2009	First monthly progress report provided to the ACCC in accordance with the terms of the ACCC's interim decision.
10 February 2009	Submissions received from the Applicants in response to certain interested party submissions.
11 February 2009	The Applicants amend the applications to now seek authorisation of the Stage 1 Allocation system only. ACCC provides amended application to interested parties.
13 February 2009	Second monthly progress report provided to the ACCC in accordance with the terms of the ACCC's interim decision.
26 February 2009	Draft determination issued.
13 March 2009	Third (and final) monthly progress report provided to the ACCC in accordance with the terms of the ACCC's interim decision.
20 March 2009	Closing date for submissions in relation to the ACCC's draft determination.
2 April 2009	Conference held in relation to the ACCC's draft determination.
31 March 2009	ACCC receives a copy of an Implementation Memorandum signed by PWCS and NPC only.
6 April 2009	ACCC receives a copy of the revised Implementation Memorandum signed by PWCS and NPC.
8 April 2009	ACCC receives a copy of the revised Implementation Memorandum signed by NCIG.
17 April 2009	Closing date for submissions from interested parties in relation to the draft determination and any issues arising from the conference.
24 April 2009	Submission received from the Applicants in relation to issues arising from the conference.
13 May 2009	Determination issued.

2. Background to the application

The applicants

PWCS

- 2.1 PWCS owns and operates the Carrington and Kooragang Island coal loading terminals at the Port of Newcastle. It is an incorporated joint venture between a number of coal producers and other participants in the Hunter Valley coal industry, including exporters and importers of coal from the Hunter Valley. Appendix B to this determination lists the current shareholders of PWCS.
- 2.2 PWCS provides coal handling services to Hunter Valley coal exporters, including receiving and unloading coal, the stockpiling of coal and loading coal into vessels for export.
- 2.3 PWCS' terminals consist of rail receival infrastructure, stockpiling areas, coal reclaimers and a dedicated conveyor system which carries the coal to shiploaders. PWCS currently has five shipping berths (two at Carrington and three at the Kooragang Island). The shiploaders at the Kooragang Island terminal can operate at a peak rate of 10 500 tonnes per hour, while the shiploaders at the Carrington terminal have a capacity of 2500 tonnes per hour.⁵
- 2.4 Part of the land on which PWCS' terminals are situated is owned by the NSW Government and leased to PWCS. The lease regarding the Kooragang Island terminal currently requires PWCS to operate the terminal as a 'common user facility' – which requires PWCS to provide access to the Kooragang Island terminal on a non-discriminatory basis to all producers who wish to ship coal.
- 2.5 Currently, any party who wishes to use the port to load coal may do so, provided they sign a Coal Handling Service Agreement. This agreement sets out the terms on which PWCS will provide coal handling services to its customers.
- 2.6 PWCS' current total coal loading capacity is 102 million tonnes per annum, with expansion underway to increase capacity to 113 million tonnes per annum by mid-2009. PWCS has development approval to complete construction of its Kooragang Terminal Master Plan and to operate at 145 million tonnes per annum.⁶

NCIG

- 2.7 NCIG is an incorporated joint venture between six Hunter Valley Coal producers – namely, BHP Billiton (Hunter Valley Energy Coal), Centennial Coal Company Limited, Peabody Energy Coal (Excel Coal Limited), Whitehaven Coal and Felix Resources. Appendix C to this determination lists the members' shares of NCIG.

⁵ Information provided at paragraph 2.3 was obtained from PWCS' website, www.pwcs.com.au, viewed on 28 January 2009.

⁶ The Applicants' supporting submission to applications for authorisation A91110-A91112, 19 November 2008, p 7.

- 2.8 NCIG was formed in 2004 following the NSW Government's invitation for submissions to develop an additional coal loading terminal at the Port of Newcastle. The first stage of NCIG's terminal, with a capacity to load 30 million tonnes of coal per annum, is currently under construction and is expected to be operational in the first quarter of 2010. All capacity for this first stage has been contracted to NCIG shareholders. NCIG-member producers currently export coal through PWCS' terminals.
- 2.9 The NCIG terminal will consist of rail infrastructure, a coal storage area, wharf facilities and shiploaders. There will be two shipping berths constructed as part of NCIG's first stage of development. A third shipping berth is proposed to be built in the second stage of development (with capacity up to 66 million tonnes per annum).⁷

The Hunter Valley coal chain

An overview

- 2.10 The Hunter Valley coal chain is a complex export system comprising:⁸
- 35 coal mines owned by 14 individual coal producers
 - 24 points at various mines for loading coal onto trains
 - approximately 28 trains (owned by two above rail operators), making an average of two trips per day
 - more than 80 different export blends of coal
 - five berths and shiploaders at the port and
 - total stockpile capacity of 3.4 million tonnes at the Port of Newcastle, which allows approximately 1.5 million tonnes of workable stockpile space for port operations.
- 2.11 The Hunter Valley coal chain is located near Newcastle in NSW and is spread over a 350 km area from around Gunnedah in the north, Ulan in the west and Newstan in the south. A map of the Hunter Valley coal network is provided at Figure 2.1 below.
- 2.12 Around 80 per cent of coal exported from the Hunter Valley is thermal (or steaming) coal primarily used for electricity generation. The remaining 20 per cent of exports is coking (or metallurgical) coal which is used to manufacture steel.⁹
- 2.13 The majority of coal from the Hunter Valley is exported to Japan (approximately 62 per cent), Korea (approximately 15 per cent) and Taiwan (approximately 13 per cent).¹⁰

⁷ Ibid, p 8.

⁸ Information obtained from the Hunter Valley Coal Chain Logistics Team's website, www.hvccft.com.au, viewed on 28 January 2009.

⁹ PWCS, *December 2008 End of Month Charts*, www.pwcs.com.au, viewed on 29 January 2009.

¹⁰ Ibid.

Figure 2.1: Map of Hunter Valley coal chain network¹¹



The Hunter Valley Coal Chain Logistics Team¹²

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

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

2.15 The objectives of the HVCCLT are two-fold – to maximise daily coal export volumes and to coordinate planning for the provision of future coal chain infrastructure. A minimum of 14 days notice is received for the arrival of a vessel at the Port of Newcastle. The HVCCLT coordinates vessel berthing, stockpile layouts and train

¹¹ Figure 2.1 was sourced from the Hunter Valley Coal Chain Logistics Team’s website, www.hvcclt.com.au, viewed on 28 January 2009.

¹² Unless otherwise stated, information provided under this heading was obtained from the Hunter Valley Coal Chain Logistics Team’s website, www.hvcclt.com.au, viewed on 28 January 2009.

sequencing with the aim of fulfilling customers' orders in the shortest possible timeframe.

- 2.16 As part of the 2008 Greiner Review of the Hunter Valley coal chain, which is discussed in further detail from paragraph 2.38 below, it was identified that the HVCCLT requires greater access to information in order to effectively perform its planning and coordination functions. The ACCC understands that a model is under development for the HVCCLT to be incorporated as an independent entity.¹³

Above rail operators

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

*QR National*¹⁴

- 2.18 QR National commenced operations in the Hunter Valley in 2005. It currently operates 6 trains and has a 20 per cent share of the Hunter Valley rail haulage market, delivering 19.8 million tonnes of coal in 2007-08.
- 2.19 QR National currently has rail haulage contracts with 5 coal producers (covering 11 mines) for coal exports from the Hunter Valley. Table 2.1 lists QR National's contracts and the rail haulage distances for each mine.

Table 2.1: QR National's contracted mines in the Hunter Valley coal chain¹⁵

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

¹³ The Applicants' supporting submission to applications for authorisation A91110-A91112, 19 November 2008, p 16.

¹⁴ Information provided under this heading was obtained from QR National's website, www.qrnational.com.au, *Hunter Valley system*, viewed on 28 January 2009.

¹⁵ Extract of table obtained from QR National's website, www.qrnational.com.au, *Hunter Valley system*, viewed on 28 January 2009.

Pacific National

- 2.20 Pacific National is fully owned by the Asciano Group and hauls around 88 per cent of coal in NSW, representing approximately 90 million tonnes of coal per annum.¹⁶ Pacific National moves coal from 17 customers in the Hunter Valley across distances generally ranging from 20km to 320km.¹⁷

Australian Rail Track Corporation

- 2.21 ARTC is a company, under the Corporations Act, whose shares are owned by the Australian Government and is overseen by the Minister for Infrastructure, Transport, Regional Development and Local Government and the Minister for Finance and Deregulation. In September 2004, ARTC negotiated a long term lease arrangement with the NSW Government, which effectively gave ARTC management of the interstate and Hunter Valley coal network in NSW.¹⁸
- 2.22 ARTC's stated objectives in the Hunter Valley are to:
- actively cooperate with and support industry arrangements and forums seeking to optimise coal supply chain capacity
 - deliver rail capacity to meet industry demand.¹⁹
- 2.23 ARTC's responsibilities in relation to the network include:
- selling rail access
 - pricing access
 - capital investment
 - operational management and
 - management of infrastructure maintenance.²⁰
- 2.24 As at November 2007, the theoretical capacity of the Hunter Valley rail network was around 124 million tonnes per annum. At this time, ARTC also reported that the largest coal volumes were in the lower end of the Hunter Valley, but noted expected growth over the next few years in coal mining along the Ulan line and in the Gunnedah Basin. Apart from being a longer distance from the port, the rail corridor between Muswellbrook and the Gunnedah Basin is only rated for 100 tonne coal wagons, as opposed to 120 tonne wagons in most other parts of the Hunter Valley network.²¹

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

¹⁷ Information obtained from Pacific National's website, www.pacificnational.com.au, viewed on 29 January 2009.

¹⁸ Submission from ARTC, 5 December 2008, pp 2, 3.

¹⁹ Ibid, p 3.

²⁰ Ibid, p2.

²¹ ARTC, *Hunter Valley Corridor, 2007-2012 capacity strategy - consultation document*, 29 November 2007, p 3.

Hunter Valley Access Undertaking

- 2.25 Access to those parts of ARTC's NSW network (including those not forming part of the interstate network and the Hunter Valley rail network) is currently governed by the NSW Rail Access Undertaking (the 'NSW Undertaking'), which is not an undertaking under Part IIIA of the Act.²²
- 2.26 The NSW Undertaking sets out a 'high level' access regime under which an access agreement is negotiated between ARTC and an access seeker – Pacific National and QR National currently have access agreements with ARTC. The NSW Undertaking also sets out a number of compulsory terms and pricing principles, as well as a framework for arbitration of access disputes between infrastructure providers and operators by IPART.²³
- 2.27 On 23 April 2009 ARTC lodged an access undertaking application for the Hunter Valley rail network with the ACCC for assessment under section 44ZZA of the Act, which will replace the current NSW Undertaking.
- 2.28 Some of the features of ARTC's Hunter Valley Access Undertaking include:
- where an applicant seeks coal access rights, access to the ARTC's rail network is conditional upon access seekers having secured coal terminal contracts (or Network Exit Capability) and
 - coal producers may seek coal access rights directly from ARTC.

Previous ACCC authorisations

- 2.29 An ACCC authorised capacity balancing system has essentially been in operation at the Port of Newcastle since interim authorisation was first granted by the ACCC to the short term 'Capacity Distribution System' in March 2004.
- 2.30 The most recent authorised capacity balancing system operated at the Port of Newcastle during 2008. In its determination of 24 April 2008, the ACCC noted that the underlying coal chain issues were not being addressed and that infrastructure capacity expansions alone would not solve the problem. In particular, structural, regulatory and contractual issues in the Hunter Valley were contributing to the ongoing capacity imbalance.
- 2.31 Table 2.2 summarises the history of previous applications for authorisation for capacity balancing systems at the Port of Newcastle.

²² Ibid, p 3.

²³ The Applicants' supporting submission to applications for authorisation A91110-A91112, 19 November 2008, p 17.

Table 2.2: History of applications for authorisation of capacity balancing systems

Authorisation	Date lodged	Authorisation	Date authorisation expired
<p>Applications for authorisation of a 'Short Term Capacity Distribution System'</p> <p>Lodged by PWCS (A90906 – A90908)</p>	5 February 2004	<p>Interim authorisation granted on 6 March 2004</p> <p>Final authorisation granted on 9 July 2004</p>	<p>31 December 2004</p> <p>The ACCC was reluctant to extend authorisation beyond this date because of the lack of certainty whether a vessel queue was likely to persist during 2005.</p>
<p>Applications for authorisation of a 'Medium Term Capacity Distribution System'</p> <p>Lodged by PWCS (A30236 – A30238)</p>	1 October 2004	<p>Interim authorisation granted on 3 November 2004</p> <p>Final authorisation granted on 15 April 2005</p>	<p>31 December 2007</p> <p>The ACCC noted there was greater likelihood of potential public detriment resulting from the Medium Term Capacity Distribution System the longer the authorisation ran.</p> <p>Under the terms of the Medium Term Capacity Distribution System, the scheme would only operate during the period of authorisation if the demand for coal loading services exceeded the capacity of the coal chain by 3 million tonnes, as well as receiving the support of the industry.</p> <p>In September 2006, the industry voted to discontinue the system. PWCS subsequently sought authorisation to reinstate a modified version of this scheme for the balance of the original period of authorisation.</p>
<p>Applications for authorisation to reinstate a modified 'Medium Term Capacity Balancing System'.</p> <p>Lodged by PWCS (Applications for revocation of authorisations A30236 – A30238 and substitution of authorisations A91033-A91035)</p>	27 February 2007	<p>Interim authorisation granted on 14 March 2007</p> <p>Final authorisation granted on 23 May 2007</p>	31 December 2007

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

Performance of the Hunter Valley coal chain

The vessel queue

- 2.32 The Applicants submit that the various capacity balancing systems that have operated at the Port of Newcastle have been successful in managing the vessel queue.
- 2.33 Between March 2004 and September 2006 the vessel queue averaged around 18 vessels.²⁴ Figure 2.2 shows a significant increase in the size of the vessel queue following the industry's decision to discontinue the capacity balancing system in September 2006. In June 2007, severe storms in the Hunter Valley region caused major disruptions within the coal chain.
- 2.34 While the capacity balancing system limited the size of the vessel queue to an average of 33 vessels throughout 2008²⁵, the ACCC notes this is still a relatively high level.
- 2.35 The average vessel queue in January 2009 was 27 vessels.²⁶ The average vessel queue in March 2009 was 16 vessels.²⁷

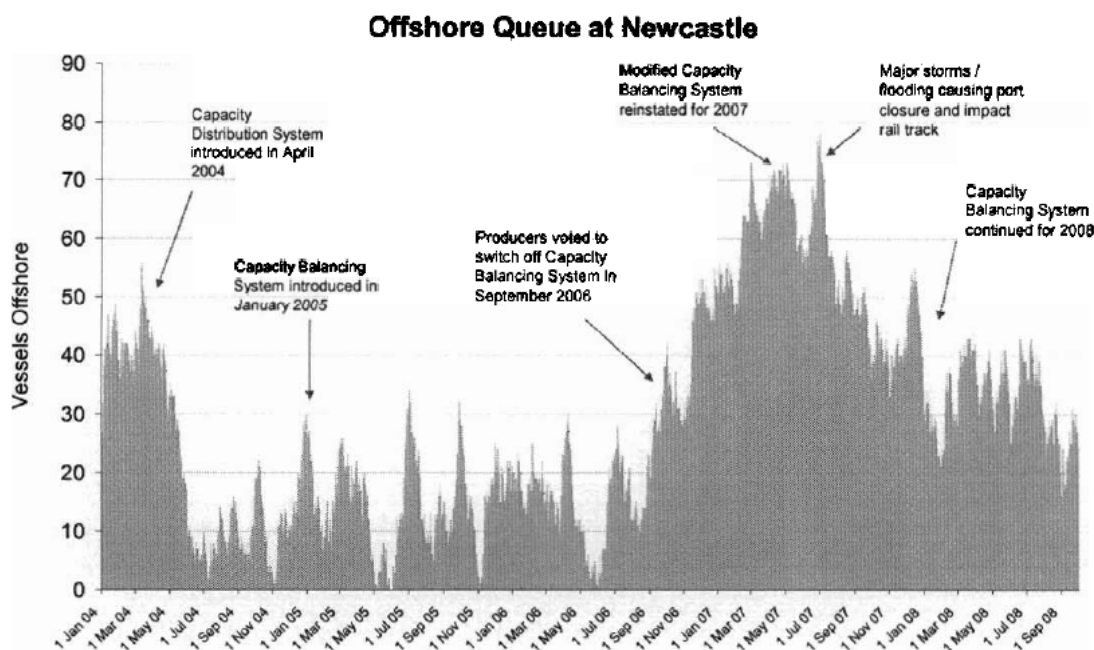
²⁴ Newcastle Port Corporation applications for authorisation (A91072-A91074), supporting submission, 3 December 2007, p 11.

²⁵ PWCS, *December 2008 end of month report* viewed at www.pwcs.com.au on 6 February 2009.

²⁶ Hunter Valley Coal Chain Logistics Team, *Monthly Performance Report 31 January 2009*.

²⁷ PWCS, *March 2009 End of Month Report*, viewed at www.pwcs.com.au on 20 April 2009.

Figure 2.2: Newcastle vessel queue from January 2004 to October 2008²⁸



Hunter Valley coal exports

2.36 Table 2.3 shows that between 2004 and 2007, annual coal exports through PWCS increased by approximately 7 million tonnes (9 per cent) from 77.81 million tonnes of coal in 2004 to 84.80 million tonnes of coal in 2007. In 2008, a record 91.4 million tonnes of coal was exported from the Port of Newcastle. This was an increase of 6.6 million tonnes of coal (approximately 8 per cent) from 2007 volumes.

Table 2.3: Annual throughput at PWCS from 2004 to 2008²⁹

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

2.37 The current (annualised) shiploading rate at PWCS for 2009 is 88.5 million tonnes per annum.³⁰

²⁸ Figure 2.2 sourced from the Applicants' supporting submission to applications for authorisation A91110-A91112, 19 November 2008, p 7.

²⁹ Table compiled by the ACCC from PWCS', *Annual Report 2007*, p 11; and PWCS' *December 2008 end of month report* viewed at www.pwcs.com.au on 6 February 2009.

³⁰ PWCS' *March 2009 End of Month Report*, viewed at www.pwcs.com.au on 20 April 2009.

Recent developments

The Greiner Review³¹

- 2.38 In January 2008, the Hon. Nick Greiner AC was appointed by the NSW Government to conduct a review of the Hunter Valley coal chain.
- 2.39 Following initial meetings with producers and service providers, Mr Greiner's brief was expanded in February to develop a long term framework for the expansion and management of the Hunter Valley coal chain.
- 2.40 In June 2008, coal producers developed a proposal for access to the coal terminals at the Port of Newcastle which was submitted to Mr Greiner. In July 2008, Mr Greiner provided his report to the NSW Minister for Ports and Waterways. The report identified the following key requirements to achieve the major expansion of the capacity of the Hunter Valley coal chain:
- improve information sharing with the logistics coordinator
 - enhance coordination of the coal chain
 - develop a long term framework for export terminal access to ensure access of capacity and
 - develop a framework for track access to ensure expansion of track capacity.
- 2.41 The initial proposal developed by coal producers in relation to the issue of access to the PWCS and NCIG coal loading terminals, formed part of Mr Greiner's Report to the NSW Government.³²
- 2.42 At the time the current authorisation applications and request for interim authorisation was lodged with the ACCC, industry representatives were still negotiating with the NSW Government about a proposed modified long term solution which provided an avenue for new entrants to access coal loading capacity. The NSW Government had indicated that it required the long term solution to contain a mechanism that catered more expressly for new entrants to the Hunter Valley to access export capacity.

NSW Government long term terminal access proposal

- 2.43 On 12 December 2008 the NSW Minister for Ports and Waterways, the Hon. Joe Tripodi MP, announced a proposed terminal access framework to resolve outstanding issues in the negotiations between the coal industry and the NSW Government in response to the Greiner Review.
- 2.44 As announced by the NSW Government, the key elements of the proposal are:
- triggers requiring terminals to build new capacity on demand
 - long term contracts to underpin investment in terminal capacity

³¹ Unless otherwise stated, the information contained under this heading was sourced from the Applicants' supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, pp 9, 15, 16.

³² Submission received from Coal and Allied, 5 December 2008, p 2.

- an industry levy to help fund new terminal infrastructure where required
- guaranteed access for new entrants and expanding producers
- business and planning certainty for existing producers
- protection for small producers and
- a proposal for a fourth coal terminal.³³

2.45 PWCS responded to the announcement in December 2008, noting that the framework includes:

- the opportunity for PWCS to lease additional government land and build a fourth coal loading terminal on Kooragang Island
- an ability for all producers to commit to long term terminal contracts, creating export certainty and security and a solid foundation for future infrastructure investment along the entire coal chain
- a trigger whereby new producers and existing producers wanting to expand give between two and four years' notice, enabling infrastructure to be built for them
- an ability for a pro-rata levy on all coal exports to cover the cost of any terminal expansion shortfalls (e.g. when contracts do not align exactly with construction needs)
- a mechanism enabling larger producers to have their contracts compressed up to a maximum of five per cent per annum if PWCS expansions are delayed or fall short of targeted capacity. Smaller producers (exporting less than five million tonnes annually) would not be subjected to compression.³⁴

Ongoing work to develop a long term solution

*Prior to the draft determination*³⁵

2.46 Following the completion of the Greiner Review and Minister Tripodi's announcement of the long term terminal access proposal for the Port of Newcastle, the Applicants advised that both the industry and government continued to make significant progress towards developing a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain.

2.47 Ongoing progress was largely being led by NPC, on behalf of the NSW Government, with considerable input from the Applicants and the Producers' Steering Committee. Among other things, the parties were seeking to clarify and develop some areas of the terminal access framework, and to provide greater detail to allow for the implementation of a long term solution based on that framework.

³³ The Hon. Joe Tripodi, Minister for Port and Waterways, Media Release, *Plan to end coal supply chain deadlock*, 12 December 2008.

³⁴ PWCS, Media Release, *PWCS welcomes new Hunter Terminal Access Proposal*, 12 December 2008.

³⁵ Information under this heading is obtained from the Applicants' amendment to the applications for authorisation, 11 February 2009, pp 4, 5.

2.48 The Applicants advised that a number of working groups had been formed to consider specific issues and facilitate implementation. Project managers were also appointed.

2.49 A summary of the nature of the ongoing work prior to the ACCC's draft determination follows:

- **Implementation** – NPC was progressing the drafting of an Implementation Memorandum, with input from the Applicants, which would set out the details of how the long term framework will be implemented. This included details of the nomination and allocation process for the implementation of a long term contractual framework at the terminals, commitments to expand capacity for producers which is supported by long term 'ship or pay' contracts, and access arrangements that ensure new and expanding coal producers will have access to export terminal capacity. The Applicants had anticipated that the Implementation Memorandum would be finalised by mid-late March 2009.
- **Growth** – The NSW Government, PWCS and NCIG determining any amendments which will be required to their individual leases with the NSW Government, as well as governance issues surrounding the proposed new coal loading terminal (T4) at the Port of Newcastle.
- **Contractual alignment** – A contractual alignment working group was established develop a contractual alignment mechanism considering issues relating to rail access (including the ARTC Hunter Valley Undertaking) and the coal loading terminals.

Following the draft determination - the Implementation Memorandum

2.50 As previously mentioned, the Applicants and NPC signed the Implementation Memorandum³⁶ in early April 2009. A copy of the Implementation Memorandum is available from the ACCC's website www.accc.gov.au (by following the 'Public registers' and 'Authorisations and notifications' links).

2.51 The Implementation Memorandum includes a commitment from the parties to comply with the Implementation Procedure in Schedule 4. That is, relevant contracts and other documents that implement the long term solution must be completed by 15 June 2009. These documents, which must be consistent with the agreed principles within the Implementation Memorandum, include:

- deeds of amendment to PWCS' and NCIG's lease with the NSW Government
- long term ship or pay contracts for PWCS and NCIG terminals
- capacity nomination and allocation procedures at PWCS and NCIG
- terminal access protocols at PWCS and NCIG
- coal chain access protocols – addressing contractual alignment between terminal access, track access and above rail

³⁶ *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, Draft 6 – Execution version.*

- the lease between NSW Government and PWCS for a new terminal (T4) at the Port of Newcastle.

Other developments

- 2.52 Approximately 1000 coal vessels are loaded at the Port of Newcastle per year on a ‘Turn of Arrival’ basis.³⁷ Under the turn of arrival system, when a vessel is 10 nautical miles from the port it advises NPC’s Vessel Traffic Information Centre that it has arrived and is ready to load coal. PWCS is then notified and proceeds to allocate access to its terminal generally in accordance with turn of arrival principles – that is, ‘first come, first served’. Having said this, the HVCCLT has some limited capacity to arrange vessel access to the terminal out of turn of arrival sequence in order to optimise the efficient operation of the coal chain.³⁸
- 2.53 On 9 December 2008 the NSW Government announced a two-stage trial of a new vessel arrival system. The new system would replace the current turn of arrival system and involves issuing ships with individual recommended arrival times.
- 2.54 The ACCC understands the NPC will track the movement of vessels using satellite technology for 14 days prior to their arrival. If successful, NPC will proceed to the second stage of the trial. The second stage will involve the voluntary slowing of vessels using collected information to program the arrival of the vessel based on its location, speed and performance during the trial. The vessel will be given a recommended arrival time based on the loading date advised by PWCS.³⁹

³⁷ The Hunter Valley Coal Chain Logistics Team’s website, www.hvcclt.com.au, viewed on 28 January 2009.

³⁸ Newcastle Port Corporation, *Vessel arrival system trial – policy paper*, 9 December 2008, p 2.

³⁹ The Hon. Joe Tripodi, Minister for Port and Waterways, Media Release, *Plan to reduce ships anchored off Newcastle*, 9 December 2008.

3. The applications for authorisation

- 3.1 The Applicants seek authorisation of the Stage 1 Allocation system which seeks to provide coal producers' access to terminal capacity and manage the coal vessel queue while the long term arrangements for access and capacity expansion of coal terminal infrastructure are developed and finalised by the industry.
- 3.2 The Stage 1 Allocation system potentially raises concerns under the anti-competitive conduct provisions of the Act. Consequently, the Applicants lodged the application for authorisation with the ACCC.
- 3.3 Each coal producer's coal loading allocation, calculated in accordance with the proposed Stage 1 Allocation system, will be subject to take or pay conditions pursuant to PWCS' Coal Handling Services Agreement.
- 3.4 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the application as being a party or proposed party to the conduct.

The Stage 1 Allocation system

- 3.5 The rules governing the operation of the proposed Stage 1 Allocation system are detailed in the *Hunter Valley coal chain PWCS Tonnage Allocation Stage 1* (provided at Appendix A to this determination).⁴⁰ The objectives of the system include:
- to distribute the available coal chain capacity among coal producers in an equitable, transparent and accountable manner and
 - achieve minimum vessel demurrage, consistent with maximum coal export throughput.
- 3.6 The Stage 1 Allocation system has the following five key steps:
- appointment of an administrator
 - capacity declaration
 - calculation of aggregate and producer 'base tonnages'
 - capacity distribution
 - queue management.

Appointment of an administrator

- 3.7 The Board of PWCS will appoint an independent Administrator to administer the Stage 1 Allocation system.

⁴⁰ Attachment 1 to the Applicants' applications for authorisation (A91110-A91112), 19 November 2008.

Capacity declaration

- 3.8 The HVCCLT will calculate the Coal Chain Capacity for each calendar month and calendar quarter in the relevant year.
- 3.9 The Administrator then determines the Available Capacity, taking into account the Coal Chain Capacity and any Queue Adjustment Amount.

Aggregate and producer base tonnages

- 3.10 Under the Stage 1 Allocation system, the 'Aggregate Base Tonnage' for 2009 will be 96.7 million tonnes per annum.
- 3.11 Each producer receives a 'Producer Base Tonnage'. The Producer Base Tonnage is the greater of each producer's highest allocation usage between 2004 and 2007 under the capacity balancing systems or their binding demand nominations with PWCS for 2008, proportionally reduced to 95 million tonnes (being the initial declared Coal Chain Capacity for 2009). The Producer Base Tonnage is then proportionally increased or decreased to match Coal Chain Capacity.

Capacity distribution

- 3.12 The Administrator calculates an 'Annual Pro-rata Allocation' for each producer in accordance with the following formula:

$$\text{Annual pro-rata allocation} = \text{Pro-rata Factor} \times \text{Available Capacity}$$

$$\text{Where the Pro-rata Factor} = \frac{\text{Producer Base Tonnage}}{\text{Aggregate Base Tonnage}}$$

- 3.13 Large producers⁴¹ will receive a monthly pro-rata allocation and small producers⁴² will receive a quarterly pro-rata allocation.

Queue management

- 3.14 The Administrator and PWCS, with the assistance of the HVCCLT, will continue to monitor the performance of the coal chain throughout the relevant period and may revise the Available Capacity for the balance of the period. Adjustments to Available Capacity under the Stage 1 Allocation system will be applied to all producers on a pro-rata basis.

⁴¹ BHP Billiton, Coal and Allied, Peabody Pacific and Xstrata Coal Australia.

⁴² Anglo Coal Australia, Austar Coal Mine Pty Ltd, Bloomfield Collieries, Centennial Coal Company, Donaldson Coal, Gloucester Coal, Idemitsu Australia Resources, Integra Coal, White Mining Limited and Whitehaven Coal Mining Limited.

4. Submissions received by the ACCC

Prior to the draft determination

- 4.1 The Applicants provided a supporting submission with their applications for authorisation and subsequently provided four⁴³ submissions in response to issues raised by interested parties and other issues.
- 4.2 The ACCC also sought submissions from around 50 interested parties potentially affected by the application, including, coal producers, rail providers, the rail track owner and government. The ACCC received public submissions from:
- ARTC
 - Asciano
 - Ashton Coal
 - The Bloomfield Group
 - Centennial Coal
 - Coal and Allied
 - Gloucester Coal
 - Nick Greiner AC
 - Idemitsu Australia Resources Pty Ltd
 - QR National
 - The Hon. Joe Tripodi
 - Whitehaven Coal Limited
 - Dr Joseph Winsen
 - Xstrata Coal Australia

Following the draft determination

- 4.3 On 26 February 2009 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation to the Stage 1 Allocation system until 30 June 2009.
- 4.4 Following the release of the draft determination, the ACCC received one submission from Shenhua Watermark Coal Pty Ltd.
- 4.5 Pacific National requested the ACCC to hold a conference in relation to the draft determination. The conference was held in Sydney on 2 April 2009. PWCS provided a submission in response to issues raised at the conference.

⁴³ One supplementary submission in response to issues raised by interested parties was lodged by PWCS only.

4.6 The primary issues raised at the conference include:

- A significant volume of work has been undertaken by industry representatives to develop a meaningful long term solution to the capacity issues facing the Hunter Valley coal chain – particularly port and government related issues. However, to date, the focus of discussion has been on port-based issues and not on ‘whole of coal chain’ issues.
- Concern that the Implementation Memorandum (at that time) will not facilitate the signing of long term contracts.
- The various port-based capacity balancing systems that have operated at the Port of Newcastle have had a detrimental impact on above rail business. Removing the Stage 1 Allocation system would return the operation of the coal chain to a commercial basis.
- Acknowledgement that the issue of contractual alignment had not progressed as much as it could have at this stage, but the issue would be focused upon in the next stages of the development of the long term solution.
- There is a clear need for a long term solution that includes the components of port, above rail and below rail. While the Stage 1 Allocation system is not perfect, it provides certainty for producers in respect of their allocations at port.

4.7 The views of the Applicants and interested parties are outlined in the ACCC’s evaluation of the arrangements in Chapter 6 of this determination. Copies of all public submissions and oral submissions at the conference held in relation to the draft determination are available from the ACCC website www.accc.gov.au (by following the ‘Public registers’ and ‘Authorisations and notifications’ links).

5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

Application A91110

- 5.2 The Applicants lodged application for authorisation A91110 under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3 The relevant test is found in section 90(8) of the Act.
- 5.4 Section 90(8) states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

Application A91111

- 5.5 The Applicants lodged application for authorisation A91111 under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.
- 5.6 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

Application A91112

- 5.7 The Applicants lodged application A91112 under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply. The relevant test for this application is found in section 90(8) of the Act.
- 5.8 Section 90(8) states that the ACCC shall not authorise the proposed conduct, unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the proposed conduct should be authorised.

Application of the tests

- 5.9 There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).
- 5.10 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.⁴⁴
- 5.11 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁴⁵
- 5.12 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.13 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).

Definition of public benefit and public detriment

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

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴⁶

⁴⁴ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

⁴⁵ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

⁴⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

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

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴⁷

Future with-and-without test

5.16 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.⁴⁸

5.17 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

Length of authorisation

5.18 The ACCC can grant authorisation for a limited period of time.⁴⁹

Conditions

5.19 The Act also allows the ACCC to grant authorisation subject to conditions.⁵⁰

Future and other parties

5.20 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future⁵¹
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁵²

⁴⁷ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

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

⁴⁹ Section 91(1).

⁵⁰ Section 91(3).

⁵¹ Section 88(10).

⁵² Section 88(6).

6. ACCC evaluation

6.1 The ACCC's evaluation of the Stage 1 Allocation system is in accordance with the net public benefit test outlined in Chapter 5 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the Stage 1 Allocation system.

The market

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

6.3 The ACCC did not receive any submissions from the Applicants or interested parties directly commenting on the relevant markets.

6.4 In its previous determinations concerning the various capacity balancing systems at the Port of Newcastle, the ACCC considered the relevant areas of competition affected by the proposed conduct to be:

- the global market for coal (or at least the Asian coal market) and
- the market for the provision of coal loading services for bulk coal carrying ships in the Newcastle region.

6.5 For the purposes of assessing the current applications for authorisation lodged by PWCS and NCIG, the ACCC's view on market definition is unchanged.

The counterfactual

6.6 In order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.

6.7 Prior to the draft determination, the Applicants submitted that in the absence of a capacity balancing system at the Port of Newcastle from 1 January 2009, a substantial vessel queue will re-form offshore. In particular, the Applicants submitted:⁵³

- The Port of Newcastle faces continuing high vessel arrival rates which reflect high demand for Hunter Valley coal.
- Until capacity expansion takes place, the industry will continue to face capacity constraints across the whole coal chain. Coal chain capacity for 2009 is expected to be approximately 94 million tonnes, with forecast demand for coal loading services of 123 million tonnes.
- Unless a system is implemented to manage the coal chain capacity limitations, a significant queue of vessels will re-form at the Port of Newcastle, giving rise to substantial demurrage costs.

⁵³ The Applicants' supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, p 8.

- 6.8 At the time of lodging the applications, the Applicants noted there were approximately 28 ships in the queue waiting to load coal. Absent the introduction of the Stage 1 Allocation system, the Applicants estimated that the queue could increase to peak at levels in excess of 70 ships (as seen prior to the reinstatement of the Capacity Balancing System in 2007, following the industry's decision to 'switch off' the system).⁵⁴
- 6.9 A number of interested parties supported the Applicants' view. In particular, Ashton Coal submitted:
- ...absent an allocation system being effective 1st January 2009, there will be significant and wide ranging adverse effects resulting from the expected increase in the off port vessel queue.⁵⁵
- 6.10 Similarly, Coal and Allied submitted:
- ...absent an interim capacity balancing system, a substantial vessel queue will re-form off the port of Newcastle.⁵⁶
- 6.11 Xstrata considers that absent the Stage 1 Allocation system:
- ...the queue could reach an average of 55 vessels and peak at levels higher than this.⁵⁷
- 6.12 Further, Gloucester Coal is of the view that:
- ...in the absence of PWCS Allocation Stage 1, ship queues and hence demurrage will increase, with adverse financial impacts on Gloucester Coal and all other producers.⁵⁸
- 6.13 Asciano considered the appropriate counterfactual in this instance is the circumstance where there is no system in place to align or manage vessel arrivals.⁵⁹
- 6.14 No interested party provided a substantial submission in response to the ACCC's conclusion in its draft determination about the counterfactual.

ACCC's view

- 6.15 The ACCC notes that there is an ongoing imbalance between the demand for coal loading services and the capacity of the Hunter Valley coal chain. At the time the application was lodged it was estimated that demand will exceed the capacity of the coal chain by 29 million tonnes in 2009.
- 6.16 The ACCC notes that the current global economic downturn has resulted in a significant reduction in demand for coal. This is reflected in massive recent reductions in spot prices, particularly coking coal.

⁵⁴ Ibid, p 9.

⁵⁵ Submission from Ashton Coal Mines Limited, 5 December 2008, p 1.

⁵⁶ Submission from Coal and Allied, 5 December 2008, p 1.

⁵⁷ Submission from Xstrata Coal, 5 December 2008, p 2.

⁵⁸ Submission from Gloucester Coal, 5 December 2008, p 2.

⁵⁹ Submission from Asciano, 7 December 2008, p 3.

- 6.17 The ACCC understands that demand for thermal coal, which currently accounts for 80 per cent of coal exported through the Port of Newcastle, has not softened to the same extent as coking coal at this stage. It is likely that demand for 2009 will be significantly lower than 2008 levels.
- 6.18 However, in light of the ongoing demand and capacity imbalance in the Hunter Valley coal chain, and taking into account that demand for thermal coal has not reduced as significantly as coking coal, the ACCC considers that without authorisation of the Stage 1 Allocation system, the size of the vessel queue at the Port of Newcastle is likely to be larger over the period for which authorisation is sought than would otherwise be the case, causing coal producers to incur substantial demurrage charges. Without a capacity balancing system in place, and therefore the requirement that a producer must have sufficient available coal loading allocation for coal to be loaded, producers are likely to send ships to port an earlier stage in order to ensure that their coal gets loaded on an 'order of arrival' basis.

Public benefits

- 6.19 The Applicants submit the Stage 1 Allocation system will deliver public benefits, including:
- savings to the industry from reduced demurrage and stockpiling costs
 - a reduction in the environmental and safety risks associated with a large number of bulk cargo vessels offshore and
 - maintaining the international reputation of the Hunter Valley coal chain.
- 6.20 In considering public benefits - particularly cost savings from increases in productive efficiency from conduct proposed for authorisation - the ACCC applies a public benefit standard when determining the weight to be given to productive efficiency savings. That is, the ACCC will consider how much weight society considers should be attached to a public benefit. Of particular interest will be the number and identity of the proposed beneficiaries.
- 6.21 The ACCC has on a number of occasions previously assessed the likely public benefits generated by the various capacity balancing systems that have operated at the Port of Newcastle since 2004. The ACCC notes that similar public benefit claims are made by the Applicants in this current application.
- 6.22 Following the draft determination, Asciano submitted that the public benefits articulated in the ACCC's draft determination of 26 February 2009 with regard to reduced vessel queues and demurrage, increased certainty for producers and improving the reputation of the Hunter Valley coal industry have all reduced materially since the draft determination. However, Asciano did not elaborate on this claim.

Demurrage and stockpiling cost savings

Submissions

- 6.23 At the time of lodging the current applications for authorisation, the Applicants submitted that if no system is in place, the vessel queue could increase to peak at levels in excess of 70 vessels. Based on vessel demurrage rates at the time, the Applicants submitted that an average vessel queue of 55 vessels would generate demurrage costs of \$US 400 million in 2009.⁶⁰
- 6.24 On the other hand, the Applicants argued that authorising the Stage 1 Allocation system will ensure that the vessel queue can be managed to a level of around 20-25 vessels. The Applicants submitted this would produce a saving of over \$US 300 million in demurrage costs over 2009.⁶¹
- 6.25 Further, the Applicants submitted that preventing an increase in the vessel queue will provide greater certainty to producers as to when a particular shipment of coal will be loaded and how much they will be able to export in each period. The Applicants submitted that greater certainty allows producers to more effectively manage their production and stockpiling of coal, and as a result reduce their stockpiling costs.⁶²
- 6.26 In this regard, Bloomfield Collieries submitted that if the Stage 1 Allocation system is not authorised:
- ...the uncertainty in the quantum and timing of port access for producers is likely to reduce Bloomfield's (and all Producer's) reliability of supply, thereby putting at risk long term contracts, and increasing the cost of doing business out of the Port of Newcastle for both customers and producers because of increased ship queues.⁶³
- 6.27 Similarly, Whitehaven Coal submitted that the Stage 1 Allocation system will provide:
- ...an orderly system of loading coal through PWCS in the short term and minimize demurrage while negotiations on a long term allocation system are concluded.⁶⁴
- 6.28 The HVCCLT submitted that until a long term commercial framework is implemented, some form of capacity balancing system is required to provide certainty for producers.⁶⁵

⁶⁰ The Applicants' supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, p 24.

⁶¹ Ibid.

⁶² Ibid, p 25.

⁶³ Submission from Bloomfield Collieries Pty Limited, 5 December 2008, p 2.

⁶⁴ Submission from Whitehaven Coal Limited, 5 December 2008, p 1.

⁶⁵ ACCC, *Pre-decision conference minutes*, 2 April 2009, p 4.

6.29 While Asciano is of the view that a queue management system does result in smaller queues than would otherwise be the case, it contends that the size of the potential demurrage savings under the proposed Stage 1 Allocation system appear to have been overstated by the Applicants. Asciano believes it is unclear whether the Applicants' claimed demurrage savings of \$US 300 million for 2009 covers the full calendar year. In particular, Asciano submitted that:

As the authorisation is only being sought for 6 months, the benefits that will accrue need to be measured across that period...Further, given the increased average queue length experienced in 2008 under the revised CBS and the recent reduction in demurrage rates, the claimed benefit appears high, even for an annual calculation.⁶⁶

6.30 In response, the Applicants submitted that 'Asciano provides no evidence that any calculations or information provided by PWCS and NCIG are incorrect'.⁶⁷ Further the Applicants note that 'both Xstrata and Coal and Allied have indicated in their submissions to the ACCC that they support the vessel queue assumptions and estimate of demurrage charges set out in the authorisation application'.⁶⁸

ACCC's view

6.31 The ACCC considers the size of the vessel queue at the Port of Newcastle is likely to be larger in the short term absent authorisation of the Stage 1 Allocation system. As such, the ACCC believes that the Stage 1 Allocation system is likely to result in public benefits by reducing deadweight demurrage costs incurred by Australian coal producers and hence improving economic efficiency compared to a situation where a vessel queue persists.

6.32 However, the ACCC notes Asciano's concerns that the Applicants' estimated demurrage savings of \$US 300 million for 2009 may be overstated. In particular, this figure relates to demurrage savings over the full calendar year, rather than just the six month period for which authorisation is sought.

6.33 The ACCC notes the global economic downturn appears to be reducing demand for thermal coal, and hence the potential size of the vessel queue absent the Stage 1 Allocation system may not be as large as initially suggested by the Applicants.

6.34 For the above reasons, the ACCC considers the level of demurrage savings generated by the Stage 1 Allocation system for the period 1 January 2009 to 30 June 2009 is likely to be significantly lower than the claimed savings of \$US 300 million. However, while difficult to quantify precisely, the ACCC accepts the Applicants' submission that the Stage 1 Allocation system will provide demurrage savings.

6.35 The ACCC also considers the Stage 1 Allocation system is likely to provide greater certainty to producers regarding their coal shipments, which in turn should allow producers to more accurately forecast production levels and maintain optimal stockpiling. The ACCC considers this to be an additional public benefit provided by the Stage 1 Allocation System.

⁶⁶ Submission from Asciano, 7 December 2009, p 7.

⁶⁷ Submission from the Applicants, 10 December 2008, p 3.

⁶⁸ Ibid, pp 3, 4.

Reduced environmental and safety risks

Submissions

- 6.36 The Applicants submitted that the proposed Stage 1 Allocation system will assist in reducing the environmental and safety risks associated with a large number of bulk cargo vessels off the Port of Newcastle and assist in protecting the unique reefs and historic ship wrecks surrounding the Newcastle Harbour.⁶⁹
- 6.37 In support of this claim, the Applicants refer to the Australian Transport Safety Bureau's report following the Pasha Bulker incident in 2007, which concluded:

The queue of 57 ships off Newcastle on 7 June 2007 increased the risk of collisions, groundings and other difficulties in the subsequent heavy weather. Capacity allocation systems have proved effective in reducing the queue in the past and, consequently, reduced the risk of ships, the port and the environment. The significant public benefit of enhanced safety that results from a reduced queue has not been identified or recognised during the application process for the authorisation of these allocation systems.⁷⁰

ACCC's view

- 6.38 The ACCC considers that to the extent the Stage 1 Allocation system results in smaller vessel queues, this is likely to generate a benefit to the public by reducing the environmental and safety risks associated with vessel queues waiting offshore at the Port of Newcastle.

Maintaining the international reputation of the Hunter Valley coal industry

Submissions

- 6.39 While the Applicants submitted that the likely substantial increase in the size of the vessel queue absent the Stage 1 Allocation system is a result of continuing strong demand for Hunter Valley coal, any such increase in the queue and delays in delivery to international customers is likely to have a negative impact on the reputation of the Hunter Valley coal industry. In this regard, the Applicants are of the view that faced with uncertainty about how long it will take for their coal to be loaded at the Port of Newcastle, international customers are more likely to consider alternative sources of supply.⁷¹
- 6.40 By way of example in support of this claim, the Applicants refer to a report in the Argus Coal Daily on 31 October 2007 which stated:

As traditional suppliers struggle to meet demand, Japan is diversifying supply by taking 77pc more Russian coal...

To meet strong demand and counter tight export availability in Indonesia and Australia, Japan's supply from Russia is climbing...⁷²

⁶⁹ The Applicants' supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, p 23.

⁷⁰ Ibid.

⁷¹ Ibid, p 25.

⁷² Ibid.

ACCC's view

- 6.41 The ACCC considers there are a number of factors which potentially influence the purchasing decision of coal buyers, including certainty and timeliness of delivery of coal.
- 6.42 In its consideration of previous applications for authorisation of capacity balancing systems, the ACCC has concluded that, to the extent a large vessel queue at the Port of Newcastle discourages customers from purchasing coal from the Hunter Valley, such systems have the potential to improve the reputation of the Hunter Valley coal industry and the Port of Newcastle, and to maintain or increase coal sales, by reducing the size of the queue. In previous matters, the ACCC has received submissions from international customers expressing concerns about the size of the vessel queue.
- 6.43 Similarly, the ACCC is satisfied that the proposed Stage 1 Allocation system may maintain the reputation of the Port of Newcastle and the Hunter Valley coal industry by limiting the size of the vessel queue and increasing buyer certainty with respect to coal delivery times. The ACCC considers maintaining or improving the international reputation of the Hunter Valley coal industry constitutes a public benefit.

ACCC conclusion on public benefits

- 6.44 The ACCC considers the proposed Stage 1 Allocation system is likely to result in the following public benefits:
- reduced vessel queues and associated demurrage costs
 - reduced coal stockpiling and increased certainty for producers regarding coal shipments
 - reduced environmental and safety risk associated with vessel queues waiting offshore and
 - maintaining or improving the international reputation of the Hunter Valley coal industry.

Public detriment

- 6.45 In its previous determination of 23 April 2008,⁷³ the ACCC granted authorisation to extend the operation of the capacity balancing system at the Port of Newcastle until 31 December 2008, to provide a transition period that would allow for the development of a longer term solution to address the ongoing capacity constraints within the Hunter Valley coal chain. The ACCC concluded that the capacity balancing system was likely to generate public detriment in the form of reduced incentive to develop a long term solution to address capacity constraints in the coal chain, reduced incentive for service providers to invest and the potential for job losses and inefficient allocation of infrastructure.
- 6.46 For the current application, the Applicants submitted that the Stage 1 Allocation system will have little impact on competition in any market, for the following reasons:
- it will not have any impact on the total volume of coal shipped through the Port of Newcastle in the short term because the Hunter Valley coal chain will continue to operate at its maximum available capacity and
 - exporters will continue to compete against each other both in relation to production and sales to overseas customers.⁷⁴
- 6.47 Prior to the draft determination, the primary concerns raised by interested parties in relation to the Stage 1 Allocation system were that it will delay the development of a long term solution to the ongoing Hunter Valley capacity constraints, reduce investment in infrastructure by service providers and have a negative impact on individual producer's coal export volumes.
- 6.48 The ACCC's draft determination of 26 February 2009 proposed to grant authorisation to the Stage 1 Allocation system until 30 June 2009. The ACCC considered that ongoing progress by the Hunter Valley coal industry towards implementing a 'whole of coal chain' long term solution was critical to the arrangements continuing to be in the public interest. A key component of the industry's ongoing progress would be the negotiation and finalisation of an agreed Implementation Memorandum by the Applicants and NPC.
- 6.49 Following the draft determination, Asciano submitted that the industry has not made sufficient progress towards implementing a 'whole of coal chain' long term solution. In particular, it believes that to date, much of the work has focused on port-based issues only.
- 6.50 An assessment of the public detriment generated by the Stage 1 Allocation system follows.

⁷³ ACCC Determination of 28 April 2008 in respect of applications for authorisation lodged by Newcastle Port Corporation (A91072-A91074) and Donaldson Coal (A91075-A91077).

⁷⁴ The Applicants' supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, p 12.

Delaying development of a long term solution to ongoing capacity constraints

Submissions

- 6.51 At the time the applications for authorisation were lodged, Coal and Allied considered that only limited progress towards developing key principles for a broadly supported long term solution had been made following the completion of the Greiner Review. Having said this, Coal and Allied considered it was important that:
- ...discussions and negotiations continue, with the active engagement of the Producers and the Government, and in the constructive environment which an interim capacity allocation system will foster...⁷⁵
- 6.52 Xstrata considered that there will be no public detriment from the Stage 1 Allocation system:
- So long as the approval for Stage 1 capacity allocation is for a defined and limited period of time...⁷⁶
- 6.53 Further, Xstrata agreed that:
- ...an interim form of capacity allocation is required to mitigate the risk of excessive vessel queuing and to facilitate the transition to a sustainable and 'whole of coal chain' long term solution.⁷⁷
- 6.54 Prior to the draft determination, Asciano argued that the Stage 1 Allocation system mitigates the most obvious symptom of the underlying capacity constraints in the Hunter Valley coal chain – namely, an excessive vessel queue and consequential demurrage costs – which undermines the urgency that would otherwise prevail amongst a number of stakeholders to find a workable solution.⁷⁸
- 6.55 In particular, Asciano submitted:
- This allows parties the luxury of seeking to defend or improve positions that they might otherwise be willing to compromise for the benefit of the system as a whole, or merely allows prevarication where participants believe they are protected against the risk of inaction.⁷⁹
- 6.56 Asciano is of the view that the cumulative effect from failing to move to a long term solution will ultimately have a significantly greater cost than the immediate demurrage savings.⁸⁰

⁷⁵ Submission from Coal and Allied, 5 December 2008, p 2.

⁷⁶ Submission from Xstrata Coal, 5 December 2008, p 1.

⁷⁷ Ibid, p 3.

⁷⁸ Submission from Asciano, 7 December 2008, p 3.

⁷⁹ Ibid, p 4.

⁸⁰ Ibid.

6.57 Following the draft determination, Asciano acknowledged the ongoing efforts of the industry to date, noting that a number of key port and government related issues had been significantly progressed.⁸¹ However, Asciano submitted that:

...many of the key fundamentals of a 'whole of coal chain' long term solution have not been adequately addressed during the negotiation of the IM [Implementation Memorandum] by NPC, PWCS and NCIG...and even if executed, the IM does not meet the ACCC stated requirement of enabling parties to enter long term contracts to give effect to the long term solution.⁸²

6.58 Prior to the draft determination, the Applicants submitted that authorisation of the Stage 1 Allocation system would not remove the incentive for the industry to continue to work to finalise a long term solution to the ongoing capacity constraints in the Hunter Valley coal chain. At that time, the Applicants argued this was evidenced by the NSW Government's announcement of the proposed long term terminal access framework in December 2008, as well as the ongoing work of the industry and government (detailed at paragraphs 2.46 to 2.49 of this determination) since interim authorisation was granted to the Stage 1 Allocation system.⁸³

6.59 Following the draft determination, PWCS submitted that the signing of the Implementation Memorandum is a substantial step towards the implementation of a binding long term solution, based on long term contracts and clear triggers for capacity expansion. However, it acknowledges that ongoing work in relation to alignment of contracts and operational matters across the entire coal chain is required. To facilitate this, PWCS is of the view that the Implementation Memorandum clearly encompasses a process for further developing alignment of contracts and capacity across the Hunter Valley coal chain – involving track access (through the ARTC access undertaking), above rail access, potential expansions of both terminal and rail infrastructure and coordination of logistics functions.⁸⁴

6.60 Further, PWCS considers that it is not apparent from Asciano's submission how the further development of contractual alignment principles and practices would be assisted in the absence of the Stage 1 Allocation system. In addition, PWCS considers it is unclear how allowing authorisation of the Stage 1 Allocation system to continue for the period of authorisation sought (namely, until 30 June 2009) would involve substantial public detriments.⁸⁵

ACCC's view

6.61 As noted in Chapter 2 of this determination, a capacity balancing system has essentially been in operation at the Port of Newcastle since March 2004.

⁸¹ ACCC, *Pre-Decision Conference Minutes, Authorisation A91110-A91112 lodged by PWCS and NCIG*, 2 April 2009, attachment – Asciano/Pacific National draft determination comments.

⁸² Ibid.

⁸³ Submission from the Applicants, 10 December 2008, p 1.

⁸⁴ Submission from PWCS, 24 April 2009, pp 1, 2.

⁸⁵ Ibid, p 2.

- 6.62 The ACCC has previously expressed concern that the longer capacity balancing systems remain in place, the more likely it is that the operation of such schemes act to reduce the incentive for industry to develop and implement long term strategies for addressing capacity constraints. This would be likely to generate significant public detriment in the form of foregone exports resulting from the failure of the industry to develop a long term solution and as such, undertake efficient investment in infrastructure expansion.
- 6.63 Since the current application in relation to the Stage 1 Allocation system was lodged with the ACCC in November 2008, the industry has continued to progress the development of the long term solution to the Hunter Valley coal chain capacity issues – commencing with the long term terminal access framework announced in December 2008 and the formation of various industry working groups in early 2009.
- 6.64 A significant milestone for the industry was the signing of the Implementation Memorandum by PWCS, NCIG and the NPC in early April 2009. The ACCC considers that the Implementation Memorandum sets out a sufficiently detailed framework and processes as to how the long term solution will be implemented on a timely basis. In particular, the Implementation Memorandum contains a binding commitment by the parties to prepare relevant contracts and other documents by 15 June 2009 to implement the long term solution – for example, amendments to the terminal leases with the NSW Government, preparation of long term ship or pay contracts with producers, capacity allocation procedures at the coal loading terminals and coal chain access protocols. Given the Implementation Memorandum has now been signed, the proposed condition contained within the ACCC’s draft determination of 26 February 2009 is no longer required.
- 6.65 While acknowledging the work carried out to date, as noted above there is still a considerable volume of work to be completed by the industry in order to implement the long term solution within the industry’s timeframes. For instance, further work is required by the industry to give effect to the agreed guiding principles on contractual alignment contained within Schedule 5 to the Implementation Memorandum – including the development of System Assumptions underpinning the determination of track and port capacity; coal chain access protocols and processes; and processes by which system capacity is managed and consumption of system capacity is reported.
- 6.66 In this regard, the ACCC considers that a critical element of any long term solution in the Hunter Valley is the development of a mechanism to ensure contracts for capacity with all service providers across the coal chain are aligned, including above and below rail, and that service providers enter into contracts based on the capacity of the coal chain as a whole, rather than the capacity of their individual components of the supply chain.
- 6.67 The ACCC is satisfied that work to finalise the long term solution to the capacity constraints in the Hunter Valley continues to progress. Accordingly, it appears that the Stage 1 Allocation system has not removed the incentive for industry to finalise a long term solution.
- 6.68 For the reasons outlined above, the ACCC is of the view that the Stage 1 Allocation system is unlikely to delay the finalisation of the long term solution and as such, is likely to result in little, if any, public detriment in the period until 30 June 2009.

Impact on investment and efficient operation of the Hunter Valley coal chain

Submissions

- 6.69 Concerns have been raised with the ACCC that the Stage 1 Allocation system will result in additional costs being borne by rail operators.
- 6.70 QR National supports authorisation of the Stage 1 Allocation system on the basis that it is a short term solution only. It believes that allocating available coal chain capacity at the producer level rather than at the mine level removes a level of flexibility from a rail operator's mode of operations.⁸⁶ In particular, QR National submitted that:
- ...by allocating capacity at the producer level, a rail operator does not gain certainty on its resourcing needs until the producer has indicated how it intends to allocate its available coal chain capacity amongst its specific mines. While the impact is usually not significant, the monthly allocation amongst larger producers does create some short term resourcing issues for a rail operator.
-QR National Coal is only comfortable with continuing to absorb costs associated with these short term resources issues on the basis that this issue will be addressed through the development of a long term solution.⁸⁷
- 6.71 Asciano submitted that to date, its cooperation in relation to the operation of the various port-based capacity balancing systems in the Hunter Valley, on which the Stage 1 Allocation system is based, has had a negative impact on its operational efficiency and commercial outcomes. For instance, it submitted that:
- There are examples of coal haulage contracts where there is long term commitment by a producer to rail a certain volume which then requires Asciano to provide a certain level of rolling stock, crew, and other resources. However, if the queue management system reduces the producers' entitlement to port capacity, the contracted volumes are not carried notwithstanding that Asciano has had the rolling stock and people available to meet the full contracted volumes.⁸⁸
- 6.72 In addition, Asciano noted the allocation received by a producer under the Stage 1 Allocation system is specified in terms of tonnes, and takes no account of the coal chain capacity consumed to deliver those tonnes to the port. Therefore, a tonne is treated the same way whether the mine is a short or long distance from the port, and without consideration of the mine, track and train infrastructure available to support the allocation. Asciano is of the view that this causes losses in throughput as a result of inefficient use of infrastructure and significant above rail operational inefficiency.⁸⁹
- 6.73 In support of this claim, Asciano refers to the HVCCLT's report that the previous Capacity Balancing System has lead to system underperformance and 'has estimated that approximately 1.4 million tonnes will be lost in 2008 due to consumption of allocation varying from the demand profile assumed in the annual system capacity declaration.'⁹⁰

⁸⁶ Submission from QR National, 3 December 2008, p 1.

⁸⁷ Ibid, pp 1, 2.

⁸⁸ Submission from Asciano, 7 December 2008, p 6.

⁸⁹ Ibid, p 5.

⁹⁰ Ibid.

6.74 Further, Asciano is of the view that the Stage 1 Allocation system will defer necessary investment in above rail infrastructure. In particular, Asciano submitted:

The Stage 1 Allocation does not attempt to address the underlying issues required to overcome the current problems and therefore must be seen as perpetuating the short comings of the existing CBS. A practical example of this is the lack of investment in trains to match the increased port capacity currently under construction. The current uncertainty with regard to any future contracted volumes undermines business cases and limits the investments Asciano has been able to make.⁹¹

6.75 In response, the Applicants submitted that the issues raised by Asciano should be able to be addressed in the context of the long term solution being advanced by the Applicants, producers and the NSW Government. In this regard, the Applicants noted that Asciano, and other service providers in the Hunter Valley coal chain, will be involved in ongoing discussions concerning contractual alignment.⁹²

ACCC's view

6.76 In previous assessments of capacity balancing systems at the Port of Newcastle, the ACCC has noted that significant public detriment would arise, in the form of lost coal exports, if the effect of these schemes was to delay efficient investment to increase capacity of the Hunter Valley coal chain. The ACCC also considered that the risk of this occurring was likely to increase the longer these capacity balancing systems remain in place.

6.77 Most recently the ACCC concluded that the operation of the capacity balancing system during 2008, which relied on pro-rata reductions of producers' demand nominations at the port, does not provide the appropriate commercial incentives for efficient investment in additional coal chain capacity.

6.78 With regard to investment, the ACCC acknowledges there have been a number of expansion activities that have been completed or commenced in the Hunter Valley over the last few years. As noted in Chapter 2 of this determination, expansion is underway to increase capacity at PWCS' terminal from 102 million tonnes per annum to 113 million tonnes per annum by mid 2009. In addition, the construction of the first stage of the new NCIG terminal is underway, which will deliver an additional 30 million tonnes of coal per annum when it is completed in the first quarter of 2010. The construction of a fourth coal loading terminal (T4) at the Port of Newcastle is also the subject of ongoing discussions with the NSW Government as part of the long term solution.

6.79 Having said this, the ACCC considers that if the appropriate long term commercial framework had existed in the Hunter Valley over the last few years, more timely investment is likely to have occurred across the entire coal chain.

⁹¹ Ibid, p 6.

⁹² Submission from the Applicants, 10 February 2009, pp 1, 2.

6.80 The ACCC is satisfied that there is evidence of significant progress now being made by the industry towards developing a long term solution to the ongoing capacity constraints. In this environment, and given authorisation is sought for the Stage 1 Allocation system until 30 June 2009 only, the ACCC considers that the proposed system is unlikely to result in substantial public detriment by deferring investment, compared to what is likely to happen in the absence of the Stage 1 Allocation system.

Impact on aggregate coal exports and individual mines

Submissions

6.81 The Applicants submitted that as with previous capacity balancing systems, the Stage 1 Allocation system will not limit the total volume of coal actually shipped through the Port of Newcastle. Under the Stage 1 Allocation system, producers will simply receive an equitable allocation of the available coal chain capacity based on the greater of the producer's 2008 demand nomination (proportionally reduced to 95 million tonnes) or their highest actual allocation usage between 2004 and 2007.⁹³

6.82 Centennial Coal submitted that there is a need for an industry solution to manage access to coal loading services at the Port of Newcastle. However, it believes the Stage 1 Allocation system is not the appropriate solution.⁹⁴

6.83 In particular, Centennial Coal is concerned that the methodology for calculating coal loading allocation under the proposed Stage 1 Allocations will significantly reduce its coal export volumes in 2009 and beyond. In particular, Centennial Coal submitted that the coal loading allocation it would receive under the proposed Stage 1 Allocation system would mean that it would:

...be effectively locked out from exporting and would not be able to continue supplementing its lower priced domestic contracts with higher prices derived on export. This would force Centennial to reassess its business model and could lead to reduced production and job losses from currently operating mines.⁹⁵

6.84 In short, Centennial Coal submitted that the current applications for authorisation of the Stage 1 Allocation system adopt a different methodology for calculating individual producer's allocations than what was agreed by producers during the Greiner Review. Centennial Coal submitted that the Producer Agreement, which formed part of the Greiner Report on the Hunter Valley coal chain, adopted a definition of '*highest throughput*' for 2004-2007, rather than '*highest allocation usage*' as proposed by the Applicants in the supporting submission to the current applications for authorisation.⁹⁶

⁹³ The Applicants supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, p 22.

⁹⁴ Submission from Centennial Coal, 8 December 2008, p 1.

⁹⁵ Submission from Centennial Coal, 8 December 2008, p 2.

⁹⁶ Submission from Centennial Coal, 19 December 2009, p 2.

6.85 Centennial Coal submitted that the ACCC should impose a condition of authorisation for the Applicants to amend the Stage 1 Allocation system as follows:⁹⁷

- increase the Aggregate Base Tonnage from 96.7 million tonnes to 97.1 million tonnes (through Centennial being able to utilise available back loading and empty rail wagons running past its Newstan mine)
- allocate capacity using actual throughput as measured by bill of lading tonnage.

6.86 In contrast, the ACCC's notes Bloomfield's submission that:

...the Producer Base Tonnages described in section 4.5 [of the supporting submission to the applications for authorisation] will address the inequitable impact that the current CBS has had on Bloomfield, whereby Bloomfield's CBS tonnage allocation has been reduced by over 20% since 2004.⁹⁸

6.87 Similarly, Gloucester Coal submitted that in recent years its coal exports have been limited by constraints in the Hunter Valley coal chain and the operation of the capacity balancing system. In regard to the Stage 1 Allocation system, Gloucester Coal stated:

The process outlined in section 4.5 of the submission [in support of the current applications for authorisation] will...restore Gloucester Coal's potential sales to 2005 levels.⁹⁹

6.88 In response to Centennial Coal's claims, PWCS submitted that the Stage 1 Allocation system accurately reflects the agreed methodology for access outlined in Mr Greiner's letter to Minister Tripodi dated 1 July 2008.¹⁰⁰

6.89 Further, PWCS stated that:

...it has not calculated individual figures for producers using the method of allocation advocated by Centennial. However, it would inevitably change individual figures for some producers as well as the aggregate. This would have a flow on effect to the allocations of all producers.¹⁰¹

6.90 As regards Centennial Coal's proposal to back load trains, PWCS submitted this 'would appear to have the effect of changing one input into the allocation methodology and assumptions relating to coal chain capacity which would have consequential impacts on other producers and service providers.'¹⁰²

ACCC's view

6.91 The ACCC considers that any decrease in the total volume of coal moved through the Hunter Valley coal chain and exported from Australia as a result of the implementation of the Stage 1 Allocation system would constitute a public detriment.

6.92 In its previous assessments of the various capacity balancing mechanisms, the ACCC concluded that public detriment arising from a reduction in the aggregate volume of coal moved through the Hunter Valley coal was likely to be negligible.

⁹⁷ Submission from Centennial Coal, 8 December 2008, p 4.

⁹⁸ Submission from Bloomfield Collieries Pty Limited, 5 December 2008, p 2.

⁹⁹ Submission from Gloucester Coal, 5 December 2008, p 2.

¹⁰⁰ Submission from PWCS, 10 February 2009, p1.

¹⁰¹ Ibid.

¹⁰² Ibid.

- 6.93 In particular, the ACCC concluded that in the absence of the capacity balancing systems, the Hunter Valley coal chain would not have been able to move any more coal. The objective of these mechanisms, like the Stage 1 Allocation system, is to allocate a proportion of the available coal chain capacity to producers against which vessel arrivals could be coordinated with greater certainty.
- 6.94 The ACCC is of the view that any reduction in the total volume of coal moved through the Hunter Valley coal chain as a result of the proposed Stage 1 Allocation system is likely to be negligible.
- 6.95 With regard to the potential detrimental impact of the Stage 1 Allocation system on individual mines such as Centennial Coal, the ACCC notes submissions from other producers that have received increased allocations compared with previous years. The ACCC considers the transfer of loading capacity from one producer to another does not in itself generate significant public detriment, as it is offset by other producers receiving increased capacity.
- 6.96 While the individual impact on Centennial Coal may be significant, the ACCC considers the issues it raises are distributional in nature and are more appropriately addressed in any ongoing negotiations and processes between industry participants and the NSW Government.

ACCC conclusion on public detriments

- 6.97 The ACCC considers that any delays to the finalisation of the long term solution to the ongoing capacity constraints in the Hunter Valley coal chain are likely to result in substantial detriments in the form of foregone exports. However, the ACCC is satisfied that significant progress is being made towards the finalisation of a long term solution in the Hunter Valley coal chain. Accordingly, the ACCC considers the Stage 1 Allocation system is unlikely to delay the finalisation of the long term solution and as such, is likely to result in little, if any public detriment in the period until 30 June 2009.
- 6.98 The ACCC considers any public detriment from the reduction in aggregate coal exports under the Stage 1 Allocation system is likely to be negligible. The ACCC also considers that the Stage 1 Allocation system is unlikely to defer investment to expand coal chain capacity in the period for which authorisation is sought.

Balance of public benefit and detriment

- 6.99 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Stage 1 Allocation system is likely to result in a public benefit that will outweigh any public detriment.
- 6.100 In the context of applying the net public benefit test at section 90(8)¹⁰³ of the Act, the Tribunal commented that:
- ...something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹⁰⁴
- 6.101 As set out at paragraph 6.44 above, the ACCC is satisfied that the Stage 1 Allocation is likely to result in public benefits, including demurrage savings for producers and reducing the environmental and safety risks associated with a vessel queue offshore.
- 6.102 On the other side, the ACCC considers that any delays to the finalisation of the long term solution to the ongoing capacity constraints in the Hunter Valley coal chain would result in substantial public detriment in the form of foregone exports. However, the ACCC is satisfied that significant progress has been, and continues to be made by the industry and NSW Government towards finalising a long term solution in the Hunter Valley.
- 6.103 On balance, the ACCC considers the public benefit flowing from the Stage 1 Allocation system is likely to result in a net public benefit in the short term.

Length of authorisation

- 6.104 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 6.105 In this instance, the Applicants seek authorisation of the Stage 1 Allocation system until 30 June 2009. The Applicants submitted this timeframe will enable ‘the facilitative process of the last three months to continue and will provide a structured environment while the long term solution is to be finalised and implemented.’¹⁰⁵
- 6.106 In its draft determination, the ACCC proposed to grant authorisation to the Stage 1 Allocation system until 30 June 2009. The ACCC indicated that if it was not satisfied that sufficient progress towards the implementation of the long term solution continued, it would consider revoking interim authorisation and not granting authorisation in the final determination.

¹⁰³ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

¹⁰⁴ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

¹⁰⁵ The Applicants amendment to applications for authorisation A91110-A9112, 11 February 2009, p 6.

- 6.107 Since that time, the parties have negotiated and executed a detailed Implementation Memorandum. While the ACCC considers the signing of the Implementation Memorandum is a significant milestone for the industry and NSW Government, there is still a significant volume of work to be completed by the industry, particularly in relation to contractual alignment.
- 6.108 Notably, the parties have committed to preparing necessary documents by 15 June 2009 in order to implement the long term solution – for example, amendments to the terminal leases with the NSW Government, capacity allocation procedures at the coal loading terminals, coal chain access protocols and the lease between the NSW Government and Port Waratah Coal Services for a new terminal (T4) at the Port of Newcastle. The Implementation Memorandum also sets out that existing Hunter Valley coal producers will be required to sign Long Term Ship or Pay contracts with PWCS, to commence on 1 July 2009.
- 6.109 Accordingly, the ACCC considers that sufficient progress towards the implementation of a long term solution has been made by the parties to warrant authorisation of the Stage 1 Allocation system until 30 June 2009. The ACCC considers the industry has had sufficient time to finalise a long term solution to the capacity issues within the Hunter Valley coal chain.

Variations to the Stage 1 Allocation system

- 6.110 The ACCC notes that any amendments to the Stage 1 Allocation system during the proposed term of this authorisation would not be covered by the proposed authorisation.

7. Determination

The application

- 7.1 On 19 November 2008 Port Waratah Coal Services Limited and Newcastle Coal Infrastructure Group Pty Ltd (the Applicants) lodged applications for authorisation A91110-A91112 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Application A91110 was made using Form A in Schedule 1 of the Trade Practices Regulations 1974. The application was made under section 88(1) of the *Trade Practices Act 1974* (the Act) to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 7.3 Application A91111 was made using Form B in Schedule 1 of the Trade Practices Regulations 1974. The application was made under section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.4 Application A91112 was made using Form D in Schedule 1 of the Trade Practices Regulations 1974. The application was made under section 88(7) of the Act to engage in conduct to which sections 45D, 45DA or 45DB of the Act might apply.
- 7.5 In particular, the Applicants sought authorisation of:
- the PWCS Tonnage Allocation Stage 1 (Stage 1 Allocation) and
 - any Long Term Terminal Access Protocols (the Long Term Protocols) which are developed and agreed in the future by producers, the Applicants and/or any Hunter Valley coal chain participant, and which are submitted to the ACCC for approval.
- 7.6 On 11 February 2009 the Applicants amended the application to now seek authorisation of the Stage 1 Allocation system only.
- 7.7 The Stage 1 Allocation system seeks to provide access to terminal capacity for Hunter Valley coal producers and manage the coal vessel queue at the Port of Newcastle while the long term arrangements for access and capacity expansion of coal terminal infrastructure are developed and finalised by the industry.

The net public benefit test

- 7.8 For the reasons outlined in Chapter 6 of this determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 7.9 The ACCC is also satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.

- 7.10 The ACCC therefore **grants authorisation** to applications A91110-A91112 for the Stage 1 Allocation system until 30 June 2009.
- 7.11 Further, this authorisation is in respect of the Stage 1 Allocation system as it stands at the time authorisation is granted. Any changes to the Stage 1 Allocation system during the term of the proposed authorisation would not be covered by the authorisation.

Interim authorisation

- 7.12 At the time of lodging the application the Applicants requested interim authorisation so that PWCS could commence the necessary steps to implement the Stage 1 Allocation system and industry participants could move forward with greater certainty in developing a long term solution.
- 7.13 On 17 December 2008 the ACCC granted interim authorisation to the Stage 1 Allocation system until 31 March 2009, conditional upon the ACCC being satisfied that work to finalise the long term solution continues, with monthly progress reports to be provided by the parties.
- 7.14 In its draft determination of 26 February 2009, the ACCC extended interim authorisation beyond 31 March 2009, subject to the industry continuing to make substantial progress towards the implementation of the long term solution.
- 7.15 Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or unless revoked.

Date authorisation comes into effect

- 7.16 This determination is made on 13 May 2009. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 4 June 2009.

Appendixes

A — Hunter Valley Coal Chain – PWCS Tonnage Allocation Stage 1

PART A – GENERAL

1. Introduction

- 1.1 PWCS and all Producers recognise that there is an unprecedented level of demand for the export of Coal utilising the existing Coal Handling Facility at the Port of Newcastle in the foreseeable future.
- 1.2 During 2008 PWCS, in conjunction with Producers and other coal industry stakeholders, participated in a consultation process to develop the long term arrangements for the export of Coal through the Port of Newcastle.
- 1.3 The consultation led to the development of a methodology for access to the Coal Handling Facility by Producers from the commencement of 2009. This Tonnage Allocation Document is based on that methodology.
- 1.4 The Tonnage Allocation Document will be stage 1 of a transition process to the long term solution for access and it will be replaced and superseded by the Access Protocols to be developed and agreed by the Hunter Valley Coal industry on or before 30 June 2009.
- 1.5 Once the Access Protocols have received authorisation from, the Australian Competition and Consumer Commission ("ACCC"), it is intended that the Access Protocols will take effect retrospectively from 1 July 2009 subject to any requirements of the ACCC.
- 1.6 The implementation of the provisions of this Tonnage Allocation Document will be as an Annexure to the Coal Handling Services Agreement.
- 1.7 Any terms that are defined in the Dictionary in Part D of this Tonnage Allocation Document or the Dictionary at Annexure 4E of the Coal Handling Services Agreement will, when used in this Tonnage Allocation Document, have the meaning given to that term in the Dictionary. If there is any inconsistency between the meaning given to a term in either Dictionary, the meaning in the Dictionary of this Tonnage Allocation Document will apply.

2. Administration

- 2.1 The board of PWCS will as soon as possible in its absolute discretion appoint an Administrator. The Administrator will be independent of any Producer.
- 2.2 The Administrator will administer the allocation of tonnages to Producers in 2009 according to the following objectives :
 - (a) to efficiently distribute the available Coal Chain Capacity, in so far as it relates to the Coal Handling Facility, among Producers in an equitable, transparent and accountable manner;
 - (b) to achieve minimum vessel demurrage consistent with maximum export Coal throughput;
 - (c) to comply with all relevant legal requirements; and

- (d) to not adversely affect the efficient operation of the Coal Handling Facility.

3. Commencement and Duration

- 3.1 The provisions of this Tonnage Allocation Document will have no force or effect until such time that authorisation or interim authorisation is granted under the *Trade Practices Act 1974*. If such authorisation is not obtained until after 1 January 2009 then, subject to any contrary requirements of such authorisation, once authorisation is obtained the provisions of this Tonnage Allocation Document will be applied retrospectively from 1 January 2009.
- 3.2 The provisions of this Tonnage Allocation Document will continue until and have no force or effect after the earlier of
 - (a) the expiry of any authorisation granted under the *Trade Practices Act 1974*, or
 - (b) the commencement of the Access Protocols.
- 3.3 If the Australian Competition and Consumer Commission imposes any authorisation conditions in respect to or affecting any provision of the Tonnage Allocation Document, a variation must be made to this Tonnage Allocation Document to the extent required to accommodate those conditions.

4. Dispute Resolution

- 4.1 In the event that there are any disputes or issues in relation to the provisions of this Tonnage Allocation Document, other than in relation to any determination, declaration or calculation by the Administrator, PWCS or HVCCLT, the dispute resolution provisions contained in section 2.15 of the Coal Handling Services Agreement will apply.
- 4.2 Any determination, declaration or calculation by the Administrator in accordance with any provision of this Tonnage Allocation Document will in the absence of manifest error be final and binding on PWCS and each Producer and may not be the subject of the dispute resolution procedures contained in section 2.15 of the Coal Handling Services Agreement.

PART B – ACCESS

5. Capacity Declaration

- 5.1 The Administrator will determine the Available Capacity for the Relevant Period taking into account the Coal Chain Capacity and any Queue Adjustment Amount.
- 5.2 PWCS, will procure that HVCCLT calculates the Coal Chain Capacity for each Calendar Month and Calendar Quarter in 2009.
- 5.3 PWCS, with assistance from HVCCLT, will declare the volume of the Queue Adjustment Amount, consistent with meeting the Objectives, specifically to minimise vessel demurrage consistent with maximum coal chain throughput.

6. Aggregate Base Tonnages

- 6.1 The Aggregate Base Tonnage is 96.7 million tonnes.

7. Producer Base Tonnages

- 7.1 Each Producer's Base Tonnage will be determined by a comparison of each Producer's 2008 Tonnage and its Highest Actual Usage in accordance with this paragraph 7.
- 7.2 If a Producer's 2008 Tonnage is equal to or greater than its Highest Actual Usage, the Producer's Base Tonnage will be its 2008 Tonnage.
- 7.3 If a Producer's 2008 Tonnage is less than its Highest Actual Usage then if:
- (a) the difference is less than 500,000 tonnes the Producer's Base Tonnage will be its Highest Actual Usage; or
 - (b) the difference is greater than 500,000 tonnes the Producer's Base Tonnage will be:
 - (A) its 2008 Tonnage; and
 - (B) the Aggregate Base Tonnage less:
 - (I) its 2008 Tonnage; and
 - (II) the aggregate of all other Producer's Base Tonnages calculated in accordance with this paragraph 7.

8. Capacity Distribution

- 8.1 The Administrator will calculate the Pro-Rata Factor for each Producer for 2009 in accordance with the following formula:

$$\frac{\text{Producer Base Tonnage}}{\text{Aggregate Base Tonnage}}$$

- 8.2 The Administrator will calculate the Annual Pro-rata Allocation for each Producer for 2009 in accordance with the following formula:

$$\text{Annual Pro-rata Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity}$$

- 8.3 The Administrator will determine the Monthly Loading Allocations of a Large Producer in the following manner:

$$\text{Monthly Loading Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity for the Calendar Month}$$

- 8.4 The Administrator will determine the Quarterly Loading Allocations of a Small Producer in the following manner:

$$\text{Quarterly Loading Allocation} = \text{Pro-Rata Factor} \times \text{Available Capacity for the Calendar Quarter}$$

- 8.5 The Monthly Loading Allocation and Quarterly Loading Allocation calculated in accordance with this paragraph 8 are subject to adjustment in accordance with paragraph 9.

PART C – QUEUE MANAGEMENT

9. Coal Chain Performance and Adjustment

- 9.1 The Administrator and PWCS, with the assistance of HVCCLT, will continue to monitor the performance of the Hunter Valley Coal Chain throughout the Relevant Period. Subject to clause 3, following advice from PWCS, the Administrator may from time to time revise the Available Capacity for the balance of 2009 in order to achieve the objectives.
- 9.2 If at any time there is, or there is reasonably forecast by the Administrator to be, a material, objectively demonstrable change in the Available Capacity for a Relevant Period, the Administrator may make pro-rata adjustments to the Loading Allocation of each Producer for the Relevant Period in a manner that reasonably reflects that change. Prior to implementing the adjustment, the Administrator will advise each Producer of its calculations of the adjustment.

PART D - DICTIONARY

2009	The calendar year commencing 1 January 2009.
2008 Tonnage	<p>Each Producer's revised binding demand nomination for the Calendar Year 2008 submitted to PWCS in October 2006 in accordance with the provisions of the Coal Handling Services Agreement in force at that time, proportionally reduced on a pro-rata basis to give an aggregate tonnage for all Producers in 2008 of 95 million tonnes.</p> <p>For the avoidance of doubt, the binding demand nominations of 2008 include the demand nominations submitted for new mines.</p>
Access Protocols	The long term provisions for access to the Coal Handling Facility and other coal terminals in the Port of Newcastle to be developed and which are intended to take effect during 2009.
Administrator	The person appointed to manage the Tonnage Allocations in accordance with paragraph 2.1.
Aggregate Base Tonnage	The aggregate base tonnage for 2009 stated in paragraph 6.1.
Annual Pro-Rata Allocation	The annual allocation for each Producer determined in accordance with paragraph 8.1.
Available Capacity	The forecast amount of Coal, expressed in tonnes, to be transported to PWCS and loaded onto vessels at the Coal Handling Facility in the Relevant Period such that an operational queue is maintained as determined in accordance with paragraph 5.1.
Calendar Month	Any of the calendar months of January to December, whichever is relevant in the context.
Calendar Quarter	A period of three months commencing on 1 January, 1 April, 1 July or 1 October, whichever is relevant in the context.
Coal Chain Capacity	The forecast capacity of the Hunter Valley Coal Chain in the Relevant Period to transport Coal to the Coal Handling Facility and load the Coal onto vessels, expressed in tonnes.
Coal Handling Facility	Carrington Coal Terminal and Kooragang Coal Terminal including all plant, equipment, buildings and other structures owned or used by PWCS to provide coal handling services.
Coal Handling Services Agreement	The agreement so titled between PWCS and each of its Customers for the provision of coal handling and other services by PWCS to the Customer.
Customer	A party to a Coal Handling Services Agreement, other than PWCS, who receives Coal Handling Services from PWCS.

Highest Actual Usage	Each Producer's highest actual usage of coal handling services expressed in tonnes in a Calendar Year for any of the Calendar Years 2004, 2005, 2006 or 2007 as determined by PWCS in accordance with the usage provisions of the Coal Handling Services Agreement in force during each relevant year.
Hunter Valley Coal Chain	The system of moving coal from a Producer's loading point in the Hunter and surrounding areas of New South Wales to the Coal Handling Facility and loading coal onto vessels for export using the Coal Handling Facility.
HVCCLT	The Hunter Valley Coal Chain Logistics Team or any other entity that provides planning and logistics services to PWCS.
Large Producer	A Producer listed as a Large Producer in Attachment A
Loading Allocation	The volume of Coal Handling Services to be provided by PWCS, expressed in tonnes, allocated to a Producer during the Relevant Period, determined in accordance with this Protocols Document.
Monthly Loading Allocation	The Loading Allocation that is allocated to a Large Producer accordance with paragraph 8.3.
Producer	A Customer producing coal from one or more mines as identified in Attachment A and who has all necessary authorisations to operate each such mine. This definition does not imply management or ownership of a particular mine but merely provides groupings for the purposes of determining Loading Allocation.
Producer Base Tonnage	The base tonnage for each Producer for the year 2009 determined in accordance with clause 7.
PWCS	Port Waratah Coal Services Limited ACN: 001 363 828.
Quarterly Loading Allocation	The Loading Allocation that is allocated to a Small Producer for the relevant Calendar Quarter in accordance with paragraph 8.4.
Queue Adjustment Amount	An amount in tonnes, that is reserved for use by PWCS to adjust the queue of vessels at the Port of Newcastle.
Relevant Period	The relevant length of time which is applicable in the context.
Small Producer	A Producer listed as a Small Producer in Attachment A.
Tonnage Allocation Document	This document that determines the tonnage allocations for each Producer in 2009 and will form an annexure to the Coal Handling Services Agreement.

ATTACHMENT A

LIST OF PRODUCERS AND ASSOCIATED MINES

Producer	Mine
Large Producer:	
BHP Billiton	Mt. Arthur Complex
Coal & Allied	Hunter Valley Mount Thorley Warkworth Bengalla
Peabody Pacific	Wambo Wilpinjong Open Cut
Xstrata Coal Australia	Cumnock United Liddell Bulga West Wallsend Mt Owen Ulan Newpac Ravensworth Glendell
Small Producer:	
Anglo Coal Australia Pty Ltd	Drayton
Austar Coal Mine Pty Ltd	Austar
Bloomfield Collieries	Bloomfield Rix's Creek
Centennial Coal Company	Newstan
Donaldson Coal	Donaldson Tasman Abel
Gloucester Coal	Stratford Mine
Idemitsu Australia Resources	Boggabri Muswellbrook Coal Co No. 1 & No. 2
Integra Coal	Camberwell Open Cut Glennies Creek Underground Glennies Creek Open Cut
White Mining Limited	Ashton Moolarben
Whitehaven Coal Mining Limited	Whitehaven Werris Creek Tarrawonga Sunnyside

B — Shareholders in PWCS

Newcastle Coal Shippers Pty Limited*	36.9491
Coal and Allied Industries Limited	16.0018
RW Miller (Holdings) Limited	13.9982
Tomen Panama Asset Management SA	10.0000
Japan Coal Development Co Ltd	4.1039
Bloomfield Collieries Pty Limited	3.4611
Nippon Steel Australia Pty Ltd	3.3171
Mitsui and Co Ltd	2.8861
Mitsubishi Corporation	1.9862
Sojitz Corporation	1.1745
JFE Steel Corporation	2.1874
Sumitomo Metal Australia Pty Ltd	1.0452
Itochu Coal Resources Australia Pty Limited	1.0171
Kobe Steel Ltd	0.6022
Nisshin Steel Co Ltd	0.2146
Taiheiyō Cement Corporation	0.1759
Kanematsu Corporation	0.1173
Marubeni Corporation	0.1173
Sumitomo Corporation	0.1173
Tokyo Boeki Steel and Materials Ltd	0.1173
Ube Industries Ltd	0.1173
Sumitomo Osaka Cement Co Ltd	0.0879
Idemitsu Kosan Co Ltd	0.0586
Mitsubishi Materials Corporation	0.0586
Nippon Oil Corporation	0.0586
Tokuyama Corporation	0.0293

* Please see over for list of shareholders

Newcastle Coal Shippers Pty Limited

Oakbridge Pty Limited	20.2321
Anglo Coal (Drayton Management) Pty Limited	20.0000
Ulan Coal Mines Limited	15.9742
Coal and Allied Industries Limited	11.4102
Warkworth Coal Sales Limited	11.2681
Port Waratah Coal Services Limited	8.9640
Bloomfield Collieries Pty Limited	2.8170
Camberwell Coal Pty Limited	2.1306
Mt Arthur Coal Pty Limited	1.7479
Muswellbrook Coal Company Limited	1.6902
Powercoal Pty Limited	1.5809
Wambo Coal Pty Limited	1.1268
United Collieries Pty Limited	0.6429
Liddell Coal Marketing Pty Limited	0.1804
Cumnock No.1 Colliery Pty Limited	0.0361
Hunter Valley Coal Corporation Pty Limited	0.0361
Oceanic Coal Australia Limited	0.0361
Bengalla Coal Sales Company Pty Limited	0.0316
Centennial Coal Company Limited	0.0316
Gloucester Coal Ltd	0.0316
Namoi Mining Pty Ltd	0.0316

C — NCIG shareholders

BHP Billiton (Hunter Valley Energy Coal Limited)	35.47
Peabody Pacific Pty Ltd (Excel Coal Limited)	17.68
Felix Resources Ltd	15.40
Donaldson Coal Pty Ltd	11.61
Whitehaven Coal Ltd	11.06
Centennial Coal Company Ltd	8.79