

# MALLESONS STEPHEN JAQUES

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

16 January 2009

Dear Dr Chadwick

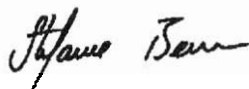
**Port Waratah Coal Services Limited and Newcastle Coal Infrastructure Group Pty Ltd applications for authorisation A91110-A91112 – Monthly Report for January 2009**

Please find attached the Monthly Report for January as required by the Australian Competition and Consumer Commission in its decision dated 17 December 2008 from Port Waratah Coal Services Limited and Newcastle Coal Infrastructure Group Pty Ltd.

The applicants are well advanced in the preparation of a workplan (see Attachments 1 and 2) but wish to clarify the issues raised in your letter of 13 January 2009 (C2008/1889) before finalising the schedule dates.

If you require any further information, please contact myself.

Yours sincerely



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**16 January 2009**  
**ACCC Progress Report 1**

## **1. Introduction**

In accordance with the interim decision of the Australian Competition and Consumer Commission (Commission or ACCC) dated 17 December 2008, Port Waratah Coal Services Limited (PWCS) and Newcastle Coal Infrastructure Group Pty Ltd (NCIG) (collectively, the Terminal Operators) are required to submit monthly progress reports to the Commission with respect to the implementation of a long term solution for infrastructure access. This document comprises the first monthly report required by 16 January 2009.

This report outlines the work that has been completed since the Interim Decision of the Commission, and includes an initial implementation/work plan that details the tasks and responsibilities for the coming months.

The project plan will become fully developed over the coming weeks as detail is added to the framework for drafting and the method of implementing the framework is finalised.

## **2. Progress in January from ACCC Interim Determination of 17 December 2008**

### **2.1 Establishment of Project Management Group**

The task of implementing a long term solution for the Hunter Valley Coal Chain necessitates communication and coordination amongst the coal producers, rail service providers, the relevant government bodies and the Terminal Operators themselves. Additionally, documentation that is required for implementation of a long term solution needs to be developed and/or agreed by each of these parties individually. As such, the Terminal Operators are aware that many tasks in implementing a long term solution fall outside of their direct control.

The Terminal Operators believe that because this process requires input from so many different parties, it needs to be managed by a third party that can impartially assign responsibilities and facilitate communication amongst those involved. As such, the Newcastle Port Corporation has appointed Port Jackson Partners to the role of Project Manager to develop an implementation plan for a long term solution.

The Terminal Operators understand that the role of the Project Manager is to:

- Develop a timetable and coordinate the completion of deliverables
- Manage the consultation and feedback process
- Summarise any issues from consultation for consideration by the relevant parties
- Facilitate communication between the responsible parties during development of a long term solution.

A Project Management Group has been formed including representatives from the Terminal Operators, the NPC, a consultant engaged by the producers, NSW Maritime, ARTC and the Project Manager. It is proposed that producer representatives will also be appointed to the Project Management Group. It will oversee the timely completion of deliverables but will not be a body for negotiation on documents or implementation.

In addition, PWCS has itself developed a Long Term Commercial Framework Project Steering Committee responsible for the timely development of documents that fall under its responsibility and for communication with other interested parties.

A project manager has also been appointed to assist the producers to meet their responsibilities in the development and implementation of the long term framework.

Accordingly, the initial stages of this significant project are now underway.

## 2.2 Documentary Framework

Preliminary work has been completed to determine the necessary documents that are anticipated to be required to be drafted or amended in order to implement a long term solution. This list is included as **Attachment 1**.

The uncertainty over the time it will take to draft, review, gain agreement and secure approval on these documents is likely to be a significant time investment and may require some flexibility in estimating the time required to develop a comprehensive long-term set of arrangements for ACCC authorisation.

## 2.3 Industry Review of NSW Government Proposal

Both PWCS and NCIG, along with producers, have reviewed the NSW Government Proposal issued by the Minister for Ports and Waterways on 12 December 2008 (Government Proposal), and have identified areas that require further development, clarification and detail in order to develop the complete documentary framework. This clarification will be sought in the coming weeks and as required during the drafting process.

## 2.4 Draft Implementation Timetable

The Project Manager is developing a draft implementation timetable to fulfil all necessary goals and develop all the associated documentation. This timetable has been drafted at a high-level, and has not yet undergone full consultation with all the parties involved. The Project Manager will finalise the inclusion of relevant dates and adapt the list of tasks in the timetable over the coming weeks as necessary. This will

be possible when there is a clearer understanding of the tasks, responsibilities and necessary schedules to achieve long term solution in the timeframe indicated by the ACCC. We intend to update the Commission as the timetable evolves.

Achieving the Commission's deadline will be challenging given the short timeline and complexity of the issues involved. The Project Manager will seek to keep parties to this timeline and to report on progress to stakeholders and the ACCC.

### **3. Industry Concerns**

#### **3.1 Work is required to prepare the long term framework for implementation**

The issue of the Government Proposal was an important milestone for achieving a long term solution for the Hunter Valley Coal Chain. The proposal received broad support from the industry.

Nonetheless, further work is required in order to establish a definitive set of principles that will underlie the development of the long term solution. In particular, there are elements of the Government Proposal that will require further development, clarification and detail.

The Terminal Operators are not seeking to re-negotiate the fundamental principles contained in the Government Proposal. However, the Terminal Operators recognise that the agreed framework for implementing a long term solution must address all relevant issues and be fully understood and accepted by the parties involved.

The development of a final proposed model was included in the initial application as the establishment of the Memorandum of Understanding (MOU) by 31 March 2009 with more comprehensive documentation to be prepared in the following period. In the ACCC's decision, this two-stage process appears to have been consolidated into a single stage, given the announcement by Minister Tripodi on 13 December 2008. Although this announcement represents significant progress towards a long-term solution, we do not believe it fully eliminates the time that would have been necessary to definitively document elements of an MOU, as originally proposed.

The Terminal Operators will make all best efforts to resolve these issues with haste, so as to implement a long term solution by the Commission's target date.

#### **3.2 Contractual Alignment**

There is broad understanding within the industry that a successful long term solution to the Hunter Valley Coal Chain must include contractual alignment between terminal and rail access. The Terminal Operators will therefore work constructively to achieve

long term contractual alignment as an outcome and keep the Commission apprised of these efforts, but do not wish the progress of the long term terminal access proposal (which has extensive industry and government support) to be delayed while the necessary work on rail arrangements is undertaken.

As such, these two work-streams have been delineated so as to advance both issues as rapidly as possible. Despite this, the Terminal Operators believe it may be necessary to complete implementation of contractual alignment on a different timeframe to the terminal access proposals so as to make best efforts to complete the latter within the timeframe prescribed by the Commission.

The Terminal Operators would like to emphasise that all rail service providers will be included in the consultation process for the development of protocols and documentation relating to terminal access without exception, and that all final terminal documentation will allow for the development (whether concurrently or at a later date) of a long term framework for contractual alignment.

The Terminal Operators understand that ARTC will also be represented on the Project Management Group such that the Access Undertaking that they are in the process of developing can be properly integrated with industry resolutions regarding contractual alignment between terminal and track access.

## **4. The Next Steps**

### **4.1 Finalisation of agreed long term framework**

As discussed in Section 3.1, despite broad support from industry of the Government Proposal, all parties have acknowledged that some development, clarification and further detail will be required to allow for drafting of implementation documents.

The Terminal Operators believe this process needs to take place as soon as practicable. The required formal documents (lease amendments, pro forma long term contracts, etc.) cannot be completed until all issues of detail and clarification have been addressed.

The Terminal Operators expect that all issues relating to the framework will be resolved in the coming weeks. Relevant parties will be required to provide feedback, including a list of clarification issues or aspects of the proposal requiring further detail. The industry and government will thereby go through a process of resolving each issue to produce a final cohesive framework to be agreed and used as the basis for drafting and implementation.

Once this has been completed, the Terminal Operators (and other respective parties) can finalise the series of documents required for implementation that rely on this framework (as per the Project Timetable).

## **4.2 Contractual Alignment**

The Terminal Operators believe that the process of implementing contractual alignment is separate to the process of implementing a long term terminal access framework. As such, the Terminal Operators believe that in order to achieve contractual alignment throughout the Hunter Valley Coal Chain, the rail services providers, producers and Terminal Operators need to establish a separate working group. Such a group will convene regularly in order to establish several potential models for implementing contract alignment, and will then manage a consultation process by which a single refined model can be determined. Meetings of this group will be formed over the coming weeks, as per the Project Timetable.

The Terminal Operators reiterate that there is no intention to remove the rail service providers from the consultation process for terminal access protocols, and any development of documents relating to terminal access will accommodate the concurrent or future development of contractual alignment between terminals and rail as necessary.

## **5. Conclusion**

The Terminal Operators are confident that the industry is making best efforts to effect a long term solution to the Hunter Valley Coal Chain within the timeframe prescribed by the ACCC. Progress since the Commission's Interim Decision has been significant, and, despite several concerns over the authorised timeframe, the Terminal Operators believe there is a clear way forward for the industry to work together to implement a good outcome for the coal producers, the terminals, and the whole of the Coal Chain.

If the Commission requires any further information, we would be pleased to assist.

**16 January 2009**

**ACCC Report — Attachment 1:  
Documentary Framework**

16 January 2009



## **INTRODUCTION TO THE DOCUMENTARY FRAMEWORK**

- § This framework (commencing on the next slide) sets out the series of documents required to establish and implement a long term solution for the Hunter Valley Coal Chain**
- § Note that development from this point is aimed at the construction of a complete long term solution, and the MOU process defined in the application for authorisation would be bypassed. This is in accordance with the requirements of the Commission**
- § It will be the responsibility of the Project Management Group to oversee and coordinate the development of these documents in the necessary timeframe by the relevant responsible parties**
- § The Project Management Group will include representation from all interested parties to a long term solution, including producers, services providers (terminals and rail), NSW Maritime, ARTC, Newcastle Ports Corporation and the project managers (Port Jackson Partners)**
- § This documentary framework represents preliminary thinking, and will be developed and finalised as soon as practicable in the coming weeks in full consultation with the parties involved.**

## DOCUMENTARY FRAMEWORK (1/4)

Task	Description/Comments	Drafting Responsibility	Interested Parties
1 Amendment to PWCS Leases	<ul style="list-style-type: none"> <li>• Modification of common user clause (Kooragang)</li> <li>• Commitment (to government) to expand subject to and in accordance with agreed principles/rules</li> <li>• Consideration to be given to the specific expansion rules/principles, including appropriate qualifications (inability to raise finance, lack of development approvals etc.)</li> </ul>	• PWCS	<ul style="list-style-type: none"> <li>• Government</li> <li>• Producers</li> </ul>
2 Amendment to NCIG Lease	<ul style="list-style-type: none"> <li>• Commitment (to government) to expand subject to and in accordance with agreed principles/rules</li> <li>• Again, consideration to be given to expansion rules/principles, including appropriate qualifications (such as inability to raise finance), particularly as clarification is required in regards to NCIG Stage 2 expansion timetable etc</li> </ul>	• NCIG	<ul style="list-style-type: none"> <li>• Government</li> <li>• Producers</li> </ul>
3 Pro forma PWCS LTSOP	<ul style="list-style-type: none"> <li>• Update draft PWCS long-term contract to give effect to terminal access protocols</li> </ul>	• PWCS	<ul style="list-style-type: none"> <li>• Producers</li> <li>• Government</li> </ul>
4 Pro forma NCIG LTSOP	<ul style="list-style-type: none"> <li>• New LTSOP or modification to current form of NCIG LTSOP to give effect to terminal access protocols.</li> </ul>	• NCIG	<ul style="list-style-type: none"> <li>• Producers</li> <li>• Government</li> </ul>

## DOCUMENTARY FRAMEWORK (2/4)

Task	Description/Comments	Drafting Responsibility	Interested Parties
5 Allocation Methodology ('Terminal Access Protocols')	<ul style="list-style-type: none"> <li>• Key dates, annual nominations, compression rules, risk etc to be documented</li> <li>• That is, nomination procedures and rules to be enshrined in a written document which has binding effect on T4, PWCS and NCIG (with respect to the 12 Mtpa) for the benefit of incumbent producers, new users and government</li> <li>• Need to work out all the rules, including the NCIG "nominations" timetable (with respect to the 12 Mtpa).</li> </ul>	<ul style="list-style-type: none"> <li>• PWCS</li> <li>• NCIG</li> </ul>	<ul style="list-style-type: none"> <li>• Producers</li> <li>• NPC/ Government</li> </ul>
6 Levy Regime	<ul style="list-style-type: none"> <li>• Need to consider implementation and enforcement</li> <li>• Need to work out basis of calculation (eg, quantification/ substantiation of the relevant terminal's carrying costs), and how the amount of the levy as calculated is then "divided" between the terminals and pushed down to the individual customers at each terminal</li> </ul>	<ul style="list-style-type: none"> <li>• NPC (?)</li> </ul>	<ul style="list-style-type: none"> <li>• PWCS</li> <li>• NCIG</li> <li>• Government</li> </ul>

## DOCUMENTARY FRAMEWORK (3/4)

<b>Task</b>	<b>Description/Comments</b>	<b>Drafting Responsibility</b>	<b>Interested Parties</b>
<b>7</b> T4 option (PWCS)	<ul style="list-style-type: none"><li>• Preliminary agreement by government to negotiate in good faith regarding release of land, development application process, grant of option etc.</li><li>• Also set out all agreed T4 commercial principles (including what is required from PWCS – governance structure, allocation rules at T4, etc)</li><li>• The above preliminary agreement could perhaps be set out in an Implementation Agreement</li><li>• Negotiation of the option to lease itself subject to the development of the agreed commercial principles</li></ul>	<ul style="list-style-type: none"><li>• Government</li></ul>	<ul style="list-style-type: none"><li>• PWCS; producers</li></ul>
<b>8</b> Contractual Alignment	<ul style="list-style-type: none"><li>• Negotiation is necessary by interested parties in order to development preferred models for implementation of contractual alignment.</li><li>• A working group will need to meet regularly in order to manage progress and negotiations.</li><li>• Detailed consideration to be given to the regime/rules to be implemented, and on whom enforceable obligations are to be placed (and by whom they can be enforced)</li><li>• Any rail arrangements would necessarily need to integrate with port arrangements</li></ul>	<ul style="list-style-type: none"><li>• [Rail Infrastructure Group, others?]</li></ul>	<ul style="list-style-type: none"><li>• Producers</li><li>• Government</li></ul>

## DOCUMENTARY FRAMEWORK (4/4)

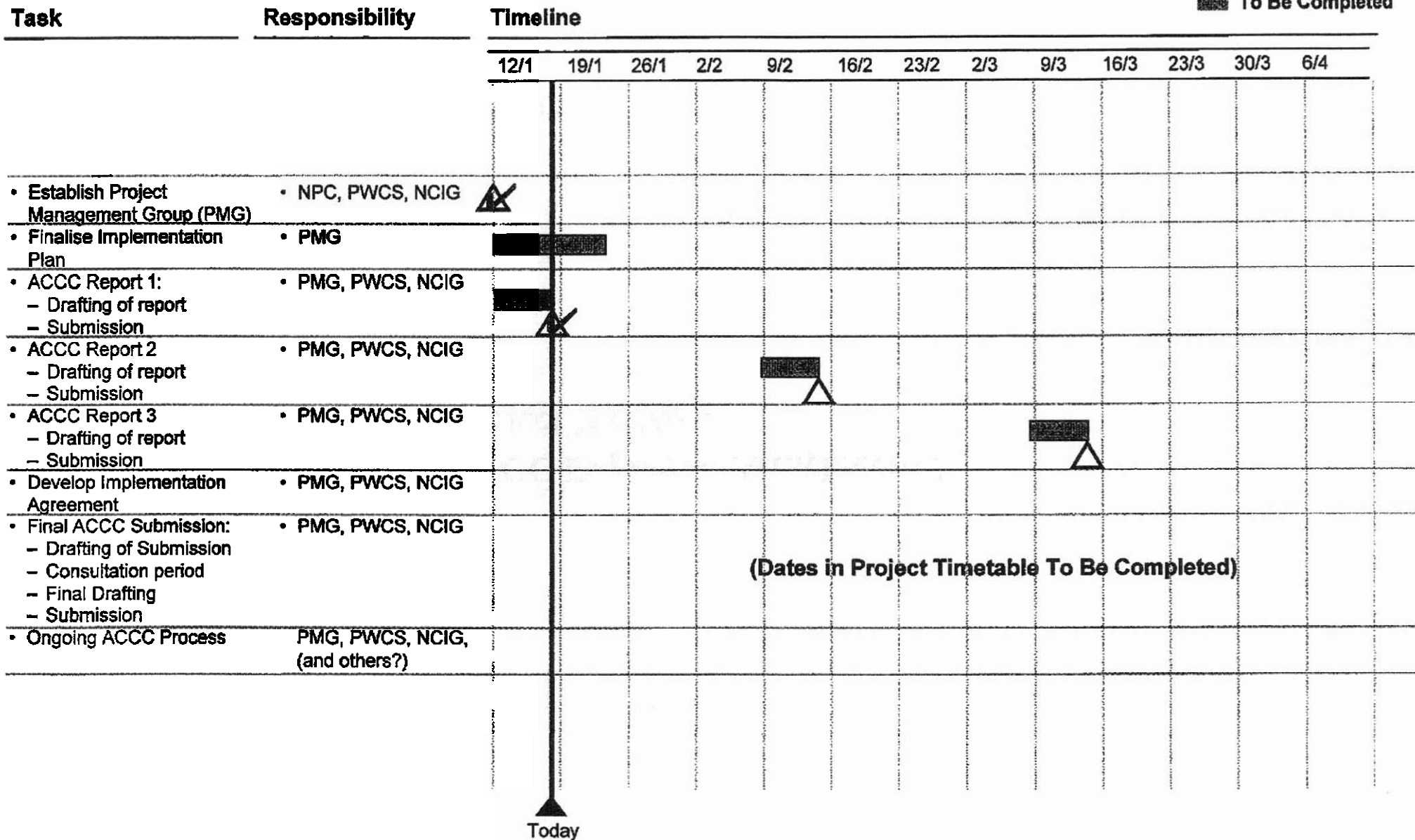
<b>Task</b>	<b>Description/Comments</b>	<b>Drafting Responsibility</b>	<b>Interested Parties</b>
<b>9</b> Implementation Agreement	<ul style="list-style-type: none"><li>• Consider an implementation plan that will set out all agreed documents and manner of simultaneous implementation.</li><li>• Timing of execution: to coincide with final ACCC approval (and to be basis for seeking that approval)</li><li>• To set out other undertakings between parties to the extent not covered in the agreed documents</li></ul>	<ul style="list-style-type: none"><li>• Project Management Group, others (?)</li></ul>	<ul style="list-style-type: none"><li>• Service providers, producers, government?</li></ul>
<b>10</b> ACCC Application (or further submissions)	<ul style="list-style-type: none"><li>• Primary responsibility of PWCS and NCIG</li><li>• Need to have overall architecture (and specific documents) completed for approval by ACCC. For example, all agreed via Implementation Agreement and submitted as one package at that time (see 9 above)</li></ul>	<ul style="list-style-type: none"><li>• PWCS &amp; NCIG</li></ul>	<ul style="list-style-type: none"><li>• Government</li><li>• NPC</li></ul>

**ACCC Report — Attachment 2:  
Project Workplan**

16 January 2009

# PROJECT TIMETABLE: PROJECT MANAGEMENT (PAGE 1/4)

Completed  
 To Be Completed



**PROJECT TIMETABLE: TERMINAL ACCESS PROTOCOLS (PAGE 2/4)**


**Completed**  
 **To Be Completed**

Task	Responsibility	Timeline													
		12/1	19/1	26/1	2/2	9/2	16/2	23/2	2/3	9/3	16/3	23/3	30/3	6/4	
<ul style="list-style-type: none"> <li>• Develop issues list re: Tripodi Proposal</li> </ul>	<ul style="list-style-type: none"> <li>• Services providers, PSC</li> </ul>														
<ul style="list-style-type: none"> <li>• Resolve issues into a final draft proposal for allocation methodology</li> </ul>	<ul style="list-style-type: none"> <li>• PMG, NPC, Services providers, Producers Steering Committee</li> </ul>														
<ul style="list-style-type: none"> <li>• Develop Terminal Access Protocols (TAP):                             <ul style="list-style-type: none"> <li>- Initial drafting</li> <li>- Consultation period</li> <li>- Final drafting</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• PWCS, NCIG (in consultation with producers and other service providers)</li> </ul>														
<b>(Dates in Project Timetable To Be Completed)</b>															
<ul style="list-style-type: none"> <li>• Levy regime:                             <ul style="list-style-type: none"> <li>- Drafting of necessary documentation</li> <li>- Consultation period</li> <li>- Final drafting</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• NPC, PWCS, NCIG (in consultation with producers)</li> </ul>														
<ul style="list-style-type: none"> <li>• Terminal 4:                             <ul style="list-style-type: none"> <li>- Drafting of agreed T4 'commercial principles'</li> <li>- Drafting of option for procurement of land for T4</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• NPC, PWCS; producers</li> </ul>														



**PROJECT TIMETABLE: DOCUMENTARY FRAMEWORK (PAGE 3/4)**

 Completed  
 To Be Completed

Task	Responsibility	Timeline															
		12/1	19/1	26/1	2/2	9/2	16/2	23/2	2/3	9/3	16/3	23/3	30/3	6/4			
<ul style="list-style-type: none"> <li>• Draft PWCS lease amendments</li> <li>• Draft NCIG lease amendment</li> </ul>	<ul style="list-style-type: none"> <li>• NPC, PWCS</li> <li>• NPC, NCIG</li> </ul>																
<ul style="list-style-type: none"> <li>• Draft PWCS LT SOP contracts:                             <ul style="list-style-type: none"> <li>- Initial drafting</li> <li>- Consultation period</li> <li>- Final drafting</li> </ul> </li> <li>• Draft NCIG LT SOP contracts:                             <ul style="list-style-type: none"> <li>- Initial drafting</li> <li>- Consultation period</li> <li>- Final drafting</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• PWCS (in consultation with producers)</li> <li>• NCIG (in consultation with producers)</li> </ul>																
<p><b>(Dates in Project Timetable To Be Completed)</b></p>																	
<div style="border: 1px solid black; background-color: black; color: white; padding: 5px;"> <p>In addition to these documents:</p> <ul style="list-style-type: none"> <li>• ACCC Reports/Submission (Page 1)</li> <li>• Implementation Agreement (Page 1)</li> <li>• Terminal Access Protocols (Page 2)</li> <li>• Levy Regime related documents (Page 2)</li> <li>• Agreement between of option to procure land for T4 (Page 2)</li> </ul> </div>																	
<p>Today </p>																	

**PROJECT TIMETABLE: CONTRACTUAL ALIGNMENT (PAGE 4/4)**

Task	Responsibility	Timeline												Completed	
		12/1	19/1	26/1	2/2	9/2	16/2	23/2	2/3	9/3	16/3	23/3	30/3	6/4	To Be Completed
<ul style="list-style-type: none"> <li>Establish a working group to negotiate terms of contractual alignment</li> </ul>	<ul style="list-style-type: none"> <li>PMG, Producers Steering committee, Rail service providers</li> </ul>														
<ul style="list-style-type: none"> <li>Develop series of models for implementing contractual alignment</li> </ul>	<ul style="list-style-type: none"> <li>Contract Alignment Working Group</li> </ul>														
<ul style="list-style-type: none"> <li>Consultation period</li> </ul>	<ul style="list-style-type: none"> <li>All industry</li> </ul>														
<ul style="list-style-type: none"> <li>Negotiate selection of model with broadest support from producers, relevant service providers and government</li> </ul>	<ul style="list-style-type: none"> <li>Contractual Alignment Working Group</li> </ul>														
<ul style="list-style-type: none"> <li>Begin development of necessary documents</li> </ul>	<ul style="list-style-type: none"> <li>TBA</li> </ul>														
<p>There is broad understanding within the industry, including the Terminal Operators, that a successful long term solution to the Hunter Valley Coal Chain must include contractual alignment between terminal and rail access. The Project Managers will therefore work constructively to achieve long term contractual alignment as an outcome and keep the Commission apprised of these efforts, but does not wish the progress of the long term terminal access proposal (which has extensive industry and government support) to be delayed while the necessary work on rail arrangements is undertaken.</p>															

**(Dates in Project Timetable To Be Completed)**

Today