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Port Waratah Coal Services
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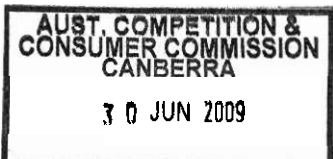
Newcastle Coal Infrastructure
Group Pty Limited

Newcastle Port Corporation

Submission in support of the
application for authorisation under
the *Trade Practices Act 1974 (Cth)*

New South Wales coal industry -
Long term solution

Dated 29 June 2009



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Submission in support of the application for authorisation under sections 88(1) and 88(7) of the *Trade Practices Act 1974 (Cth)*

1 Introduction and summary

1.1 Purpose of submission

This submission is made by:

- (a) Port Waratah Coal Services Limited (“PWCS”);
- (b) Newcastle Coal Infrastructure Group Pty Limited (“NCIG”); and
- (c) Newcastle Port Corporation (“NPC”),

(together, the “Applicants”) in support of their application for authorisation of certain aspects of a long term solution to the capacity constraints at the Port of Newcastle. The application is made under sections 88(1) and 88(7) of the *Trade Practices Act 1974 (Cth)* (“TPA”).

1.2 Conduct for which authorisation is sought

To assist in implementing the long term solution for access to and expansion of terminal capacity, and to give effect to certain New South Wales Government requirements of coal terminal operators and coal industry participants in relation to the future of the New South Wales industry, the Applicants seek authorisation to:

Make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the proposed conduct set out in Attachment 1 of this submission (“Capacity Framework Arrangements”).

The conduct for which authorisation is sought will be reflected in a range of agreements and other documents between various participants in the Hunter Valley coal chain.

The Capacity Framework Arrangements have been developed in a manner that is consistent with the non-binding principles set out in the Implementation Memorandum signed by PWCS, NCIG and NPC (and provided to the Commission on a publicly available basis) in April 2009 (“Implementation Memorandum”). The Capacity Framework Arrangements have also been further developed by NPC, PWCS and NCIG to facilitate the timely phasing in of the long term solution.

The Capacity Framework Arrangements (for which the Applicants seek authorisation) include:

Nomination and Allocation Procedures for the nomination and allocation of capacity at the Terminals

- (a) the allocation of capacity to access seekers at the PWCS Terminals under long term contracts in accordance with the PWCS Nomination and Allocation Procedure;
- (b) the allocation of up to 12 Mtpa of capacity to access seekers (initially exclusively to Non-NCIG Producers) at NCIG Stage 2 under long term contracts in accordance with the NCIG Nomination and Allocation Procedure;

Expansion arrangements at the Terminals to facilitate usage of terminal capacity

- (c) the ability for terminal operators to impose (at their election) an industry levy payable by all users of the Terminals in specified circumstances to facilitate an expansion of capacity at their respective Terminals;
- (d) certain agreed triggers and processes for determining whether and when expansions of the PWCS Terminals are required (including the construction of a new terminal, where necessary);
- (e) the “compression” and “decompression” of certain capacity allocations in circumstances where there is a delay or shortfall in any expansion of the PWCS Terminals (including completion of a new terminal) or in the completion of NCIG Stage 2;
- (f) a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient capacity transfer system to limit commercial incentives to hoard capacity to the detriment of all industry participants; and

Contractual alignment

- (g) proposed principles to facilitate the alignment of commercial contracts with service providers across the coal chain, including above and below rail.

In a process that is separate to this application for authorisation, the Australian Rail Track Corporation (“ARTC”) has submitted an Access Undertaking to the Commission. It is anticipated that PWCS, NCIG and ARTC will work through the details of their proposed contracting arrangements to ensure that they are aligned.

The Applicants recognise that the description of the Capacity Framework Arrangements in Attachment 1 is quite broad and detailed. However, this has been necessitated by the breadth of the Implementation Memorandum and the fact that it represents a whole-of-coal-chain solution put forward by the New South Wales Government with interconnected aspects. The conduct for which authorisation is sought is linked directly to the framework set out in the Implementation Memorandum.

Finalisation of long form contractual documentation

The conduct for which authorisation is sought has been divided in Attachment 1 into two separate parts to take account of the phased approach to the implementation of the long term solution between 1 July 2009 and 31 December 2009. Those two parts are as follows:

- **Part A** - This Part covers the “phasing in” period for implementation of the long term solution between 1 July 2009 to 31 December 2009 and any offer by PWCS and any acceptance of that offer by any Producer of the 2009 PWCS Base Tonnage for that period.
- **Part B** - This Part is only applicable if, by no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS):
 - the PWCS Capacity Framework Documents (as defined in Attachment 1) are executed in full by PWCS and NPC; and
 - the NCIG Capacity Framework Documents (as defined in Attachment 1) are executed in full by NCIG and NPC.

Part B seeks authorisation of all relevant conduct set out in that Part that will arise on or after the date on which both these pre-conditions are satisfied.

If the pre-conditions in Part B are not satisfied by 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS), the Applicants would propose that any authorisation in respect of Part A would continue until 31 December 2009, during which period the Applicants (or some of the Applicants) may put in place steps to implement a variant of the conduct set out in Part B of Attachment 1 through the lodgement with the Commission of a separate application for authorisation.

1.3 The long term solution and the Capacity Framework Arrangements

Not all aspects of the long term solution require authorisation under the TPA. Accordingly, the Applicants are only seeking authorisation in relation to the conduct set out in Attachment 1 (that is, the Capacity Framework Arrangements).

That said, it is important that the Capacity Framework Arrangements for which authorisation is sought are viewed in their totality and in the wider context of the long term solution of which they form a critical part. The Capacity Framework Arrangements are part of a larger and integrated solution that has been developed by the industry, the components of which together provide the basis for capacity expansions at the Port of Newcastle and long term alignment with capacity at other levels of the Hunter Valley coal chain. Together, they will result in substantial benefits for the Hunter Valley, New South Wales and Australian economies.

The Capacity Framework Arrangements (or aspects of the Capacity Framework Arrangements) will be reflected in a range of formal agreements and other documents, including:

- (a) a formal Capacity Framework Agreement between NPC, PWCS and NCIG;
- (b) long term ship or pay contracts for PWCS Terminals (including the Terminal Access Protocols and PWCS Nomination and Allocation Procedure);
- (c) long term ship or pay contracts for NCIG Stage 2 (or, in the case of NCIG Producers, the long term ship or pay contracts entered into in respect of NCIG Stage 1 as extended and amended for NCIG Stage 2);
- (d) amendments to the leases for the land on which the PWCS Terminals are located;
- (e) amendments to the agreement for lease for the land on which NCIG Stage 2 will be located to include the NCIG Nomination and Allocation Procedures for 12 Mtpa of capacity at NCIG Stage 2;
- (f) the Deed of Undertaking between NPC and NCIG in lieu of further amendments to the agreement for lease for the land on which NCIG Stage 2 will be located;
- (g) the lease arrangements and governance arrangements in relation to the proposed new "Terminal 4" to be operated by PWCS; and
- (h) the levy protocols.

The Applicants will provide the Commission with copies of the relevant contracts and documents (or relevant parts of those documents) in which the Capacity Framework Arrangements are reflected as soon as practicable.

While authorisation is not being sought separately for those documents, this will, as a practical matter, enable the Commission to see how those documents give effect to the Capacity Framework Arrangements (that is, the conduct for which authorisation is sought). It is anticipated that most of these documents will be provided to the Commission on a confidential basis.

1.4 Phased approach to implementation of the long term solution

Purpose of the phased approach

The proposed long term solution is the result of a very substantial amount of work undertaken by the Applicants and other industry participants throughout 2008 (including through the Greiner process and culminating in the announcement of Minister Tripodi's terminal access framework) and 2009 (including the negotiation of the Implementation Memorandum, work on contractual alignment issues and the continuing development of agreements to reflect the Capacity Framework Arrangements).

The very large amount of work that has been undertaken, in particular over the past 6 months, will be implemented through a range of detailed documents, which are yet to be finalised, and changes to long-standing operating practices. The long term solution and Capacity Framework Arrangements represent a fundamental shift in the way that the industry has operated over a large number of years. It is therefore not possible for all aspects of the long term solution to be implemented and be up-and-running seamlessly by 1 July 2009, when the current authorisation expires.

To address this issue, PWCS, at the request of industry participants (and as the only current export coal terminal operator in Newcastle), proposes to implement a phased-in approach to give effect to the new way in which its services will be contracted and provided.

The purpose of the phased-in approach is to:

- assist producers, exporters, and other participants in the coal chain to adjust both operationally and commercially to the new environment (i.e. provide an “implementation” period so that producers and other service providers can become operationally familiar with the new system, how it operates and how system performance will be measured prior to commencement of services under the new long term contracts);
- enable PWCS to consult with and undertake an education process with customers in relation to the new environment to assist them in that adjustment;
- enable producers time to obtain internal approvals to enter into very substantial commitments under long term ship or pay contracts;
- provide an opportunity for PWCS, producers and other service providers to develop and refine operational protocols and parameters, review any necessary system changes and enhancements, and develop the capacity transfer system prior to commencement of services under the new long term contracts from 1 January 2010; and
- enable PWCS and producers to adjust to both the new arrangements and changes to services provided by other Hunter Valley service providers (e.g. the ARTC Undertaking in respect of which the Commission commenced public consultation in late May 2009).

As set out above, this reflects the reality that it is not possible from a practical perspective for all aspects of the long term solution to be implemented and up-and-running under long term contracts by 1 July 2009. The Applicants consider that the best, most efficient and fairest way of achieving the very substantial public benefits associated with the long term solution is to adopt the phased-in approach.

How the phased approach will be implemented

The “phased-in” approach involves the following steps:

- Phase 1 involves PWCS offering capacity allocations to existing users of the PWCS Terminals based on the “2009 Base Tonnage Offer” for the period 1 July 2009 to 31 December 2009 under a modified PWCS Coal Handling Services Agreement, which will incorporate the PWCS Terminal Access Protocols; and
- Phase 2 involves PWCS implementing and giving effect to the PWCS Nomination and Allocation Procedure. Pursuant to that procedure, PWCS will offer capacity allocations to existing users of the PWCS Terminals based on the “2010 Base Tonnage Offer” for the period from 1 January 2010 onwards and commence inviting nominations for additional capacity allocations under the terms of a new long term ship or pay contract to commence on 1 January 2010.

Phase 2 will commence once the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents are executed, which must occur no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS) for Phase 2 to have effect.

It is anticipated that documentation relating to the capacity transfer system will be finalised by 30 November 2009 for implementation from 1 January 2010.

1.5 The long term solution and Capacity Framework Arrangements involve substantial public benefits

The Applicants consider that the long term solution (of which the Capacity Framework Arrangements form a critical part) involves very substantial public benefits and no discernible public detriments.

Increased contractual certainty

The arrangements will provide greater contractual certainty to PWCS and NCIG, to other service providers in the Hunter Valley, and to both existing and new producers, including through entry into long term ship or pay contracts. This increased contractual certainty will have a number of flow-on benefits to the Australian and regional Hunter Valley economies. Those benefits include:

- fostering efficiency which will improve the international competitiveness of Hunter Valley coal and Australian coal exports, which have been subject to various export bottlenecks and congestion;
- facilitating efficient and substantial infrastructure investment and expansion decisions by participants in the Hunter Valley coal industry (that is, terminal operators, above and below rail providers, and coal producers);
- facilitating new entry by coal producers in the Hunter Valley;
- facilitating increases in employment in the Hunter Valley and surrounding areas; and

- increasing incentives for coal producers to invest in the Hunter Valley coal production and handling industry.

Contractual alignment

The Capacity Framework Arrangements will facilitate the greater alignment of contracted capacity across the coal chain. As the Commission is aware, a lack of contractual alignment has been a contributing factor to issues in the Hunter Valley coal chain in the past.

The proposed contractual alignment arrangements set out in Attachment 2 are still progressing. However, the Applicants consider that this is a critical part of the long term solution.

The key features of the contractual alignment solution include:

- in association with entry into long term ship or pay contracts for terminal access, producers will be required to commit to long term track access with ARTC and long term contracts with rail operators for each of their respective load points;
- “System Assumptions” will underpin the determination of track and terminal capacity and be distilled into contractual performance standards which will be monitored and reported on. Deviations from the system assumptions and performance standards will be directly incurred by individual service providers and producers as applicable; and
- access to the coal chain will be based on aligned contractual rights.

This contractual alignment will provide greater certainty for all participants to commit resources in the long run with a greater degree of confidence and consistency.

Major capacity expansions

Increased contractual certainty will also facilitate major capacity expansions in the Hunter Valley, and therefore increase coal exports, export revenue and royalties payable to the New South Wales Government.

In particular, the long term solution (including the Capacity Framework Arrangements) will provide a mechanism to enable coal loading capacity at the Port of Newcastle to be increased from the current 102 mtpa to 211 mtpa and beyond to potentially 300 mtpa of coal exports from New South Wales. This will potentially involve incremental expansions in excess of \$1.8 billion at the PWCS terminals, \$2 billion at the NCIG terminal (to Stage 2) and approximately \$2-3 billion at subsequent terminal developments at the Port of Newcastle.

The long term solution, facilitated by the Capacity Framework Arrangements, will also provide greater certainty and a clearer platform for capacity expansions involving capital expenditure over the next 4 years of approximately \$1.2 billion on track and \$500 million on additional train sets in the Hunter Valley. This is

in addition to approximately \$1.4 billion spent since 2004 on terminal, track and train infrastructure¹.

These non-government funded infrastructure upgrades due, in part, to the increased certainty arising from long term contractual arrangements are a very substantial public benefit².

Increased export revenue and export royalties and increased employment

The long term solution (including the Capacity Framework Arrangements) will also result in a substantial increase in export revenue for the State of New South Wales, together with substantial increases in both employment in the State (particularly during the major construction phases) and export royalties payable to the New South Wales Government.

Again, these are very significant public benefits -- particularly in the current economic environment -- which are and will be funded by the private sector.

Reduced vessel queue

In addition, the Capacity Framework Arrangements will facilitate management of the vessel queue off the Port of Newcastle by requiring producers to have sufficient access to both terminal and track capacity before coal can be accepted for export. In the absence of any other capacity balancing mechanism (i.e. on expiry of the current authorisation on 30 June 2009), the Applicants anticipate that a vessel queue is likely to re-form, given that in the current economic climate there remains a reasonable level of demand for thermal coal from the Hunter Valley. It is difficult to estimate costs in the present economic environment. However, the Applicants consider it would involve deadweight demurrage costs on the coal industry in the order of USD 400 million per annum.

The management of the vessel queue will also:

- provide a number of environmental and safety benefits in reducing and managing the vessel queue. This is particularly important in light of the Australian Transport Safety Bureau ("ATSB") Transport Safety Investigation Report in relation to the grounding of the Pasha Bulker³; and
- contribute significantly to the improvement of the international reputation of the Port of Newcastle and the Hunter Valley coal industry, and therefore the competitiveness of New South Wales coal exports against other coal exporting nations.

¹ Based on information provided by track and rail operators.

² For completeness, the Applicants note that the track upgrades will initially be funded by the Government, and will be repaid by the industry through access charges.

³ ATSB Transport Safety Investigation Report, Marine Occurrence Investigation No 243 "Independent investigation into the grounding of the Panamanian registered bulk carrier Pasha Bulker" www.atsb.gov.au/publications/investigation_reports/2007/MAIR/pdf/mair243_001.pdf

Widespread support for long term solution

A further significant public benefit arises from the widespread support within the Hunter Valley coal industry and from the New South Wales Government (as exemplified by NPC's involvement as an Applicant) for the arrangements set out in, and anticipated by, the Implementation Memorandum, upon which the long term solution will be based.

Benefits are based on the phased implementation of the long term solution

PWCS anticipates that, in accordance with the phased-in approach, it will be able to obtain acceptance of the 2010 Base Tonnage Offers and binding nominations for expansion capacity under long term ship or pay contracts in September / October 2009 (or earlier, if the PWCS Capacity Framework Documents and the NCIG Capacity Framework Documents are executed in full before 31 August 2009), with those allocations to take effect from 1 January 2010. PWCS considers that there are substantial public benefits which will arise from the implementation of the 2009 Base Tonnage Offer, 2010 Base Tonnage Offer and other aspects of the long term solution.

1.6 The long term solution and Capacity Framework Arrangements will not give rise to any discernible public detriments

The Applicants consider that the matters set out above constitute significant public benefits, particularly when compared with the relevant counterfactual - that is, the Hunter Valley coal industry:

- (a) without an agreed terminal expansion framework;
- (b) without agreed nomination and allocation processes;
- (c) without an agreed basis for producers and other service providers to facilitate and enable contractual alignment;
- (d) without the increased investment certainty for terminal operators, producers and other service providers which arises through long term ship or pay contracts and clear parameters around terminal capacity expansion and compression of entitlements; and
- (e) without the wide-spread industry agreement represented by the Implementation Memorandum and long term solution.

The long term solution (of which the Capacity Framework Arrangements form a critical part) is intended to facilitate greater levels of investment in terminal capacity at the Port of Newcastle through long term ship or pay contracts, while seeking to eliminate the exclusionary effect that long term arrangements may otherwise have through:

- measures that discourage the hoarding of capacity;
- capacity transfers, including a limitation on the maximum fees for transfers of unused capacity allocations and the introduction of a transparent and efficient system for transferring capacity to limit the commercial incentives to hoard capacity to the detriment of all industry participants; and

- an industry levy, which may be applied to fund expansion at PWCS or 12 Mtpa at NCIG Stage 2 (where that expansion is not fully contracted), and which will ensure new entrants are not unduly burdened with costs not payable by existing competitors.

In light of the above, the long term solution (including the Capacity Framework Arrangements) will not have any detrimental impact on the total volume of coal shipped through the Port of Newcastle either in the short term or long term. To the contrary, it will result in a more efficient allocation and utilisation of terminal capacity in the short term and will facilitate expansion of terminal capacity over the medium to long term in a manner that aligns with increases in demand for coal loading services. It will also provide a method of aligning capacity requirements across the coal chain, resulting in the better utilisation of the supply chain as a whole, and resulting in more efficient use of terminal infrastructure and potentially higher volumes of coal being shipped through the Port of Newcastle.

The long term solution (including the Capacity Framework Arrangements) will ensure that exporters continue to compete against each other in relation to the production of coal or sales of coal to overseas customers.

For these reasons, the Applicants submit that the Capacity Framework Arrangements for which authorisation is sought will result in substantial public benefits which outweigh any public detriments.

1.7 Timing and request for interim authorisation

Given the strict timetable for implementation following signing of the Implementation Memorandum, work is continuing on the long form documentation that will underpin the long term solution (and which will incorporate the contracts and arrangements set out above). Phase 1 will be effective from 1 July 2009 and it is proposed that aspects of Phase 2 will be implemented between the date on which the PWCS Capacity Framework Documents and the NCIG Capacity Framework Documents are executed in full and 31 December 2009, to enable allocations under PWCS' long term ship or pay contracts to be effective from 1 January 2010.

To assist in meeting this timeframe, while work on the long form documentation continues, the Applicants wish to obtain authorisation in relation to the conduct set out in Attachment 1. The Applicants will provide the Commission with copies of the relevant contracts and documents (or relevant parts of those documents) which reflect that conduct as soon as practicable, so the Commission can, at a practical level, see how those documents give effect to the Capacity Framework Arrangements for which authorisation is sought.

In addition, as discussed with the Commission, it is important that PWCS is able to make 2009 Base Tonnage Offers to producers and conduct its nomination and allocation processes for 2010 and onwards as soon as possible so that:

- (a) the Applicants, other service providers and the Hunter Valley Coal Chain Logistics Team can determine the demand (based on ship or pay obligations) for coal infrastructure services;

- (b) the process for developing contractual alignment can progress, based on firm Load Point by Load Point nominations;
- (c) the Applicants and other service providers can make appropriate investment decisions in relation to the timing of capacity expansions and, where necessary, commit to projects (some of which involve substantial lead times); and
- (d) producers can obtain contractual certainty about the volumes of coal they will be able to export and, as a result, confidently make investment decisions in relation to their respective mining operations.

It is also important that other aspects of the Capacity Framework Arrangements be implemented as soon as possible, so that the Applicants and other industry participants can confidently move forward with the long term solution as soon as possible and take advantage of the momentum that currently exists to develop and give effect to that solution.

Accordingly, the Applicants request the Commission to grant interim authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the proposed conduct set out in Attachment 1.

If there are timing difficulties associated with the Commission providing interim authorisation in respect of all of the conduct set out in Attachment 1 by 30 June 2009, the Applicants would request that the Commission consider providing:

- interim authorisation in respect of the conduct set out in Part A of Attachment 1 prior to 30 June 2009 (or, at least, if after 30 June 2009, with an ability to implement that conduct effective from 1 July 2009); and
- interim authorisation in respect of the conduct set out in Part B of Attachment 1 as soon as possible after 30 June 2009.

As set out above, PWCS considers that the phased-in approach of the 2009 Base Tonnage Offer and the remainder of the long term solution, which would be supported by the granting of an interim authorisation as set out above, involves a number of very substantial benefits which outweigh any public detriment.

1.8 Duration of authorisation

The Applicants request that the Commission grants an authorisation for the contracts, arrangements and understandings the subject of this application for a period of 15 years, commencing on 1 July 2009 and continuing until 30 June 2024. The 15 year period is proposed to facilitate the entry into, and giving effect to, long term contracts and the levy and capacity allocation transfer arrangements required by the New South Wales Government.

The 15 year period also reflects the rolling 10 year or “evergreen” nature of nominations under the proposed long term contracts, and the requirement for regulatory certainty given the very substantial level of investment in infrastructure expansion that is proposed under the long term solution.

1.9 Structure of submission

This supporting submission is structured as follows:

- Section 2** - sets out further information in relation to the Implementation Memorandum, Capacity Framework Arrangements and long term solution;
- Section 3** - sets out information in relation to the public benefits which will arise from the long term solution, including the Capacity Framework Arrangements, and why they outweigh any public detriments;
- Section 4** - sets out reasons supporting the Applicants' request for urgent interim authorisation; and
- Section 5** - sets out a brief conclusion.

2 The Implementation Memorandum, Capacity Framework Arrangements and long term solution

2.1 Introduction

This section summarises the long term solution as envisaged in the Implementation Memorandum, and provides an overview of arrangements involving other service providers in the Hunter Valley.

The Applicants consider that the best way to provide commercial certainty for terminal operators, producers (both new and existing) and other infrastructure service providers in the Hunter Valley -- and therefore facilitate efficient investment -- is to facilitate capacity expansion where necessary, based on long term ship or pay contracts and a mechanism to ensure contractual alignment along the coal chain.

To this end, the long term solution (as anticipated in the Implementation Memorandum) will, once implemented, involve:

Expansion of existing coal terminal capacity for both existing users and new entrants

- an agreed framework and triggers for coal terminal expansions and the development of a new terminal (Terminal 4) at the Port of Newcastle;
- binding nomination and allocation procedures in relation to both existing and expansion terminal capacity (i.e. for both PWCS and 12 Mtpa of capacity at NCIG Stage 2);
- producers entering into long term ship or pay contracts with PWCS and NCIG respectively, in accordance with the nomination and allocation procedures;
- a binding mechanism for compression of capacity allocations (including a mechanism to penalise hoarding of capacity entitlements) if there is a shortfall of capacity caused by a delay in delivering the capacity that is required to be provided by an expansion of the PWCS Terminals (including a new terminal) or by NCIG Stage 2, or there is otherwise a shortfall in the capacity which the relevant expansion is capable of delivering; and
- an industry levy that may be applied to fund any uncontracted capacity of any expansion of the PWCS Terminals (including the construction of a new terminal) or uncontracted capacity in the 12 Mtpa in NCIG Stage 2, to ensure commercial expansion by the terminal operators;

Measures to facilitate usage of terminal capacity

- a maximum fee for transfers of contracted capacity allocations and the introduction of a transparent and efficient system for transferring capacity;

- measures which are designed to penalise hoarding of capacity entitlements where there is a delay or shortfall in an expansion of the PWCS Terminals (including construction of a new terminal) or at NCIG Stage 2;

Addressing whole of coal chain alignment issues

- principles to facilitate the alignment of producers' contracted volumes across terminal (PWCS and NCIG) and track and rail, based on System Assumptions which define the capacity being constructed and purchased under long-term ship or pay contracts; and
- arrangements for the operational co-ordination of different parts of the coal chain.

The long term solution also involves the suspension of the common user provisions in PWCS' existing lease, with such provisions only being re-activated if PWCS does not comply with certain obligations to NPC under the leases.

Further details in relation to each of these elements is set out below.

2.2 Implementation Memorandum

The Implementation Memorandum signed by PWCS, NCIG and NPC in April 2009 is a detailed, largely non-binding document that sets out the basis for the implementation of a long term solution for access to, and expansion of, export terminal capacity at the Port of Newcastle. It also sets out principles for the further development of alignment across terminal and below rail contracts.

The Applicants and producers are currently seeking to finalise binding long form contractual arrangements, based on the framework set out in the Implementation Memorandum. Accordingly, the Applicants wish to seek authorisation in relation to certain conduct (which will, in turn, be reflected in a range of provisions in agreements and other documents).

As the Commission has already been provided with a copy of the Implementation Memorandum and has a substantial amount of information in relation to the proposed long term solution, this section contains only a brief description of the key features of that solution. A copy of the Implementation Memorandum is set out in Attachment 4.

All terms used in this section have meanings as defined in the Implementation Memorandum.

Nomination and allocation principles

The Implementation Memorandum sets out nomination and allocation principles for access to the PWCS Terminals and nomination and allocation principles for 12 Mtpa of capacity at NCIG Stage 2⁴. These principles form the basis of the nomination and allocation procedures for each of the PWCS and NCIG Terminals that comprise part of the long term solution.

⁴ NCIG Stage 1 capacity has been fully allocated to NCIG shareholders.

The principles provide a process for PWCS to offer base tonnages to existing producers -- first for the period 1 July 2009 to 31 December 2009 and then from 1 January 2010 on a long term basis -- and nomination and allocation of expansion capacity for any excess and expansion capacity at the PWCS Terminals (including Terminal 4).

In accordance with the Implementation Memorandum, the nomination and allocation procedure for PWCS also includes:

- certain priority rules which will apply to prioritise the order in which nominations for expansion capacity are to be satisfied while capacity increases; and
- limitations on the ability for NCIG Producers to nominate for expansion capacity at PWCS until certain pre-conditions are satisfied, including a commitment to build NCIG Stage 2.

In accordance with the Implementation Memorandum, the NCIG nomination and allocation principles provide a process for NCIG to offer capacity to Non-NCIG Producers (in the first instance) at NCIG Stage 2 (up to a maximum 12 Mtpa) on a long term basis. These principles include PWCS determining the allocations at NCIG in circumstances where Non-NCIG Producers nominate for more than 12 Mtpa of capacity at NCIG Stage 2.

Long term ship or pay contracts

The Implementation Memorandum provides for producers to enter into long term “evergreen” ship or pay contracts with each of PWCS and NCIG in accordance with the respective nomination and allocation principles.

Triggers for expansion by PWCS

The Implementation Memorandum specifies agreed triggers for terminal expansions or, if that is not sufficient, construction of a new terminal by PWCS (Terminal 4) and timeframes for completion.

The triggers are based on 10 year tonnage commitments by new or expanding producers, where that capacity cannot be fulfilled through voluntary contracted allocation reductions or existing unutilised PWCS capacity.

The Implementation Memorandum also specifies the timing in which expansion or construction of a new terminal must be completed and a process for review of that timing by a Reviewer.

Interim solution for capacity shortfalls

The Implementation Memorandum contains a framework mechanism for compression of Contracted Allocations in the event that there is a shortfall of capacity caused by a shortfall in expansion at PWCS or caused by a delay in expansion at PWCS. In accordance with the Implementation Memorandum, the long term solution and Capacity Framework Arrangements will include (unless specified exceptions apply in relation to hoarding) an obligation for Producers to compress in order to accommodate, as far as possible, the shortfall in capacity in the following order:

- first, Producers may voluntarily elect for a portion of their Contracted Allocation to be compressed;
- next, Producers who have failed to meet the Utilisation Threshold of 95% for the previous 18 month period will be compressed (i.e. to counter hoarding); and
- last, if there is still a capacity shortfall, all Producers (with Contracted Allocation of 5 Mtpa or more) will be compressed up to their General Compression Limit (up to 5% of their Contracted Allocation in the first year, 10% in the second year etc).

NCIG Stage 2

The Implementation Memorandum does not contain any specific trigger for NCIG to undertake the NCIG Stage 2 expansion. However, access by NCIG producers to expansion capacity at PWCS will be limited until there is commitment to NCIG Stage 2 expansion and other preconditions are met.

The Implementation Memorandum also provides for 12 Mtpa of capacity in NCIG Stage 2 to be offered to Non-NCIG producers in accordance with the nomination and allocation principles and the timeframe for completion of NCIG Stage 2.

The Implementation Memorandum provides that, if there is a shortfall or delay in completion of NCIG Stage 2, then unless specified exceptions apply in relation to hoarding, compression will apply in order to accommodate the shortfall in capacity as follows:

- first, Producers may voluntarily elect for a portion of their Contracted Allocation to be compressed;
- next, Producers who have failed to meet the “Utilisation Threshold” of 95% for the previous 18 month period will be compressed (i.e. to counter hoarding); and
- last, if there is still a capacity shortfall, NCIG producer transfers will be required on a sliding scale over a period of time up to 12 Mtpa.

Capacity Transfer

The Implementation Memorandum requires that Producers use their best efforts to transfer any portion of Contracted Allocation that will not be utilised by that Producer to another Producer, pursuant to a Capacity Transfer System (“CTS”) that is expected to be developed under the terms of the Capacity Framework Agreement. The CTS will not be the exclusive means of transferring capacity.

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

Levy

To provide certainty for terminal operators who are undergoing expansion at their terminal, the Implementation Memorandum provides that a levy may be applied to fund any uncontracted capacity in any expansion at PWCS or uncontracted capacity in the 12 Mtpa in NCIG Stage 2.

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

Terminal 4

The Implementation Memorandum framework applies to the provision of capacity at Terminal 4 in the same way as it applies to all other terminals owned and controlled by PWCS. NPC and PWCS are currently negotiating lease and governance terms in relation to Terminal 4, based on the governing principles for the construction and operation of Terminal 4 set out in the Implementation Memorandum.

Coal Chain co-ordination and contractual alignment

The Implementation Memorandum provides guiding principles for contractual alignment across terminal and below rail. The general principle is that producers will attempt to secure track access that matches their terminal access, ensuring contractual alignment. If there is an imbalance between track and terminal capacities, Producers' access rights will be limited to the lesser of their terminal and track access. It is the responsibility of individual Producers to establish above rail contracts to match the effective capacity of the terminal and track.

The Implementation Memorandum also provides for PWCS and NCIG to share information and coordinate with the Hunter Valley Coal Chain Co-ordinator with a view to optimising coal chain capacity.

As the Commission is aware, substantial work has been, and is continuing to be, carried out by the industry in relation to issues concerning contractual alignment. This is primarily being undertaken by:

- the Contractual Alignment Working Group or "CAG", which comprises representatives of PWCS, NCIG, Producers, the Hunter Valley Coal Chain Logistics Team, ARTC, Pacific National and QR National; and
- individual service providers (ARTC, Pacific National and QR National) as part of managing their separate contractual arrangements.

This process has resulted in the development of the proposed Contractual Alignment Principles set out in Attachment 2.

In preparing and implementing the Contractual Alignment Principles a practical challenge arises that System Assumptions are needed to form the basis of contracts. However, accurate System Assumptions can only be produced by modelling the known task. In turn, the known task can only be determined after contracts have been executed. The Applicants consider that the proposed phased implementation will assist industry participants in making any necessary adjustments to address this issue, or which are necessary having regard to the ARTC Undertaking process and contractual development by above rail providers.

2.3 Incentives to facilitate the timely completion of long form documentation

To encourage the timely implementation of the long term solution, and finalisation of the necessary long form documentation, NPC (with the support of the New South Wales Government) has proposed that the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents be finalised by no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS).

In particular, Part B of Attachment 1 provides as follows:

- (a) It is intended that the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents will be finalised by 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS), and that documentation relating to the capacity transfer system will be finalised by 30 November 2009 for implementation from 1 January 2010; and
- (b) It is also intended that no part of the long term solution (other than as set out in Part A of Attachment 1) will be implemented until the PWCS Capacity Framework Documents and the NCIG Capacity Framework Documents are finalised. This is intended to ensure that each of PWCS and NCIG has an opportunity to review the relevant documents for consistency with the framework set out in the Implementation Memorandum prior to them being implemented. Given PWCS' commercial imperative to commence the nomination and allocation process for 2010, it also operates as a substantial incentive for PWCS to finalise the PWCS Capacity Framework Documents as soon as practicable.

Section 2D of the Part B of Attachment 1 also describes consequences in the event that NCIG does not comply with its obligations under the Deed of Undertaking or Capacity Framework Agreement.

2.4 Arrangements with other service providers

Above rail operators

As the Commission is aware, there are two operators that currently provide rail haulage services to Hunter Valley coal producers -- namely:

- (a) Pacific National, which is wholly-owned by the Asciano Group and hauls approximately 88% of coal in New South Wales, including coal

from 17 customers in the Hunter Valley across distances generally ranging from 20km to 320km; and

- (b) QR National, which commenced operations in the Hunter Valley in 2005, currently operates 6 trains and has an approximate 20% share of rail haulage (having contracts with 5 coal producers, covering 11 mines) in the Hunter Valley.

Producers enter into commercial contracts for the haulage of coal from their mines in the Hunter Valley to the Port of Newcastle. The Applicants consider that the long term solution (including the Capacity Framework Arrangements) will provide greater certainty to enable producers and above rail operators to enter into long term ship or pay contracts for the haulage of coal. This is particularly the case given that the long term solution will involve both a clear process for determining terminal entitlements and principles to facilitate the alignment of producers' contracted volumes across port and track.

Australian Rail Track Corporation

As set out in the Commission's draft determination dated 26 February 2009, ARTC is currently consulting with industry in relation to a Hunter Valley Access Undertaking under Part IIIA of the TPA, which will replace the current New South Wales Undertaking. ARTC submitted its undertaking to the Commission in late April 2009.

Again, the Applicants consider that the long term solution (including the Capacity Framework Arrangements) will provide greater certainty to enable producers and ARTC to enter into arrangements for train paths for the haulage of coal.

3 The long term solution and Capacity Framework Arrangements will deliver substantial public benefits and will not involve any discernible public detriments

3.1 Introduction

The long term solution (of which the Capacity Framework Arrangements form a critical part) involves substantial public benefits and no discernible public detriments, both in the short and long term.

3.2 The relevant conduct will provide greater contractual certainty to PWCS and NCIG and to both existing and new producers which will, in turn, have a number of consequential public benefits

The long term solution will provide significantly greater contractual certainty to PWCS and NCIG and to both existing and new producers in relation to terminal entitlements, including through entry into long term ship or pay contracts. The contractual alignment aspects of the proposed long term solution will provide further certainty, both to producers and above and below rail providers in the Hunter Valley.

This increased certainty will have a number of corollary benefits to the Australian and regional Hunter Valley economies, including:

- fostering efficiency which will improve the international competitiveness of Hunter Valley coal and Australian coal exports;
- facilitating efficient infrastructure investment and expansion decisions by participants in the Hunter Valley coal industry (that is, terminal operators, above and below rail providers, and coal producers);
- facilitating increases in employment within the Hunter Valley and surrounding areas; and
- increasing incentives for coal producers to invest in the Hunter Valley coal production and handling industry.

From a coal terminal operator's perspective (and, the Applicants would anticipate, also from a rail infrastructure provider's perspective), securing binding take or pay commitments from users is a key consideration for management and Boards in approving and undertaking any major capacity investment and expansion. Similarly, the Applicants would anticipate that security of coal chain access (both rail and terminal) is likely to be a key consideration for the management and Boards of, and investors in, coal producers in approving or undertaking expenditure on mine expansion projects. Progressing or financial close of projects may be jeopardised by lack of certainty in relation to the ability to recover costs or a sufficient return on investment.

The long term solution (based on the Implementation Memorandum) is expressly designed to deliver increased contractual certainty and enable PWCS, NCIG and users to enter into long term ship or pay contracts. The phased implementation is also intended by PWCS to provide greater certainty and continuity for producers in relation to the implementation of the new system.

With increased contractual certainty, PWCS, NCIG, other service providers and producers (both existing and new entrants) will be better placed to make long-term plans and decisions, particularly with respect to production and investment. This in turn will allow PWCS, NCIG, other service providers and producers to operate more efficiently and invest in appropriate system upgrades.

As previously recognised by the Commission, this is a very substantial public benefit.

3.3 The relevant conduct will enhance competition between producers of export coal and will not have any adverse impact on competition in any market

The Applicants consider that the long term solution, including the Capacity Framework Arrangements for which the Applicants are seeking authorisation, will have a very limited, if indeed any, impact on competition in any relevant market. This is because:

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

Accordingly, rather than preventing or limiting competition, the long term solution (including the Capacity Framework Arrangements) represents a further positive step forward to facilitate greater competition, and greater efficiency, by Hunter Valley producers, service providers and other investors in the Hunter Valley.

3.4 The relevant conduct will facilitate contractual alignment along the coal chain

In addition to providing benefits in terms of greater contractual and investment certainty, the Applicants consider that the alignment of contractual obligations across the coal chain will also:

- optimise the use of coal chain infrastructure in order to best meet contractual commitments;

- provide coal exporters and buyers with more certainty regarding the volume of coal they can ship, loading times and vessel schedules, which will enable exporters and buyers to plan and manage their operation more efficiently; and
- facilitate efficient and co-ordinated investment decisions by participants in the Hunter Valley, by identifying the areas which require investment. By aligning contractual obligations and incentives across the coal chain, the long term solution will create an environment more conducive to optimal and efficient investment decisions.

3.5 The relevant conduct will facilitate management of the vessel queue while terminal capacity expansions are completed and minimise dead weight demurrage costs

Demand for loading services for thermal coal in the Hunter Valley is anticipated to increase towards the second half of 2009⁵. The Applicants consider that a vessel queue is likely to re-emerge from 1 July 2009 if binding commercial agreements (including the Capacity Framework Arrangements) are not implemented to give effect to the framework set out in the Implementation Memorandum and other aspects of the long term solution which continue to be developed (e.g. contractual alignment).

If no system is in place beyond 30 June 2009 (the counterfactual), the Applicants estimate that the vessel queue could increase to peak at levels in excess of 70 vessels, with an average vessel queue of 55 vessels generating an estimated USD 200 million in demurrage costs for producers for the 6 months to 31 December 2009⁶.

Giving effect to the long term solution (including the Capacity Framework Arrangements) from 1 July 2009 will ensure that the vessel queue can be managed to a level of around 20-25 vessels. The Applicants estimate that this will represent a saving of over USD 150 million in demurrage costs over the 6 months to 31 December 2009 and substantially greater savings as demand continues and capacity expansions take place⁷. As the Commission has previously recognised:

- demurrage charges are economically inefficient dead-weight losses -- they involve coal producers paying substantial sums to shipping companies to have empty ships sit idle off the coast of Australia; and

⁵ <http://www.afr.com/home/viewerSearch.aspx?ATL://1239938323078&keywords=coal+and+allied>

⁶ The Applicants consider that the estimates provided in the submission supporting applications for authorisation A91110 - A91112 continue to be reasonable. Forecasting the size of a vessel queue absent the long term solution and Capacity Framework Arrangements is subject to a range of factors, including the state of the global markets for thermal and coking coal. However, in the current economic environment, high vessel queues are continuing (even with the PWCS Tonnage Allocation Stage 1 in place). This suggests a return to high vessel queues in the absence of the long term solution.

⁷ See footnote 5.

- reducing inefficient demurrage payments to overseas shipping companies is a clear public benefit⁸. Despite the immediate benefit being a cost saving to coal producers, it has a clear flow-on benefit in that this deadweight cost can be invested in a more productive manner. The Commission has also, in the past, indicated that an application for authorisation that relates solely to exports inherently involves benefits and detriments that are public in nature⁹.

Preventing an increase in the vessel queue will also give exporters and buyers of coal greater certainty as to when a particular shipment of coal will be loaded and how much they will be able to load in each period. This greater certainty will enable producers to manage more effectively their production and stockpiling of coal. This, in turn, is likely to allow producers to reduce inefficient stockpiling costs below what would be the case in the event of uncertainty of vessel queues.

3.6 The relevant conduct will facilitate major capacity expansions in the Hunter Valley, with a range of associated public benefits

As set out above, the long term solution (of which the Capacity Framework Arrangements form a critical part) will facilitate major terminal capacity expansions at the Port of Newcastle and, by providing increased contractual certainty, is also likely to provide the foundation for further major capacity expansions in the Hunter Valley by both producers and other service providers.

This terminal capacity expansion will be further facilitated by the industry levy arrangements which form part of the Capacity Framework Arrangements. The levy, being part of Minister Tripodi's terminal access framework, will (if required) both assist terminal operators in funding necessary expansions and seek to ensure that such expansion is funded by all users, rather than the burden falling solely or disproportionately on new entrants and expanding producers (therefore balancing the interests of users and the public).

The new capacity expansions will give rise to increased capital expenditure, increased export coal revenue, increased export royalties for the New South Wales Government and higher levels of employment in the Hunter Valley, particularly during the major construction phases.

Expansion of the Terminals (and any further capacity expansions by producers and other service providers) is likely to involve a number of large construction phases where investment and employment will increase substantially, followed by a phase of increased operation where exports will increase as well as employment (although to a lesser extent than during construction). These are substantial public benefits.

⁸ ACCC Final Determination, Applications for Authorisation A90906, A90907, A90908 lodged by PWCS (9 July 2004), p 60, and ACCC Final Determination, Applications for Authorisation A91110, A91111 and A91112 (13 May 2009).

⁹ ACCC Final Determination, Applications for Authorisation A90906, A90907, A90908 lodged by PWCS (9 July 2004), p 62

3.7 The relevant conduct will maximise utilisation of available capacity by seeking to discourage hoarding of excess capacity by producers

The long term solution will seek to ensure that available capacity is utilised to the greatest extent possible and that unused allocations are transferred between producers in a timely and efficient manner by introducing express measures to discourage the hoarding of unused allocations.

The Capacity Framework Arrangements involve the development of a Capacity Transfer System for the transfer of unused allocations of capacity to other producers. This system is intended to reflect the New South Wales Government's policy with regard to the long term solution, as announced in December 2008 by Minister Tripodi.

Under the Capacity Framework Arrangements, there will also be a limit on fees chargeable by producers for the transfer of allocation. This is intended to facilitate a transparent and efficient system for transferring capacity and also to counter hoarding of unused entitlements.

These capacity transferring arrangements involve clear public benefits by maximising capacity utilisation and expansion at terminal and, ultimately, across the whole Hunter Valley coal supply chain.

3.8 The relevant conduct will provide a number of environmental and safety benefits

The long term solution (of which the Capacity Framework Arrangements form a critical part) will provide a number of environmental and safety benefits. In particular, it will aid 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 Newcastle Harbour.

As the Commission is aware, in its report following the Pasha Bulker incident in 2007, the ATSB identified the large vessel queue as a factor which heightens the risk of collision, due to the increased likelihood of ships anchoring in close proximity to each other which, in turn, results in less time to take action if their anchors drag. In particular, the report stated that:

"the queue of 57 ships off Newcastle on 7 June 2007 increased the risks of collisions, groundings and other difficulties in the subsequent heavy weather. 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 had not been identified or recognised during the application process for the authorisation of these allocation systems.

The Australian Transport Safety Bureau recommends that Port Waratah Coal Services, individually and as a member of the Hunter Valley Coal Chain Logistics Team, take action to address this safety issue".

Of the recommendations, this was the only one directed to PWCS. In addition, the ATSB specifically identified a “*potential for major pollution or the blockage of the port resulting in enormous financial costs*”¹⁰.

These safety and environmental public benefits have previously been accepted by the Commission. In particular, in its Final Determination concerning Applications A91110 - A91112 (13 May 2009), the Commission stated that:

*“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”*¹¹.

3.9 The relevant conduct will facilitate new entry by coal producers in the Hunter Valley

As set out in Minister Tripodi’s media releases¹², one of the Government’s key objectives in developing the terminal access framework and Implementation Memorandum was to facilitate “*guaranteed access for new entrants and expanding producers*”. Several aspects of the long term solution (of which the Capacity Framework Arrangements form a critical part) are intended to facilitate new entry and expansion by producers and therefore promote further competition in relation to the production and exporting of coal.

The proposed arrangements involve producers entering into long term ship or pay contracts which will provide greater certainty for, and therefore underpin expansion decisions, by both the terminal operators, producers and other service providers in the Hunter Valley. This expansion will accommodate both expansion by existing producers and entry by new producers. Expansion by PWCS can be triggered upon receipt of binding, long term commitments (e.g. 10 years) by new entrants or existing producers.

New entry will also be further facilitated by:

- measures that discourage the hoarding of capacity;
- capacity transfers, which will facilitate a transparent and efficient system for transferring capacity and limit the commercial incentives to hoard capacity to the detriment of all industry participants; and
- an industry levy, which may be applied to fund uncontracted expansion capacity at PWCS or uncontracted capacity in the 12 Mtpa at NCIG Stage 2, and which will ensure new entrants are not unduly burdened with costs not payable by existing competitors.

Facilitating new entry through these measures and better utilisation of the coal chain as a whole will promote the conditions for increased competition in relation to the production and exporting of coal. This is a substantial public benefit.

¹⁰ ATSB Transport Safety Investigation Report, Marine Occurrence Investigation No 243 “Independent investigation into the grounding of the Panamanian registered bulk carrier Pasha Bulker” www.atsb.gov.au/publications/investigation_reports/2007/MAIR/pdf/mair243_001.pdf

¹¹ Paragraph 6.38.

¹² 12 December 2008, 16 December 2008 and 8 April 2009.

3.10 The relevant conduct will contribute significantly to the improvement of the international reputation of the Port of Newcastle and the Hunter Valley coal industry

The Applicants consider that the long term solution (of which the Capacity Framework Arrangements form a critical part) will contribute significantly to the improvement of the international reputation of the Port of Newcastle and the Hunter Valley coal industry as a reliable, efficient and competitive supplier of export coal. This will, in turn, promote the competitiveness of New South Wales coal exports against other coal exporting nations.

While the likely increase in the vessel queue after 30 June 2009 (absent the long term solution) is a result of continuing demand for Hunter Valley coal, any significant increase in the vessel queue and delays in delivery to international customers is likely to have a negative impact on the international reputation of the coal producers and the Hunter Valley coal chain, including the Port of Newcastle.

International coal buyers, faced with uncertainty about how long it will take for their coal to be loaded at the Port of Newcastle because of a long vessel queue (and coal chain capacity constraints), may lose confidence in the Hunter Valley's coal producers and be more likely to consider alternative sources of supply, including from other countries such as Indonesia and Russia. In this regard, there is therefore a very real prospect of international substitution by buyers in response to uncertain supply conditions in Australia.

The Applicants therefore submit that there is a very clear public benefit from the Hunter Valley coal chain and the Hunter Valley coal producers having a strong international reputation as efficient, timely and low-demurrage exporters.

3.11 The relevant conduct will not give rise to any discernible public detriments

As set out above, the Applicants consider that the long term solution (of which the Capacity Framework Arrangements form a critical part) will not adversely affect competition in any market. In addition, the long term solution will not have any detrimental impact on the total volume of coal shipped through the Port of Newcastle either in the short term or long term. Accordingly, the arrangements for which authorisation is sought will not give rise to any discernible public detriments.

To the contrary, the long term solution -- which is based on the Implementation Memorandum (which, in turn, builds on the terminal access framework announced by Minister Tripodi on 12 December 2008) -- is intended to facilitate capacity expansion of coal terminals at the Port of Newcastle through long term ship or pay contracts. The arrangements also seek to eliminate the exclusionary effect that long term arrangements may otherwise have (and further promote new entry) through:

- measures to discourage the hoarding of capacity;
- processes for the transfer of unused capacity; and

- an industry levy, which may be applied to fund expansion, and which will ensure new entrants are not unduly burdened with costs not payable by existing competitors.

3.12 Conclusion

For the reasons set out above, the Applicants consider that the Capacity Framework Arrangements in respect of which authorisation is sought involve a number of substantial public benefits which outweigh any potential public detriments.

4 Interim authorisation

4.1 The Applicants' request for interim authorisation for nominated elements of the long term solution

As the Commission is aware, authorisation (A91110 - A91112) expires on 30 June 2009. That authorisation relates only to the PWCS Tonnage Allocation Stage 1.

The Applicants consider that interim authorisation is required in relation to the current application:

- (a) so that they can start to implement the long term solution, and in particular, give effect to the Base Tonnage Offer for the period 1 July 2009 to 31 December 2009 and the respective Nomination and Allocation Procedures and contractual alignment principles (which are essential to enable planning by PWCS and NCIG, users and other service providers in the Hunter Valley); and
- (b) to enable PWCS and NCIG to enter into long term ship or pay contracts with users of the Terminals and therefore obtain sufficient certainty (both for the terminal operators and producers) to undertake the necessary planning in relation to investment and expansion decisions and, in the case of producers, sales decisions and proposed arrangements with other Hunter Valley service providers.

In support of this request for interim authorisation, the Applicants note that:

- the long term solution, and specifically the Capacity Framework Arrangements for which the Applicants are seeking authorisation, will promote competition between producers of export coal and will not have any adverse impact on competition in any relevant market;
- granting the interim authorisation would not in any way prevent the Hunter Valley coal industry from being able to return to its pre-authorisation state if the Commission were ultimately to deny authorisation;
- there is a clear timing imperative to enable the Applicants to start to implement Phase 1 and Phase 2 of the long term solution in parallel, and the Applicants have submitted this application as soon as practicable having regard to the process for developing each aspect of that solution.

As the Commission is aware, the timing constraints surrounding this request for interim authorisation arise both as a result of the need for the Applicants and others in the Hunter Valley coal industry to undertake a very substantial body of work in order to facilitate the implementation of the framework set out in the Implementation Memorandum, and the impending cessation of the current short term authorisation (such short duration being required by the Commission for the specific purpose of maintaining pressure on the development and implementation of a long term solution to capacity constraints in the Hunter Valley); and

- the granting of interim authorisation for the Capacity Framework Arrangements will not cause any material harm to any other party, particularly as the long term solution and Capacity Framework Arrangements reflect a long process of industry engagement.

4.2 Consequences if interim authorisation is granted

As set out above, the Applicants believe that granting the interim authorisation would not in any way prevent the Hunter Valley coal industry from being able to return to its pre-authorisation state if the Commission were ultimately to deny authorisation.

Importantly, the granting of interim authorisation would not affect the amount of coal that is actually exported through the Port of Newcastle. The Hunter Valley coal chain will continue to operate at full capacity and producers will continue to compete for export sales.

4.3 Consequences if interim authorisation is not granted

If interim authorisation is not granted, the Applicants will not be able to proceed with implementing the framework detailed in the Implementation Memorandum, obtain binding nominations from producers, proceed with firm plans in relation to contractual alignment, or give effect to binding agreements in relation to the long term solution, until (and unless) the Commission grants final authorisation.

This would involve a delay in the implementation of those arrangements (including capacity expansions), defer the realisation of the substantial benefits set out in this submission, and involve substantial uncertainty for the coal industry as to what arrangements will be in place beyond 30 June 2009.

Given that the existing authorisation in relation to the PWCS Tonnage Allocation Stage 1 expires on 30 June 2009, PWCS would also need to “unwind” the current allocation system, with the resulting potential for the re-formation of a vessel queue.

The Applicants consider that, when compared to the relevant counterfactual (as set out in Section 1.6), the balance is overwhelmingly in favour of granting interim authorisation.

4.4 Conclusion

In these circumstances the Applicants submit that this is an urgent matter being of a kind with respect to which it is appropriate for the Commission to grant interim authorisation. This is particularly the case given that the Commission is cognisant of the factual basis and background to the development of the Implementation Memorandum and the need for execution of binding commercial agreements to give effect to the framework specified in the Implementation Memorandum.

Accordingly, the Applicants request that the Commission grants an interim authorisation, so that they can undertake the steps set out in Section 4.1 above and proceed with the phased implementation of the proposed long term solution.

As set out above, if there are timing difficulties associated with the Commission providing interim authorisation in respect of all of the conduct set out in Attachment 1 by 30 June 2009, the Applicants would request that the Commission consider providing:

- interim authorisation in respect of the conduct set out in Part A of Attachment 1 prior to 30 June 2009 (or, at least, if after 30 June 2009, with an ability to implement that conduct effective from 1 July 2009); and
- interim authorisation in respect of the conduct set out in Part B of Attachment 1 as soon as possible after 30 June 2009.

5 Conclusion

The Applicants submit that the long term solution (of which the Capacity Framework Arrangements form a critical part) involves substantial public benefits and no discernible public detriments.

The Applicants therefore submit that the Capacity Framework Arrangements (which are the subject of this application for authorisation) meet the statutory test for authorisation under the TPA and request that the Commission grants the authorisations requested under sections 88(1) and 88(7) of the TPA.

5.1 Request for interim authorisation

Having regard to the factors set out in section 4 above, the Applicants request the Commission to grant an interim authorisation so they can commence implementation of the framework set out in the Implementation Memorandum, including the 2009 Base Tonnage Offer and proposed nomination and allocation procedures (which are necessary to enable planning by PWCS and NCIG, users and other service providers in the Hunter Valley) and long term arrangements with terminal users.

5.2 Duration of authorisation

The Applicants request that the Commission grants the authorisation requested for a period of 15 years, commencing on 1 July 2009 and concluding on 30 June 2024.

The 15 year period is proposed to facilitate the entry into, and giving effect to, long term contracts and the levy and capacity allocation transfer arrangements required by the New South Wales Government. The 15 year period also reflects the rolling 10 year or “evergreen” nature of nominations under the proposed long term contracts, and the requirement for regulatory certainty given the very substantial level of investment in infrastructure expansion that is proposed under the long term solution.

5.3 Further assistance

If the Commission has any questions or requires further information, the Applicants would be pleased to assist.

**Port Waratah Coal Services Limited
Newcastle Coal Infrastructure Group Pty Limited
Newcastle Port Corporation
29 June 2009**

Attachment 1 - Capacity Framework Arrangements

Introduction

This Attachment describes the conduct for which the Applicants are seeking authorisation, which may be implemented in various provisions of contracts, arrangements or understandings between:

- (a) any or all of PWCS, NPC and NCIG;
- (b) any or all of PWCS, NCIG, NPC and any Hunter Valley coal chain participant, including any producer of coal for export through the Terminals, or exporters of coal through the Terminals; or
- (c) PWCS, NCIG, NPC, any coal producer or exporter, the Hunter Valley Coal Chain Coordinator (or equivalent body) and any above or below rail service provider in the Hunter Valley.

The conduct for which the Applicants seek authorisation is referred to as the "Capacity Framework Arrangements".

The Capacity Framework Arrangements (and the provisions of the contracts, arrangements and understandings which give effect to or implement the relevant aspects of the Capacity Framework Arrangements) are necessary to give binding legal effect to the non-binding principles set out in the Implementation Memorandum signed by PWCS, NCIG and NPC and provided to the Commission in April 2009.

The Capacity Framework Arrangements form a critical component of the proposed long term solution to capacity constraints in the Hunter Valley coal chain.

The Capacity Framework Arrangements

Any word or expression that is used in this Attachment 1 which begins with a capital letter but is not defined has the meaning given in Part C.

PART A - Conduct between date of authorisation and 31 December 2009

The Applicants seek authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, which involves the following conduct being undertaken between 1 July 2009 and 31 December 2009:

1. Offer and acceptance of PWCS Base Tonnage for 2009

Any offer by PWCS, and any acceptance of that offer (in whole or in part) by any Producer, of the 2009 PWCS Base Tonnage for the period 1 July 2009 to 31 December 2009.

The aggregate 2009 PWCS Base Tonnage available for offer is 96.7 Mt.

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

- (i) that Producer's 2008 binding Nomination for capacity allocation at the PWCS Terminals (inclusive of new mines) proportionally reduced to 95Mt ("2008 Tonnage"); and
- (ii) if that Producer's 2008 Tonnage is less than that Producer's highest actual allocation usage between 2004 and 2007 (inclusive), that Producer will also receive an agreed share of an additional 1.7Mt determined in accordance with clause 7.3 of the PWCS Tonnage Allocation Stage 1.

The offer will be made on the terms of that Producer's existing coal handling services agreement which will be modified to give effect to the 2009 Base Tonnage Offer and the transfer fee cap under the Terminal Access Protocols.

Producers will be entitled to contract for any tonnage up to their 2009 PWCS Base Tonnage offer. Before a Producer can accept any 2009 PWCS Base Tonnage offer that Producer must satisfy the requirements set out in section (b) below.

(b) Acceptance requirements

Before a Producer can accept any offer of a 2009 PWCS Base Tonnage, that Producer must:

- (i) advise PWCS of a constant tonnage for each Load Point; and
- (ii) provide PWCS with relevant information required for system assumptions and contractual alignment.

(c) Lapse of offer

If a Producer does not accept all or any part of a 2009 PWCS Base Tonnage offer by the due date for acceptance then:

- (i) the offer or part of that offer (as applicable) will lapse; and
- (ii) the relevant capacity allocation which was offered but not accepted will be made available in accordance with the nomination and allocation process described in section 1 of Part B.

2. Contractual alignment and vessel queue

The conduct of PWCS:

- (a) requiring Producers to have adequate entitlements to track and train haulage upon lodging any application under the Coal Handling Services Agreement for the provision of coal handling services in respect of each vessel to be loaded;
- (b) refusing to supply coal handling services if a Producer has inadequate track or train delivery entitlements in respect of the application for a vessel to be loaded; and

- (c) in revising flexibility limits or reducing allocations on a pro rata basis should an excessive vessel queue develop or be forecast to develop due to impacts at PWCS. Where excess queuing is due to an impact external to the Terminals, PWCS may, but is under no obligation to, apply adjustments to allocations in a manner that reasonably reflects that impact.

3. Transfer fee cap

The conduct of capping the fee that a Producer with a Contracted Allocation at the PWCS Terminals may charge another to use a portion of its Contracted Allocation (“Relevant Proportion”) at no more than 5% of the fee charged by PWCS for the Relevant Portion.

PART B – Conduct if long form documents executed by all parties by 31 August 2009 (or such other date as may be agreed by the Applicants)

The Applicants seek authorisation to make a contract or arrangement or arrive at an understanding, or give effect to a provision of a contract, arrangement or understanding, if by no later than 31 August 2009 (or such other date as may be agreed by NPC, NCIG and PWCS):

- (a) the PWCS Capacity Framework Documents are executed in full by PWCS and NPC; and
- (b) the NCIG Capacity Framework Documents are executed in full by NCIG and NPC.

1. Offer and acceptance of PWCS Base Tonnage for 2010

(a) *PWCS Base Tonnage for 2010*

Any offer by PWCS, and any acceptance of that offer (in whole or in part) by any Producer, of the 2010 PWCS Base Tonnage on an annual basis for a period of up to 10 years commencing on 1 January 2010.

The aggregate 2010 PWCS Base Tonnage available for offer is 97.4 Mtpa.

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

- (i) that Producer's 2008 Tonnage; and
- (ii) that Producer's highest actual allocation usage between 2004 and 2007 (inclusive).

The offer will be made on the terms of a new long term ship or pay contract.

Producers will be entitled to contract for any tonnage up to their PWCS Base Tonnage offer and for any length of contract up to 10 years. Before a Producer can accept any 2010 PWCS Base Tonnage offer that Producer must satisfy the requirements set out in section 1(b).

(b) *Acceptance requirements*

Before a Producer can accept any offer of a 2010 PWCS Base Tonnage, that Producer must:

- (i) advise PWCS of a constant annual tonnage for each Load Point Allocation, unless there is a ramp down in respect of the Load Point;
- (ii) provide PWCS with reasonable security as required by PWCS;
- (iii) provide PWCS with a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, coal production is feasible with respect to the Load Point Allocation for the term sought at PWCS; and

- (iv) provide PWCS with relevant information required for system assumptions and contractual alignment.

(c) *Lapse of offer*

If a Producer does not accept all or any part of a 2010 PWCS Base Tonnage offer by the due date for acceptance then:

- (i) the offer or part of that offer (as applicable) will lapse; and
- (ii) the relevant capacity allocation which was offered but not accepted will be made available in accordance with the nomination and allocation process described in section 2.

2. PWCS Nomination and Allocation

The nomination for capacity allocations at the PWCS Terminals by any Producer, and the allocation of capacity allocations at the PWCS Terminals to any Producer, in accordance with the principles set out in this section 2 and in sections 2A, 2B and 2C:

(aa) Allocation of Capacity for 1 October 2009 to 31 December 2009

PWCS may elect to offer to Producers any additional PWCS Capacity that is available between 1 October 2009 and 31 December 2009 above the aggregate Base Allocations. If PWCS elects to make this pro rata offer, it will be made to all Producers as follows:

- (i) first, up to the Producer's 2010 Base Tonnage Offer; and
- (ii) then, on a pro rata basis based on their respective 2009 load point allocations.

(a) Allocation of Capacity for 1 January 2010 to 30 June 2010

Any additional capacity above that required to satisfy the capacity allocations which have been offered and accepted in accordance with section 1 will be offered for allocation in the period 1 January 2010 to 30 June 2010 only to all existing Producers at PWCS on a pro rata basis based on their respective Base Allocation.

(b) Allocation of Capacity for 1 July 2010 and beyond

Allocation of capacity above that required to satisfy the capacity allocations which have been offered and accepted in accordance with section 1 will be offered for allocation from 1 July 2010 and beyond in accordance with the Annual Capacity Nomination and Allocation Process set out in section 2A below.

2A. Annual Capacity Nomination and Allocation Process

(a) Expansion Planning

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

(b) Demand Assessment

- (i) PWCS will undertake an annual demand assessment process with Producers each year. This process will include submission of nominations for 10 year Load Point Allocations, notice of renewals or extensions of existing 10 year Load Point Allocations and notice of any offers of voluntary Load Point Allocation reductions.
- (ii) In the year in which NCIG intends to Commit to NCIG Stage 2, the timing of the annual demand assessment process will be coordinated with NCIG, such that the NCIG Nomination and Allocation process is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

(c) Nominations

Expansion Capacity at PWCS existing Terminals will be available for nomination to Non-NCIG Producers exclusively until 1 January 2010.

NCIG Producers will only be able to submit nominations when all of the pre-conditions set out in section 2C have been met.

Nominations for Load Point Allocations must:

- (i) Advise a constant annual tonnage for each Load Point Allocation;
- (ii) Nominate a commencement date which:
 - (A) is 1 January in either the 1st, 2nd, 3rd or 4th year after the nomination is submitted; or
 - (B) with the approval of NPC, is 1 January in the 5th year after the nomination is submitted, provided that NPC is satisfied that:
 - (I) the Producer nominating for that capacity establishes that the nomination is for a planned mine with infrastructure that has extended lead times for delivery; and
 - (II) the nomination will not have any adverse effect on nominations for allocations which may commence earlier.
- (iii) Provide reasonable security as required by PWCS;
- (iv) Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, at least 10 years of coal production is feasible with respect to the Load Point Allocation sought at PWCS;
- (v) Provide information relating to the development status of the source mine, including development consent and other approvals to operate;
- (vi) Provide a timeline for coal production, where the nomination relates to a new or expansion project;

- (vii) Provide relevant information required for system assumptions and contractual alignment; and
- (viii) Provide a duly executed and binding CHSA for the nominated allocation, if the Producer has not already done so.

If for any reason a nomination does not result in a contract through the nomination and allocation process then that nomination shall have no continuing effect including having any priority under the Priority Rules set out in section 2A(h) below.

(d) *Renewal and Extension*

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

An end of Load Point Allocation extension of up to 3 years may be exercised by Producers with 5 years remaining on their Load Point Allocation.

(e) *Voluntary Reduction Offer*

A Producer may offer to PWCS a voluntary reduction to a Load Point Allocation. PWCS may reallocate the Load Point Allocation (up to the amount volunteered) to another Producer in accordance with this nomination and allocation process.

(f) *Capacity Assessment and Review*

PWCS will assess its Capacity availability and its ability to meet aggregate nominations and existing Contracted Allocations. If necessary, PWCS will finalise its detailed expansion plan to fulfil the nominations. If necessary, a review of the time in which an expansion of the PWCS Terminals (including the construction of a new terminal) is required to be completed will be conducted in accordance with section 6(e). This assessment will take into consideration contractual alignment and, for this purpose, PWCS will conduct a review with ARTC to ascertain track arrangements in relation to nominations.

(g) *Allocation*

PWCS will contract Load Point Allocations with Producers. Contracted Allocations which cannot be satisfied by existing Capacity at the PWCS Terminals, will commence within the time required under section 6(b) unless a Review of that time has been undertaken in accordance with section 6(e) and an alternative date for the delivery of capacity is established. If PWCS cannot satisfy the nominations in full, priority rules will apply.

(h) *Priority Rules*

Existing Load Point Allocations will not be diluted.

- (i) Where nominations are made in the same year, nominations starting sooner will be prioritised over nominations starting later provided that:

- (A) where there is no available PWCS capacity in 1st year after the nomination is submitted then, nominations in 1st and 2nd year will have equal priority; and
 - (B) where there is no available PWCS capacity in 1st or 2nd year after the nomination is submitted then, nominations in 1st, 2nd and 3rd year will have equal priority;
- (ii) Where nominations are made in the same year to start at the same time, nominations will be prioritised according to development status and first coal production;
 - (iii) Nominations submitted in the same year that become contracts take priority over nominations submitted in later years;
 - (iv) Each priority group is satisfied in full before the next priority group; and
 - (v) If nominations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.
- (i) ***Capacity Delivery***
 - (i) PWCS will deliver Capacity within the contracted timeframe.
 - (ii) If necessary, a review of the contracted timeframe for delivery of Capacity will be conducted in accordance with section 6(e).
 - (iii) If capacity is delivered part way through a year the Load Point Allocation will reflect the partial year.
 - (iv) If required in accordance with section 5, Contracted Allocations will be compressed as set out in section 5.
 - (v) Compressed Allocations will be reallocated to Producers who have Load Point Allocations impacted by the relevant event which triggered the requirement to compress.
 - (vi) Where the Compressed Allocation is insufficient to satisfy the impacted Producers, the following priority rules will apply:
 - (A) Load Point Allocations commencing in a particular year will take priority over Load Point Allocations starting in a later year;
 - (B) Where Load Point Allocations commence in a particular year, Load Point Allocations where the source mine has all approvals to operate and sufficient track access will take priority;
 - (C) Each priority group is satisfied in full before the next priority group; and
 - (D) If Load Point Allocations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.

2B Allocation of Unallocated Expansion Capacity

- (i) PWCS will make an announcement when it has any Unallocated Expansion Capacity and invite nominations for that Unallocated Expansion Capacity. Nominations must not exceed the amount of Unallocated Expansion Capacity or any time period stated in the announcement.
- (ii) If NCIG has not committed to NCIG Stage 2, NCIG Producers may only nominate for Load Point Allocations for capacity contracts for the maximum available period not to exceed 2 years in length. If NCIG Stage 2 has been Committed, all Producer's nominations will be treated the same as all other Producers.
- (iii) In allocating the Unallocated Expansion Capacity, the following priority rules will apply:
 - (A) Nominations commencing sooner will take priority over nominations commencing later;
 - (B) Nominations for a longer time period will be prioritised ahead of nominations for shorter time periods; and
 - (C) If nominations within a priority group cannot be satisfied:
 - (I) If NCIG Stage 2 has not been Committed, nominations by Non-NCIG Producers within a priority group will be prioritised ahead of nominations by NCIG Producers within that priority group;
 - (II) All else being equal, each Producer will be offered their pro-rated share.

2C Nominations by NCIG Producers

(a) Application of this section 2C

- (i) Nothing in this section 2C limits the entitlement of an NCIG Producer to nominate for Unallocated Expansion Capacity at the PWCS Terminals in accordance with section 2B(ii).
- (ii) If a Producer becomes an "NCIG Producer" after 1 January 2009 because:
 - (A) a Non-NCIG Producer acquires a NCIG Producer after that date;
 - (B) a Non-NCIG Producer acquires a source mine identified in an NCIG ship or pay agreement after that date; or
 - (C) an NCIG Producer acquires a Non-NCIG Producer after that date,

for the purposes of this section 2C, any mine or mines ("**The Specified Mine or Mines**") of that Producer for which it was entitled to submit

nominations at PWCS immediately prior to the date it becomes an NCIG Producer will be treated as if it continued to be owned by a Non-NCIG Producer and that Producer may nominate for capacity allocations at the PWCS Terminals in excess of its Base Allocation in respect of the Specified Mine or Mines.

- (iii) If at any time after 1 January 2009 a NCIG Producer acquires a source mine of a Non-NCIG Producer and the output of that Mine was shipped through the PWCS Terminals before the date of the acquisition (“**the Specified Mine**”) then the Specified Mine will be treated as if it continued to be owned by a Non-NCIG Producer and that Producer may nominate for capacity allocations at the PWCS Terminals in excess of its Base Allocation in respect of the Specified Mine.
- (iv) A Producer who is entitled to continue to nominate for expansion capacity at the PWCS Terminals under section 2C(a)(ii) or (iii) must not do so for the purposes of increasing the capacity allocations available to any mines other than the Specified Mine or Mines referred to in paragraph 2C(a)(ii) or (iii).

(b) *Period before commitment of NCIG Stage 2*

Each NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until the later to occur of the following:

- (i) 1 January 2010; and
 - (ii) the date on which NCIG Stage 2 is Committed.
- (c) *While Excluded Stage 1 Allocation is excluded from anti-hoarding calculations***
- (i) Further to section 2C(b) and 2C(d), an NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until that NCIG Producer has made an election in accordance with section 2C(c)(ii).
 - (ii) An NCIG Producer may elect to include its Excluded Stage 1 Allocation when determining that NCIG Producer’s Utilisation Threshold, in which case the NCIG Producer must nominate a date on which the election will become effective (“**Stage 1 Election Trigger Date**”).
 - (iii) If an NCIG Producer makes an election under section 2C(c)(ii) and is not otherwise prevented from nominating for expansion capacity under the provisions of this section 2C then:
 - (A) subject to section 2C(c)(iii)(B), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5); and

- (B) the nomination referred to in section 2C(c)(iii)(A) must not nominate a start date for delivery date of such capacity allocations which is earlier than the Stage 1 Election Trigger Date.

(d) Period during Nominated Deferred Period

- (i) Further to sections 2C(b) and 2C(c), if an NCIG Producer has specified a Nominated Deferral Period in accordance with section 5(d)(i)(B)(II), then:

- (A) subject to section 2C(d)(i)(B), that NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5) until the expiry of the Nominated Deferred Period; and
- (B) at any time during the Nominated Deferred Period that NCIG Producer may elect to surrender its right to extend the Nominated Deferral Period in accordance with that section, in which case the NCIG Producer must nominate a date on which the election will become effective ("**Stage 2 Election Trigger Date**").

- (ii) If an NCIG Producer makes an election in accordance with section 2C(d)(i)(B) and is not otherwise prevented from nominating for expansion capacity under the provisions of this section 2C then:

- (A) subject to section 2C(d)(ii)(B), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage (as may be reduced in accordance with section 2D or section 5); and
- (B) the nomination referred to in section 2C(d)(ii)(A) must not nominate a start date for delivery of such capacity allocations which is earlier than the Stage 2 Election Trigger Date.

2D. Conduct where NCIG is in breach of Deed of Undertaking or Capacity Framework Agreement

Any conduct that is in accordance with the following principles:

- (i) In the event of a breach of the Deed of Undertaking or the Capacity Framework Agreement by NCIG, NPC will issue a breach notice to NCIG detailing the nature of the breach.
- (ii) NCIG will have 30 days to rectify the breach. During this time, and until the breach is rectified to the satisfaction of NPC (acting reasonably), NCIG Producers will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of their PWCS Base Tonnage. For clarity, nothing in this section 2D(ii) limits the conduct described in section 2C regarding the entitlement of NCIG Producers to nominate for any capacity allocations at the PWCS Terminals in excess of their PWCS Base Tonnage.

- (iii) If the breach has not been rectified to the satisfaction of NPC (acting reasonably) within 30 days then:
 - (A) until the breach is rectified to the satisfaction of NPC (acting reasonably), PWCS will be entitled to terminate any unfulfilled PWCS Contracted Allocations of NCIG Producers for capacity at PWCS which exceeds their PWCS Base Tonnage; and
 - (B) PWCS will be entitled to reduce the PWCS Contracted Allocations of NCIG Producers by up to 1 Mtpa per month for a period of not less than 2 years determined by NPC (in its absolute discretion) until the breach is rectified to the satisfaction of NPC (acting reasonably) or the PWCS Contracted Allocations of NCIG Producers has been reduced to zero. For clarity, the first tonnage reduction may be made on expiry of the 30 day rectification period.
- (iv) If there are two or more breaches by NCIG (either under of the Deed of Undertaking or the Capacity Framework Agreement, or both) in any 60 day period, or there are three or more such breaches in any period, then NPC will be entitled to reduce the rectification period referred to section 2D(ii) and section 2D(iii) by as many days as it determines in its absolute discretion (including by reducing that period to zero days).
- (v) Nothing in this section 2D will preclude, limit or otherwise restrict the ability of PWCS to compress or reduce the Contracted Allocations of NCIG Producers in accordance with section 5.

3. *NCIG Nomination and Allocation*

The nomination of capacity allocations of 12 Mtpa at NCIG Stage 2 by any Producer, and the allocation of capacity allocations of 12 Mtpa at NCIG Stage 2 to any Producer, in accordance with the following principles:

Step 1: EOI Process: Invite Expressions of Interest (inclusive of an NCIG standard-form Confidentiality Deed) from all Non-NCIG Producers. NCIG will consult with PWCS as to the timing of the nomination and allocation process in accordance with the Implementation Memorandum.

Step 2: Provide Information Package and form of ship or pay contract (“SoP”) to Non-NCIG Producers who have signed the Confidentiality Deed (“**Nominating Non-NCIG Producers**”); initiate independent due diligence on Nominating Non-NCIG Producers.

Step 3: Receive nominations. Nominations must include:

- (i) a commitment to ship a minimum of 3 Mtpa (throughput) when Stage 2 of the terminal is operating at full capacity on the terms of the SoP;
- (ii) a nominated source mine(s) for which registered mining title is held;
- (iii) development consent for the source mine(s), subject only to conditions of a formal nature;

- (iv) a JORC Code compliant Statement of Marketable Coal Reserves for the source mine(s) showing total Marketable Coal Reserves; and which demonstrates 11 years of coal production for exporting through NCIG CET;
- (v) consent by the applicant to participate in the due diligence enquiries to be conducted on behalf of the financiers for NCIG Stage 2;
- (vi) lodgement of cash or a bond.

Step 4: Assess nominations against the criteria and requirements established for the financing of NCIG Stage 2 and those applicants that facilitate the most efficient and effective operation of the terminal, including on the basis of the information provided by Nominating Non-NCIG Producers in Step 3 and the outcome of the due diligence process (“**complying nominations**”). If complying nominations for less than or equal to 12 Mtpa, go to Step 6. If complying nominations for more than 12Mtpa, go to Step 5.

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

- (i) is consistent with the principle that allocations of capacity are provided to as many of those Nominating Non-NCIG Producers as possible (including by reducing nominated allocations where appropriate, subject to the relevant Nominating Non-NCIG Producers confirming such reduction); and
- (ii) takes account of the views of the HVCCLT regarding the optimisation of coal chain utilisation.

Step 6: Confirm indications with successful applicants. Applicants sign provisional SoPs, subject only to the occurrence of Financial Close and submit Bid Bond (the terms of provisional SoPs and Bid Bond will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 in excess of the 12 Mtpa). Any non-allocated tonnes remaining from the 12 Mtpa will be available for further nomination by all Producers (including NCIG Producers) by re-applying Steps 1-6 (with changes as necessary to acknowledge that NCIG Producers may participate in the process).

Step 7: At Financial Close, applicants sign a binding SoPs. The terms of SoPs signed by Non-NCIG Producers will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2.

4. *Coordination of Nomination and Allocation*

- (i) The provision of any information by NCIG to PWCS and NPC in January and July of each year for the purpose of updating those parties of its progress for Commitment of NCIG Stage 2 and advising whether it intends or reasonably expects to commence the NCIG Nomination and Allocation Procedure within the next 6 months.
- (ii) The provision of any notice by NCIG to PWCS and NPC before it commences the NCIG Nomination and Allocation Procedure and any coordination between NCIG, PWCS and NPC to ensure that, in the year

that the NCIG Nomination and Allocation Procedure is conducted, the NCIG Nomination and Allocation Procedure is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

4A. Long term ship or pay contracts

Any requirement for PWCS or NCIG to offer 10 year evergreen long term ship or pay contracts to Producers in accordance with the following:

Subject to sections 2B(ii) and 2C, a Producer that wishes to obtain access to Capacity that is to be allocated at the terminals according to the Nomination and Allocation Procedures must be offered a 10 year evergreen long term ship or pay contract ("**Long Term Ship or Pay Contracts**") with the relevant Terminal Operator, provided that nothing in this section 4A prevents the Terminals Operators from also offering other contracts with shorter terms to Producers.

5. Compression and decompression

Any compression and/or decompression of any Producer's PWCS Contracted Allocation in accordance with the following:

(a) When does compression apply?

PWCS will compress PWCS Contracted Allocations when:

- (i) there is a PWCS Expansion Delay or a PWCS Expansion Shortfall at any time giving rise to a Capacity Shortfall; and
- (ii) there is a NCIG Stage 2 Delay or NCIG Stage 2 Shortfall.

(b) Compression waterfall for delays or shortfall at PWCS

When compression applies under section 5(a)(i), PWCS Contracted Allocations of the Producers will be compressed in the following order:

- (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed ("**Voluntary Compressed Allocation**"), the PWCS Contracted Allocation of those Producers will be compressed as follows:
 - (A) if the aggregate Voluntary Compressed Allocation exceeds the relevant Capacity Shortfall, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Capacity Shortfall; and
 - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Capacity Shortfall, the PWCS Contracted Allocation of those Producers will be compressed by the amount that each of them have elected to compress;

- (ii) second, if the compression referred to in section 5(b)(i) does not satisfy the Capacity Shortfall then, subject to section 5(d)(i), the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:
 - (A) if that Producer's Voluntary Compressed Allocation equals or exceeds that Producer's Unutilised Allocation, the Producer will not be subject to further compression under this section 5(b)(ii);
 - (B) if that Producer's Voluntary Compressed Allocation is less than that Producer's Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:
 - (I) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (II) the aggregate Compressed Allocation of all Producers to whom section 5(b)(i) and this section 5(b)(ii) applies equals the relevant Capacity Shortfall; and
- (iii) third, if the compression referred to in sections 5(b)(i) and 5(b)(ii) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer (including Producers who have compressed under sections 5(b)(i) and 5(b)(ii)) will be compressed pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the earlier to occur of the following:
 - (A) the aggregate Compressed Allocation of all Producers is equal to the relevant Capacity Shortfall; and
 - (B) the Compressed Allocation of that Producer under section 5(b)(i) and this section 5(b)(iii) (but not under section 5(b)(ii)) is equal to the General Compression Limit of that Producer.

(ba) Residual Capacity Shortfall

If the relevant Capacity Shortfall referred to in section 5(b) above cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with section 5(b) the PWCS Contracted Allocation of the relevant Producer (or Producers) who are seeking allocations of Capacity to be made available by the relevant PWCS Expansion will be compressed by the residual Capacity Shortfall.

(c) Compression waterfall for delays or shortfall at NCIG Stage 2

When compression applies under section 5(a)(ii), PWCS Contracted Allocations will be compressed in the following order to accommodate all or part of the Non-NCIG Stage 2 Allocations at the PWCS Terminals:

- (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed (“**Voluntary Compressed Allocation**”), the PWCS Contracted Allocation of those Producers will be compressed as follows:
 - (A) if the aggregate Voluntary Compressed Allocation exceeds the Non-NCIG Stage 2 Allocations, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Non-NCIG Stage 2 Allocations; and
 - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Non-NCIG Stage 2 Allocations, the PWCS Contracted Allocation of those Producers will be compressed by the amount that each of them have elected to compress; and
- (ii) second, if the compression referred to in section 5(c)(i) does not satisfy the Non-NCIG Stage 2 Allocations, subject to section 5(d)(i), the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:
 - (A) if that Producer’s Voluntary Compressed Allocation equals or exceeds that Producer’s Unutilised Allocation, the Producer will not be subject to further compression under this section 5(c)(ii);
 - (B) if that Producer’s Voluntary Compressed Allocation is less than that Producer’s Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:
 - (I) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (II) the aggregate Compressed Allocation of all Producers to whom section 5(c)(i) and this section 5(c)(ii) applies equals the Non-NCIG Stage 2 Allocations.
- (iii) If the Non-NCIG Stage 2 Allocations cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with sections 5(c)(i) and 5(c)(ii) the NCIG Producers (on a pro rata basis) must transfer to Non-NCIG Producers such amount of their Contracted Allocation as is necessary to satisfy the Non-NCIG Stage 2 Allocations in accordance with the following timetable:

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

If NCIG Producers do not transfer to Non-NCIG Producers the relevant amount of Contracted Allocations that is required under the above paragraph within the time that is required, the PWCS Contracted Allocation of the NCIG Producers will be reduced to cover the shortfall on a pro rata basis in the proportion the PWCS Contracted Allocation of each NCIG Producer bears to the aggregate PWCS Contracted Allocation of all NCIG Producers.

(d) Exceptions to compression

(i) The Contracted Allocation of a Producer will not be compressed under section 5(b)(ii) or section 5(c)(ii) if the Reviewer (acting reasonably and in good faith) is satisfied that:

(A) **delays:** the failure of that Producer to meet the Utilisation Threshold in the relevant period is caused by a delay:

- (I) in the development of a new project of that Producer;
- (II) in the expansion of an existing project of that Producer;
- (III) in the expansion of associated track facilities or channel works; or
- (IV) resulting from adverse geological and/or mining conditions affecting mine production,

which is outside the reasonable control of that Producer; or

(B) **NCIG Excluded Stage 2 Capacity:** in respect of any NCIG Producer:

- (I) the Contracted Allocation of that NCIG Producer is no greater than the projected maximum production of that NCIG Producer from new and existing mines;
- (II) at the time that NCIG Stage 2 is Committed, that NCIG Producer has specified a period (“**Nominated Deferral Period**”) during which any part of its Contracted Allocation which comprises allocations of Excluded Stage 2 Capacity (“**Relevant Allocation**”) will not be used by that NCIG Producer, provided that the Nominated Deferral Period may be extended by up to 3 years if that NCIG Producer gives notice of the

extension 2 years prior to the end of the initial Nominated Deferral Period; and

- (III) during the Nominated Deferral Period, the NCIG Producer has used its best efforts to transfer the Relevant Allocation for the duration of the Nominated Deferral Period, including by making a bona fide open offer to the market to transfer the Relevant Allocation on customary terms, including by offering to transfer the Relevant Allocation in accordance with section 7(iv),

and those sections will also not apply to a Producer that has otherwise offered to transfer all Unused Allocations of that Producer in accordance with section 7(iv), but only to the extent that so much of the Unused Allocations as are not actually transferred.

- (ii) Section 5(b)(iii) only applies to a Producer whose Group Contracted Allocation at the time the relevant Capacity Shortfall arises is 5 Mtpa or more.
- (iii) If:
 - (A) there is a PWCS Expansion Shortfall; and
 - (B) that PWCS Expansion Shortfall was caused or contributed to by failure in the design of the Expansion to deliver the required Capacity,

then the Contracted Allocation of NCIG Producers that is contracted pursuant to an offer of that NCIG Producer's PWCS Base Allocation will not be subject to compression under section 5(b)(iii) in respect of that PWCS Expansion Shortfall.

(e) Exceptions to calculations for NCIG Producers

- (i) If a Producer is an NCIG Producer then, for the purposes of calculating:
 - (A) the pro rata proportion of the PWCS Contracted Allocation of that Producer to be compressed under section 5(b)(iii);
 - (B) the extent to which the compression of that Producer's PWCS Contracted Allocation will be reduced under section 5(f)(i)(D)(I); and
 - (C) the amount which represents that Producer's General Compression Limit,

the Excluded Contracted Allocation of that Producer will be subtracted from that Producer's Contracted Allocation.

- (ii) Unless and until an election is made by an NCIG Producer in accordance with section 2C(c)(ii) (if any) and that election becomes effective, the Excluded Stage 1 Allocation of that NCIG Producer (including any Contracted Allocation Usage applicable to that Excluded Stage 1 Allocation) will not apply when determining the Utilisation Threshold of that NCIG Producer, provided that:
 - (A) the NCIG Producer has developed a proposal (including terms and conditions) for transferring the Excluded Stage 1 Allocation which optimises the potential transfer of that Excluded Stage 1 Allocation; and
 - (B) the Reviewer has agreed with that proposal.

(f) *Decompression*

- (i) If:
 - (A) in the case of Contracted Allocations compressed under section 5(b), the relevant Capacity Shortfall is reduced; and
 - (B) in the case of Contracted Allocations compressed or transferred under section 5(c), Capacity becomes available at NCIG Stage 2 for Non-NCIG Producers,

then compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) will reduce accordingly such that:

- (C) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under section 5(b)(i) or section 5(c)(i) and at any time that Producer wishes to decompress that amount, the amount compressed will be reduced pro rata amongst the Producers who have elected to decompress under this section 5(f)(i)(C) in the proportion that their Voluntary Compressed Allocation (as may be reduced under section 5(f)(iii)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
- (D) second:
 - (I) with respect to compression under section 5(b)(iii), the amount of any PWCS Contracted Allocation that is compressed under that section will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers; and
 - (II) with respect to the obligation of NCIG Producers referred to in section 5(c)(iii) to transfer Contracted Allocations to the relevant Non-NCIG Producers, that obligation will be reduced pro rata amongst those NCIG Producers in the same proportion that the NCIG

Producers initially transferred their Contracted Allocations; and

- (E) third, the amount of any Contracted Allocation that is compressed under section 5(b)(ii) or section 5(c)(ii) (as applicable) will be reduced pro rata amongst the Producers to whom the relevant section applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocations of all such Producers.
- (iii) For the purposes section 5(f)(i)(C), the Voluntary Compressed Allocation of a Producer will be reduced by any portion of that Producer's PWCS Contracted Allocation which would have been compressed under section 5(b)(ii) or section 5(c)(ii) (as applicable) had that Producer not elected to compress under section 5(b)(i) or section 5(c)(i) (as applicable).

(g) Cessation of compression

Compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) will come to an end at the same time that the relevant Expansion Delay or Expansion Shortfall which triggered that compression (and in the case of section 5(c)(iii), the obligation of NCIG Producers to transfer Contracted Allocations) comes to an end.

(h) Calculation of compression and decompression

- (i) The Reviewer will be responsible for calculating the extent to which each Producer is required to compress and decompress under this section 5.
- (ii) Subject to relevant confidentiality requirements, the Terminal Operators must:
 - (A) promptly provide the Reviewer with all relevant information that is needed for the Reviewer to accurately calculate the extent to which each Producer is required to compress under this section 5; and
 - (B) meet all of the reasonable costs and expenses incurred by the Reviewer in calculating the extent to which each Producer is required to compress or decompress under this section 5.
- (iii) A Producer or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this section 5(h) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (A) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision of the Reviewer; and
 - (B) appoint one of those persons to review the decision of the Reviewer.

The provisions of this section 5(h) will apply to the review to be conducted by that person (with such changes as are necessary).

- (iv) Subject section 5(h)(v), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (v) If a review that is conducted under section 5(h)(iii) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this section 5(h)(v) will be extended by the period of the delay.

6. Co-ordination of Expansion

Any co-ordination of expansion of terminal facilities or services in accordance with the following:

(a) *Expansion by PWCS - When is obligation to expand triggered?*

- (i) Subject to section 6(a)(ii) and section 6(e), if:
 - (A) the Aggregate PWCS Contracted Allocations from time to time exceeds the Aggregate PWCS Available Capacity at that time (“**Capacity Shortfall**”); and
 - (B) the Capacity Shortfall cannot be fulfilled through voluntary Contracted Allocation Reductions,

PWCS must expand the PWCS Terminals to provide additional Capacity which, at a minimum, satisfies the Capacity Shortfall. However, PWCS will not be required to expand to meet any nominations for expansion capacity at the PWCS Terminals which nominate for allocations of less than 10 years.

- (ii) Subject to section 6(e), if the existing PWCS Terminals are not capable of being expanded further to provide the additional Capacity that is necessary to satisfy the Capacity Shortfall, PWCS must build a new terminal to provide that additional Capacity. However, for the avoidance of doubt, nothing in this section 6 precludes any person other than PWCS from undertaking a project to construct a new terminal.
- (iii) If at any time PWCS is required to build a new terminal under section 6(a)(ii) (other than Terminal 4, which is specifically addressed in section 10), then:
 - (A) PWCS must use its best endeavours to identify and acquire appropriate sites for that new terminal; and
 - (B) before commencing any work to undertake the construction of that new terminal PWCS must first use its best endeavours to expand the PWCS Terminals that

exist at that time to satisfy the relevant Capacity Shortfall.

(b) Expansion by PWCS - Time for completion

(i) If PWCS is required to expand a PWCS Terminal under section 6(a)(i) then, subject to section 6(e), that expansion must be Completed:

(A) in the case of Master Plan Completion Phase 1, two years after the date on which the relevant Capacity Shortfall referred to in section 6(a)(i) arises;

(B) in the case of Master Plan Completion Phase 2, two years after the later of:

(I) the date on which the relevant Capacity Shortfall referred to in section 6(a)(i) arises; and

(II) the date on which PWCS is able to access the Hunter River following completion of the relevant part of the BHP Billiton Hunter River Remediation project; and

(C) in any other case, within 2 years after the date on which the relevant Capacity Shortfall referred to in section 6(a)(i) arises.

(ii) If PWCS is required to build a new terminal under section 6(a)(ii) then, subject to section 6(e), that terminal must be capable of meeting the Capacity Shortfall in respect of which the obligation to build the terminal was triggered within 4 years after the date on which that Capacity Shortfall arises.

(iii) Without limiting section 6(e), if having used its best efforts to obtain finance for the purposes of undertaking a particular PWCS Expansion, PWCS is unable to obtain such finance then:

(A) PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion, in which case PWCS must provide all information, records and personnel that the Minister requires in order to consider such request; and

(B) having considered the request, the Minister may (in the Minister's absolute discretion) agree to relieve or suspend PWCS of its obligation to undertake that PWCS Expansion.

(c) Development of NCIG Stage 2

NCIG must not commence construction of NCIG Stage 2 unless it has first offered to allocate 12 Mtpa of Capacity at NCIG Stage 2 to Non-NCIG Producers under Long Term Ship or Pay Contracts in accordance with the NCIG Nomination and Allocation Procedure.

(d) Time for completion of NCIG Stage 2

- (i) NCIG Stage 2 must be capable of delivering the Capacity that is contracted by Non-NCIG Producers at NCIG Stage 2 within the following time periods:
 - (A) if NCIG Stage 2 is Committed on or before 31 December 2009, within 4 years after the date on which NCIG Stage 2 is Committed; and
 - (B) otherwise, within 2 years (or such other time period determined in accordance with section 6(e)) after the date on which NCIG Stage 2 is Committed.
- (ii) For the purposes of section 6(d)(i), NCIG must notify each of NPC and PWCS of the date on which NCIG Stage 2 is Committed within 7 days after that date.

(e) Process for review

- (i) If section 6(b)(i)(C) applies then PWCS may trigger a review under this section 6(e) of the time in which a PWCS Expansion is required to be Completed under that clause by submitting a request to NPC prior to contracting allocations.
- (ii) If section 6(d)(i)(B) applies then, at any time prior to the date on which NCIG Stage 2 is Committed, NCIG may trigger a review under this section 6(e) of the time in which NCIG Stage 2 is required to be Completed under that section by submitting a request to NPC.
- (iii) Subject to section 6(e)(v), the obligation to undertake a PWCS Expansion under section 6(a) will be suspended if:
 - (A) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (I) PWCS has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that PWCS Expansion in a timely manner (including by taking steps to identify ways of redesigning the PWCS Expansion in a manner that would assist in obtaining the Development Consents); and
 - (II) notwithstanding PWCS's efforts, PWCS has been unable to obtain, or is unlikely to obtain, the relevant Development Consents; or
 - (B) a Force Majeure Event prevents that PWCS Expansion being undertaken.
- (iv) Subject to section 6(e)(vi), the obligation to Complete NCIG Stage 2 under clause 6(d) will be suspended if a Force Majeure Event prevents NCIG Stage 2 being Completed.

- (v) If the obligation to undertake a PWCS Expansion under section 6(a) is suspended under section 6(e)(iii), that obligation will recommence at a time determined by the Reviewer or:
 - (A) in the case of section 6(e)(iii)(A), when the relevant Development Consents are subsequently obtained; and
 - (B) in the case of section 6(e)(iii)(B), when the relevant Force Majeure Event ceases to prevent PWCS from undertaking the PWCS Expansion.
- (vi) If the obligation to Complete NCIG Stage 2 is suspended under paragraph 6(e)(iv), that obligation will recommence at a time determined by the Reviewer or when the relevant Force Majeure Event ceases to prevent NCIG from Completing NCIG Stage 2.
- (vii) The time for Completion of an Expansion under this section 6 will be extended if:
 - (A) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (I) there are Engineering Limitations that will delay Completion of that Expansion beyond the scheduled time of Completion; or
 - (II) notwithstanding that the relevant Terminal Operator undertaking that Expansion has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake that Expansion in a timely manner (including by taking steps to identify ways of redesigning the Expansion in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake that Expansion will not be obtained within a time that would reasonably allow the relevant Terminal Operator to Complete the Expansion in accordance with the relevant timeframe for that Expansion under this section 6; or
 - (B) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (viii) The length of any extension of time to be given under section 6(e)(vii) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
 - (A) in respect of an extension of time for Engineering Limitations, the length of time it would reasonably take to remedy or otherwise address the relevant Engineering Limitations;
 - (B) in respect of an extension of time for delays in obtaining Development Consents, the length of time it would

reasonably take to obtain the Development Consents, including the period of time it would reasonably take to modify engineering designs to comply with the likely terms of any Development Consent; and

- (C) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.
- (ix) It is a condition of any extension of time that is granted under section 6(e)(vii) that:
- (A) the relevant Terminal Operator must take all reasonable and prudent steps to minimise the impact that the relevant Engineering Limitations or Force Majeure Event (as applicable) may have on the development and construction of the relevant Expansion (including the time for Completion of that Expansion);
 - (B) in the case of a PWCS Expansion, if Capacity can be realised from the PWCS Expansion it must be made available to Producers, notwithstanding that such Capacity may not fully satisfy the relevant Capacity Shortfall which triggered that PWCS Expansion; and
 - (C) in the case of NCIG Stage 2, if Capacity can be realised from NCIG Stage 2 it must be made available to relevant Non-NCIG Producers, notwithstanding that such Capacity may not fully satisfy all Non-NCIG Stage 2 Allocations.
- (x) The relevant Terminal Operator or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this section 6(e) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
- (A) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision; and
 - (B) by agreement with the relevant Terminal Operator (as the case requires), appoint one of those persons to review the decision of the Reviewer.

The provisions of this section 6(e) will apply to the review to be conducted by that person (with such changes as are necessary).

- (xi) Subject to section 6(e)(xii), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (xii) If a review that is conducted under section 6(e)(x) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the

determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this section 6(e)(xii) will be extended by the period of the delay.

7. Capacity Transfers

- (i) The conduct of capping the fee that a Producer with a Contracted Allocation at the PWCS Terminals may charge another to use a portion of its Contracted Allocation ("**Relevant Proportion**") at no more than 5% of the fee charged by PWCS for the Relevant Portion.
- (ii) The conduct of capping the fee that a Producer with a Contracted Allocation at the NCIG Terminals may charge another to use a portion of its Contracted Allocation ("**Relevant Proportion**") so that such fees do not exceed the fees which are charged to that Producer for the Relevant Portion by NCIG by more than 5%.
- (iii) The conduct of sharing of information and coordination between the Applicants (and other participants in the Hunter Valley coal industry) for the purpose of developing and implementing a transparent centralised system to facilitate and manage the offering and acquisition of Unused Allocations ("**Capacity Transfer System**").
- (iv) Making and/or giving effect to any requirement:
 - (A) for Producers to use the Capacity Transfer System to transfer Unused Allocations; and
 - (B) that Producers who do not use their best efforts to transfer their Unused Allocations on customary terms (including by making a bona fide attempt to transfer Unused Allocations in accordance with the Capacity Transfer System) will not be entitled to claim relief from anti-hoarding compression in accordance with section 5(d)(i) in respect of those Contracted Allocations.

8. Levy

- (i) The setting, making and/or giving effect to any industry levy (to be applied on a per tonne basis across all coal exported from the Terminals) that may be applied by PWCS or NCIG to assist with meeting the cost of any Unallocated Expansion Capacity ("**Levy**") in accordance with the following:
 - (A) A Terminal Operator may elect to apply the Levy whenever:
 - (I) that Terminal Operator Completes an Expansion; and
 - (II) the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion ("**Unallocated Expansion Capacity**"),

provided that NCIG must not apply the Levy to any Excluded Stage 2 Capacity.

- (B) Subject to paragraph (C), the Terminal Operator will use its best endeavours to allocate the Unallocated Expansion Capacity to any Producer either under a Long Term Ship or Pay Contract or under any short term contractual arrangement in accordance with the Nomination and Allocation Procedures.
 - (C) Whilst NCIG has not Committed to NCIG Stage 2, NCIG Producers will only be entitled to nominate for allocations of Unallocated Expansion Capacity at PWCS Terminals under fixed term contractual arrangements for the maximum term then available not exceeding 2 years.
 - (D) If the Levy is applied in respect of any Unallocated Expansion Capacity, the Levy will cease to apply when that Unallocated Expansion Capacity is subsequently allocated under a Long Term Ship or Pay Contract.
 - (E) Where the relevant Unallocated Expansion Capacity is allocated under any short term contractual arrangement the Levy will be adjusted accordingly.
- (ii) Sharing of information and coordination between the Applicants for the purpose of developing and implementing protocols for the calculation, charging and collection of the Levy (“Levy Protocols”).

9. Contractual alignment

- (a) The making or giving effect to:
 - (i) any limitation or restriction on the offering or contracting of available capacity or services by either PWCS, NCIG or any above or below rail service provider in the Hunter Valley in accordance with the “System Design from 1 July 2009” principles set out in the Contractual Alignment Principles in Attachment 2.
 - (ii) the development and implementation of any “System Assumptions” (including any agreement in relation to system capacity, in whole or in part) to define the capacity being constructed and purchased under long term contracts as set out in Attachment 2;
 - (iii) any adjustment or variation to contracted allocations or determination of capacity losses based on the Contract Performance Management process set out in the Contractual Alignment Principles in Attachment 2; and
 - (iv) sharing of information and coordination between the Applicants, Producers, the HVCCC, above and below rail providers and others for the purpose of:
 - (A) developing a capacity transfer system; and
 - (B) to facilitate the operational coordination and efficient operation of different parts of the coal chain,

in each case as contemplated by the Contractual Alignment Principles in Attachment 2.

- (b) The conduct of PWCS or NCIG:
 - (i) requiring Producers to have adequate entitlements to track and train haulage upon lodging any application under their contracts for the provision of coal handling services in respect of each vessel to be loaded; and
 - (ii) refusing to supply coal handling services if a Producer has inadequate track or train delivery entitlements in respect of the application for a vessel to be loaded.

10. Terminal 4

Any requirement in relation to the structure, ownership or operation of Terminal 4 that:

- (a) the Capacity Framework Arrangements set out in this Part B of Attachment 1 will apply to the provision of Capacity at Terminal 4 in the same way as they apply to all other terminals owned and controlled by PWCS; or
- (b) access to capacity will be open to all Producers on a non-discriminatory basis, except to the extent discriminatory treatment is expressly contemplated in this Part B of Attachment 1.

11. Other arrangements specified in the Implementation Memorandum

Any other conduct which gives effect to the provisions of the Implementation Memorandum and which is not addressed in Sections 1-10 above.

PART C - Dictionary

In this Attachment I:

Aggregate PWCS Available Capacity means the aggregate Capacity of the PWCS Terminals from time to time.

Aggregate PWCS Contracted Allocations means the aggregate of all Contracted Allocations at PWCS Terminals.

Associate means, in relation to a person:

- (a) a Related Body Corporate of that person;
- (b) a person, or the trustee or manager of a trust, which Controls that person;
- (c) a person, or the trustee or manager of a trust, which that person Controls;
- (d) a Related Body Corporate of a person included in paragraph (a), (b) or (c);
- (e) a partnership or an incorporated or unincorporated joint venture in which the person, or any one or more of the persons mentioned in paragraph (a), (b), (c) or (d), holds an interest;
- (f) a body corporate, or the trustee or manager of a trust, which one or more of the persons mentioned in paragraph (a), (b), (c), (d) or (e) alone or together Controls; or
- (g) the trustee of a trust (including a discretionary trust) of which a person included in paragraph (a), (b), (c), (d) or (e) is a beneficiary (whether or not through one or more other trusts, including discretionary trusts).

For the purposes of this definition, a reference to a partnership or an unincorporated joint venture is also a reference to the persons who are parties to that partnership or unincorporated joint venture.

Base Allocation means, in respect of a Producer, that part of the PWCS Base Tonnage offer for the year 2009 and 2010 (respectively) that is accepted by that Producer.

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

Capacity Framework Agreement means the agreement of that name to be entered into between NPC, NCIG and PWCS.

Capacity Shortfall has the meaning given in section 6(a)(i)(A) of Part B.

Committed means, in respect of NCIG Stage 2, the point in time when NCIG is contractually bound to make available Capacity to Non-NCIG Producers (as referred to in section 6(c) of Part B) pursuant to executed and binding long term ship or pay contracts, and **Commit** and **Commitment** have corresponding meanings.

Completed means, in respect of an Expansion, that Expansion is commissioned, available to receive coal and is capable of satisfying the Capacity that is required to be satisfied by that Expansion under this document.

Compressed Allocation means:

- (a) in respect of a Producer at any time, the extent to which that Producer's Contracted Allocation has been compressed under section 5 of Part B; and
- (b) in respect of all Producers at any time, the extent to which the Contracted Allocations of all Producers has been compressed in accordance with section 5 of Part B at that time.

Contracted Allocation means, in respect of a Producer, the aggregate amount of Capacity which the Terminal Operators are contractually bound to make available to that Producer.

Contracted Allocation Reduction means a reduction in the Contracted Allocation of a Producer at the PWCS Terminals as agreed between that Producer and PWCS from time to time.

Contracted Allocation Usage means, in respect of a Producer at any time, the use by that Producer of that Producer's Contracted Allocation, not including any part of that Producer's Contracted Allocation that has been transferred to another Producer through a capacity transfer or swap, plus:

- (a) that Producer's use of any Contracted Allocation of another Producer that is acquired through a capacity transfer or swap;
- (b) any portion of that Producer's PWCS Contracted Allocation which has been compressed in accordance with section 5 of Part B during the 18 month period immediately prior to that time; and
- (c) any portion of that Producer's Contracted Allocation which has not been used by the Producer as a direct result of a Force Majeure Event.

Control has the meaning given in the *Corporations Act 2001* (Cth).

Deed of Undertaking means the deed to be entered into between NPC, NCIG and NCIG Producers which gives effect to all of the provisions initially drafted for inclusion in the NCIG Agreement for Lease, as well as any other relevant or incidental provisions agreed between NPC and NCIG during discussions and negotiations of the long form documentation.

Development Consents means all licences, consents, approvals, permits, authorisations, certificates of registration or other concessions issued by a government authority which are required to be obtained or entered into in respect of any part of any Expansion.

Engineering Limitations means, in respect of an Expansion:

- (a) the time for delivery of the Expansion in the most efficient and effective manner (having regard to the then prevailing practice for comparable terminals in Australia) will exceed the time in which that expansion is required to be Completed under this document; or
- (b) any engineering limitation in the construction of that Expansion that:
 - (i) is of a type that a reasonable and prudent person of sufficient experience, knowledge, qualification and skill would not have foreseen or allowed for when preparing the project plan and project timeline for that Expansion, including:
 - (A) a latent condition affecting the site the subject of the Expansion; or
 - (B) any delay or excessive lead times in the supply of major items of equipment by a supplier;
 - (ii) is beyond the reasonable control of the relevant Terminal Operator and not attributable to an employee, agent or Related Body Corporate of that Terminal Operator;
 - (iii) the relevant Terminal Operator or any Related Body Corporate of that Terminal Operator could not reasonably have provided against before executing this document;
 - (iv) the relevant Terminal Operator could not reasonably have avoided or overcome; and
 - (v) has been notified to the Reviewer promptly after the date on which the relevant Terminal Operator undertaking that Expansion became aware of that engineering limitation (whether before or after commencement of construction of that Expansion).

Excluded Contracted Allocation means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1 or through Excluded Stage 2 Capacity.

Excluded Stage 1 Allocation means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1.

Excluded Stage 2 Capacity means that portion of the Capacity available at NCIG Stage 2 which is not required to be offered for allocation to Non-NCIG Producers in accordance with section 6(c) of Part B.

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

Expansion Delay means a PWCS Expansion Delay or an NCIG Stage 2 Delay (as applicable)

Expansion Shortfall means a PWCS Expansion Shortfall or an NCIG Stage 2 Shortfall (as applicable).

Force Majeure Event means an event or circumstance which:

- (a) in relation to a party:
 - (i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;
 - (ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing this document; and
 - (iii) that party could not reasonably have avoided or overcome; and
- (b) is not substantially attributable to any breach of this document by one or more of the other parties,

and so long as the requirements of paragraphs (a) and (b) have been satisfied, may include:

- (c) an act of God, lightning, storm, flood, hurricane, typhoon, cyclone, volcanic activity, fire, earthquake, explosion or peril of navigation;
- (d) theft, malicious damage, strike, lockout, boycott or any a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party;
- (e) a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party
- (f) act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, terrorism, insurrection, civil commotion, epidemic, rebellion, military or usurped power or martial law;
- (g) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (h) embargo, power or water shortage;
- (i) confiscation by order of any government;
- (j) the introduction of or change to legislative requirements or regulations applicable to an Expansion;
- (k) a direction by a municipal, public or statutory authority (not caused by a failure of the affected party to comply with legislative requirements);
- (l) a delay by a municipal, public or statutory authority (not caused by the affected party);
- (m) the affected party is unable to secure a lease from the applicable NSW State Government authority or department for land that is needed to carry out an Expansion but for which that affected party does not already hold a lease; or

- (n) failure by a financier to meet its commitment to provide funding for an Expansion where that failure is not due to the financier exercising or not exercising (as the case may be) any rights its has against the affected party under the financing documents or otherwise.

General Compression Limit means, in respect of a Producer:

- (a) 5% of that Producer's Contracted Allocation in the calendar year in which that Producer's Contracted Allocation is first compressed for a PWCS Expansion Delay or PWCS Expansion Shortfall under section 5(b)(iii) of Part B; and
- (b) for each calendar year thereafter in which that PWCS Expansion Delay or PWCS Expansion Shortfall (and any other concurrent PWCS Expansion Delay or PWCS Expansion Shortfall) subsists, an additional 5% of that Producer's Contracted Allocation.

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

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

NCIG Capacity Framework Documents means:

- (a) the Deed of Variation between NCIG and NPC amending the terms of the Agreement for Lease for the land on which NCIG Stage 1 and NCIG Stage 2 is to be constructed in order to give effect to the relevant provisions of the Capacity Framework Arrangements;
- (b) the Capacity Framework Agreement between PWCS, NCIG and NPC which gives effect to the relevant provisions of the Capacity Framework Arrangements; and
- (c) the Deed of Undertaking.

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

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

NCIG Stage 1 means the terminal operated by NCIG up to a total Capacity of 30 Mtpa.

NCIG Stage 2 means any expansion (or part thereof) of the terminal operated by NCIG in excess of the total Capacity that can be delivered by NCIG Stage 1.

NCIG Stage 2 Delay means NCIG Stage 2 is not capable of meeting the Capacity referred to in section 6(d) of Part B within the time required under section 6(d) (subject to any extension of time permitted under section 6(e) of Part B).

NCIG Stage 2 Shortfall means the extent to which the Capacity available at NCIG Stage 2 falls short of meeting the Non-NCIG Stage 2 Allocations.

Nominated Deferral Period has meaning given in section 5(d)(i)(B)(II) of Part B.

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

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

Producer means any person who, by virtue of its ownership, management rights or some other means:

- (a) exercises effective operational control over; or
- (b) has, in relation to its dealings with the Terminal Operators, authority to represent the interest of,

one or more mines producing coal for export through the Hunter Valley Coal Chain.

Producer Group means, in respect of a Producer, that Producer and each Associate of that Producer.

PWCS Base Tonnage means the base tonnage to be offered for allocation to Producers at the PWCS Terminals in the year 2009 in accordance with Part A and in the year 2010 in accordance with section 1 of Part B.

PWCS Capacity Framework Documents means:

- (a) each Deed of Variation between PWCS and NPC amending the respective PWCS Leases to give effect to the relevant provisions of the Capacity Framework Arrangements;
- (b) the Agreement for Lease for Terminal 4 between PWCS and NPC; and
- (c) the Capacity Framework Agreement between PWCS, NCIG and NPC which gives effect to the relevant provisions of the Capacity Framework Arrangements.

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

PWCS Contracted Allocation Usage means, in respect of a Producer at any time, the use by that Producer of that Producer's PWCS Contracted Allocation, not including any part of that Producer's PWCS Contracted Allocation that has been transferred to another Producer through a capacity transfer or swap, plus:

- (a) that Producer's use of any PWCS Contracted Allocation of another Producer that is acquired through a capacity transfer or swap;
- (b) any portion of that Producer's PWCS Contracted Allocation which has been compressed in accordance with section 5 of Part B to this Attachment 1 during the 18 month period immediately prior to that time; and

- (c) any portion of that Producer's PWCS Contracted Allocation which has not been used by the Producer as a direct result of a Force Majeure Event.

PWCS Expansion means an expansion of existing PWCS Terminals or the building of a new terminal by PWCS (as applicable) as required under section 6 of Part B.

PWCS Expansion Delay means a PWCS Expansion is not Completed within the time required under section 6(b) of Part B (subject to any extension of time permitted under section 6(e) of Part B) and includes any PWCS Expansion that is suspended under section 6(e)(ii) of Part B.

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

PWCS Tonnage Allocation Stage 1 means the PWCS Tonnage Allocation Stage 1 set out in Attachment 1 of PWCS' and NCIG's supporting submission in respect of applications for authorisation A91110 - A91112.

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

Terminal Access Protocols means, in relation to PWCS, the proposed PWCS Terminal Access Protocols.

Terminal Operators means each of PWCS and NCIG.

Unallocated Expansion Capacity has the meaning given in section 8(i)(A)(II) of Part B.

Unused Allocations means any portion of a Producer's Contracted Allocation that will not be used by the Producer for any period and for any reason.

Unutilised Allocation means, in respect of a Producer, the difference between the amount that is 95% of that Producer's Contracted Allocation for a relevant period of time and that Producer's Contracted Allocation Usage during that period.

Utilisation Threshold means, in respect of a Producer, that Producer's Contracted Allocation Usage is at least 95% of that Producer's Contracted Allocation on average over a period of 18 consecutive months.

Attachment 2 - Contractual Alignment Principles

PROPOSED CONTRACTUAL ALIGNMENT

Introduction

This section of the Submission aims to address the contractual alignment requirements as detailed in the ACCC's Determination of 13 May 2009, specifically items:

"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 industry in order to implement the long term solution within the industry's timeframes. For instance, further work is required by industry to give effect to the agreed guiding principles on contractual alignment contained within Schedule 5 of the Implementation Memorandum – including the development of System Assumptions underpinning the determination of track and terminal 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 individual components of the supply chain.'*

Schedule 5 of the Implementation Memorandum sets out the guiding principles of Coal Chain Contractual Alignment. These remain valid and are being used in the development of both the long term contracts and associated access protocols for Hunter Valley coal chain infrastructure. Schedule 5 of the IM also envisaged the following documents to give effect to the Contractual Alignment Principles;

1. System Assumptions
2. Hunter Valley Coal Chain Starting Point
3. Access Protocols and Process (also envisaged under IM Schedule 4 as 'Coal Chain Access Protocols)
4. Contract Performance Management

System Assumptions

As recognised by the ACCC, the System Assumptions are critical in that they underpin the determination of track and terminal capacity. Essentially, they define the capacity which is being constructed and purchased under long-term take-or-pay contracts, and it is therefore imperative that the System Assumptions be as realistic as possible.

Implementing the long-term solution from scratch therefore presents a "catch 22";

**Accurate System Assumptions are needed to form the basis of contracts,
however
Accurate System Assumptions can only be produced by modelling the known task,
yet
The known task can only be determined after contracts have been executed.**

Whilst the Hunter Valley Coal Chain Logistics Team (HVCCLT) has produced a nominal 150Mtpa model and associated System Assumptions based on non-binding indicative forecasts, industry recognises that long-term contracts must be based on more definitive System Assumptions. These System Assumptions will, in an iterative manner, assist to define some key Performance Standards to be included in the long term contracts, including;

- o Load Point Standards
- o Train Standards – sizes, cycle times
- o Unloading Standards

- o Cargo Assembly Standards – build times, parcels per vessel, parcel size etc.
- o Vessel Standards

Key considerations yet to be finalised are the potential level of different Performance Standards allowed within the chain, and the extent to which current arrangements may or may not be permanently or temporarily grandfathered compared to new / expanding producers. All stakeholders are proactive towards best-practice standards. However, these must be evaluated based on the detailed System Assumptions taking into account both individual and group commercial considerations.

The attached "Staged Implementation of Contractual Alignment" table has therefore been prepared to ensure contractual alignment in an environment generally bounded by the following constraints:

1. The current PWCS Tonnage Allocation Stage 1 expires on 30 June 2009 and needs to be replaced by a contracted framework,
2. Long-term contracts must be fast-tracked to determine the sources, volume and timing of the infrastructure expansion task, and
3. Producers will have to commit to long-term contracts before finalisation of System Assumptions and operating rules/performance standards. Accordingly, the long term contracts need to be self-executing on finalisation of System Assumptions and operating rules/performance standards (which must be clarified as soon as possible).

Hunter Valley Coal Chain Starting Point

As per the Implementation Memorandum it has been generally agreed that the 97.4Mtpa in 2010 is the starting point for Terminal and Track Access rights. Once again, the System Assumptions and associated performance standards will need to be finalised to ensure these rights are defined and measurable.

Access Protocols and Process

Rather than a set of Coal Chain Access Protocols, further work has identified the potential for the PWCS Terminal Access Protocols, NCIG Terminal Access Protocols and ARTC Access Protocols (being developed via its Access Undertaking) to be aligned in such a manner that Coal Chain Access Protocols may be unnecessary. Given the urgent need for long term contracts in order to finalise System Assumptions, service providers are currently focusing on aligning their contractual provisions, particularly flexibility/tolerance issues. Once this is done, there is further work to be done to ensure their Access Protocols are aligned in such a manner that there is a transparent allocation of existing capacity, together with appropriate conditions precedent and a mechanism to ensure that Access Seekers are able to align major commitments to take-or-pay contracts that provide certainty across the chain.

This important aspect of contractual alignment which involves aligned commitments to contracts has formed the basis of the proposed approach to the initial contracting phase to implement the long-term solution.

Contract Performance Management

The industry has substantially progressed the structure and constitution of the proposed Hunter Valley Coal Chain Coordinator (HVCCC). In addition to coordinating both long-term and short-term planning functions, the HVCCC is envisaged to perform a key role in monitoring and recording system performance against the performance standards which form the basis of contracts.

Contract performance criteria will be inherent in individual service provider contracts through take or pay penalties and flexibility limits. Flexibility limits will be included in the HVCCC simulation model and be monitored in accordance with the Producer validation sheet. Variation from agreed performance levels may lead to individual or shared capacity losses as follows:

Determination of Capacity losses:

The HVCCC will determine and apportion capacity losses as per the following:

LOAD POINTS: Capacity losses attributable to a Load Point due to failure to operate in line with the determined load point and other standards will be borne by that individual producer if make up capacity across track, train and terminal is not available

TRACK: For the period 1 July 2009 to 31 December 2009, capacity losses attributable to Track due to failure to operate in line with their agreed standards will be dealt with in accordance with the existing track access agreements (i.e. "business as usual"). Post 31 December 2009, capacity losses will be shared across all "upstream" affected Producers as set out in the section 5.3 of the Hunter Valley Access Undertaking (HVAU) lodged with the ACCC on 23 April 2009:

- If the track outage is for 7 days or less, then ARTC will have discretion regarding allocation taking into account contracted commitments and efficient utilisation of track and Coal Chain Capacity. The intent is that this will provide flexibility to ARTC and the logistics team to minimise impact on Coal Chain Capacity but in a manner that also preserves individual contracted entitlements as much as possible.
- If the track outage is more than 7 days, then track capacity will be allocated on an equitable pro rata basis having regard to producers' unused contracted entitlements.

To the extent that ARTC has caused the track outage such that producers have not received their contracted track entitlements, ARTC is at risk of having to pay rebates to those producers under the system wide true up test included in Schedule 2 of the Indicative Access Holder Agreement attached to the HVAU. The CAG has also asked there be consideration of whether or not downstream producers have been able to benefit from an upstream constraint, and the extent to which such benefit may then be shared to partially off-set upstream losses once the constraint has been removed. This occurs to some degree as downstream producers will use their contracted entitlements up leaving capacity later in the month for the upstream producers. However, this can be considered further during the ACCC consultation process.

Producers generally agree that this issue needs to be approached fairly and reasonably under a guiding principle that enables some flexibility for the logistics team to minimise impacts in a manner that also preserves individual allocation as much as possible.

TRAINS: Capacity losses attributable to Rail Operators due to their failure to operate in line with their agreed standards will be borne by each affected user of that Rail Operator on a contractual basis if make up capacity across train, track and terminal is not available.

COAL TERMINALS: Capacity losses attributable to Coal Terminals due to their failure to operate in line with their agreed standards will be borne by affected users of that Coal Terminal on a pro rata basis if make up capacity across train track and terminal is not available.

HARBOUR: Capacity losses attributable to Newcastle Port Operations will be shared across affected Producers on a pro rata basis if make up capacity across train track and terminal is not available.

Performance reporting is currently available on a weekly basis through the HVCCC on an individual Producer Load Point basis. This report includes load point performance, train cycle time and other measures that identify performance. It is envisaged that these reports will be further enhanced through the establishment of operating rules for the HVCCC. Such operating rules are to be developed to optimise system capacity whilst recognising that individual contractual agreements will take priority.

System Design From 1 July 2009

In appreciation of the current constraints in finalising draft long-term contracts, reconciling alignment, consulting with producers and then allowing prudent time for Producer boards to approve entry in long-term contracts, the Transition to Contracted Alignment document sets out the proposed three-stage process as follows;

1. Phase 1:

Terminal

Producers enter into binding 6 mth commitments for terminal for the period 1 July 2009 to 31 December 2009. This framework will enable the risk of queuing to be managed as follows:

- Terminal: Whilst terminal system capacity is > 102Mtpa, it will be contracted to 96.7Mtpa until 31 December 2009. It is aimed to finalise outstanding areas of the commercial frameworks, particularly relating to system standards and the Capacity Transfer System by 4th quarter 2009. Prior to this time, PWCS and ARTC shall conduct an assessment in consultation with industry with a view to offering increases to these contracts (first from 96.7Mtpa to 97.4Mtpa, and then pro-rata upwards should any additional capacity be considered available, taking into account:
 - System Assumptions and associated Performance Standards finalisation
 - Capacity Transfer System targeted finalisation
 - Current operation of the Quarter 3 arrangements and the associated vessel queue
 - Views from Producers at that time
 - The concept of additional usage of unutilised train capacity established for Quarter 3 would continue for Quarter 4
 - Other relevant considerations.

Track

- ARTC will extend the existing track access agreements with PN and QR which are due to expire on 30 June 2009 until 31 December 2009. While ARTC considered entering into heads of agreements with producers under which it committed to provide track access equivalent to the port allocations for the period 1 July 2009 to 31 December 2009, this was not feasible for a number of reasons including the need for new complex contractual arrangements, lack of underlying systems and changes required to the existing haulage agreements. These are set out in ARTC's letter to producers dated 23 June 2009, attached as Appendix 4.
 - Whilst track system capacity is > 102Mtpa, there should be no major difficulties obtaining sufficient track access to match Terminal allocations, even if overall Coal Chain Capacity is greater than 96.7 Mtpa. Track capacity will be contracted to PN and QR for utilisation until 31 December 2009. It is aimed to finalise outstanding areas of the commercial frameworks, particularly relating to system assumptions and performance standards and the Capacity Transfer System in the 4th quarter of 2009.
- Trains: There is current debate over train nominal vs train system capacity. Losses associated with haulage operators can only be defined and quantified by the way in which they are contracted, hence must be resolved contractually between the counter-parties. The approach by the track and terminal providers to under-contract the track-terminal system capacity during this 6 month transitional stage will assist in alleviating any issues/potential queuing arising from operational adjustments necessary due to haulage losses. Should the HVCCLT determine through the period 1 July 2009 to 31 December 2009 that there is unutilised train capacity, then to the extent that contracts with the relevant train operator allows, this unused capacity should be offered to those producers who have the ability to use it .

- Load Points: Whilst load point performance is a key individual responsibility under the proposed long-term contracts, this can only be implemented once the standards have been determined together with the reporting system. During the transitional phase, PWCS will reserve the right, but not the obligation, to coordinate and make potential pro-rata adjustments to firstly voluntary reductions, then flexibility, but potentially the allocation provided under the 6 mth contracts in the event this particular issue is causing vessel queuing. It is intended during 4th quarter 2009, contracts may be varied to include system standards so as individual responsibility can be implemented in a staged manner under the 6 mth terminal agreements.
- Capacity Transfer System: A Capacity Transfer System is planned to be developed 4th quarter 2009 and be implemented from 1 January 2010. During the 3rd and 4th quarter of 2009, capacity transfers will generally take place as it has in the past. Tracking, recording and publication of the effects of capacity transfers will be established, however any losses associated with transfers during this phase will be shared on a pro-rata basis having regard to the vessel queue.
- During the transitional phase, PWCS will reserve the right, but not the obligation, to coordinate and make potential pro-rata adjustments to firstly voluntary reductions, then flexibility, but potentially the allocation provided under the 6 mth contracts in the event there is vessel queuing.

2. Phase 2

Producers submit binding long-term commitments for terminal and track commencing 1 January 2010. Notwithstanding that the following matters may not be finalised at the time these commitments are made, the long term contracts will be self-executing when this occurs:

- Final System Assumptions and associated Conditions Precedent and Performance Standards
- Final Capacity Transfer System
- Role of HVCCC and Reporting Standards

Producers to identify requirements for track access commencing 1 January 2010 (anticipated volume of coal and rolling stock configuration) by 3 July 2009. ARTC will negotiate the long term contracts based on volumes consistent with those notified but the information provided is not binding.

It is targeted that in Q4 2009, Track and Terminal providers return executed long-term contracts and thus confirm certainty of coal chain access. Producers should then have the required certainty to commit to associated haulage contracts so as to trigger the mobilisation of trains which are critical to ensure the expanded infrastructure can be fully utilised.

Attachments:

1. Staged Implementation of Contractual Alignment
2. Staged Changes for the Alignment of HVCC Operational Parameters
3. Guiding Principles of Contractual Alignment (as per IM Schedule 5 – re-stated here for relevance)
4. ARTC Letter of Intent - Transitional Arrangements

Appendix 1

STAGED IMPLEMENTATION OF CONTRACTUAL ALIGNMENT

Subject to:

- **ACCC authorisation (as required)**
- **Board approvals of PWCS, ARTC, NCIG**
- **Target dates potentially extended to allow reasonable time for Producer internal approvals**

Indicative Target Date	PWCS	ARTC
3 June 2009	<p>Issue draft to all Producers;</p> <ul style="list-style-type: none"> ○ CHSA (modified) for 6mth 1 Jul 09-31Dec 09 for 96.7Mtpa, based on Load Point Allocations, and with an ability to increase to 97.4 and then pro-rata upwards should any additional capacity be considered available, taking into account: <ul style="list-style-type: none"> ○ System Assumptions and associated Performance Standards finalisation ○ Capacity Transfer System finalisation ○ Current operation of the Quarter 3 arrangements and the associated vessel queue ○ Views from Producers at that time ○ The concept of additional usage of unutilised train capacity established for Quarter 3 would continue for Quarter 4 ○ Other relevant considerations. ○ Terminal Access Protocols ○ Form of LTSOP for 10yr contracts from 1 Jan 2010. 	
3 June – Mid July	<p>Consultation with;</p> <ul style="list-style-type: none"> ○ All Producers ○ NCIG & ARTC: Reconciliation of Alignment Methodology including Access Protocols and Terms and Conditions (especially Operating Protocol) 	
By mid-June		Pre-application review - Sessions with Producers and Operators to provide overview of transitional arrangements and contract structure
Following submission to ACCC of application for authorisation	<p>Issue final forms;</p> <ul style="list-style-type: none"> ○ 6mth CHSA for 96.7Mtpa 	
By 30 June		<ul style="list-style-type: none"> ○ ARTC to extend QR and PN's existing track access agreements to 31 December 2009
3 July		Producers to identify their anticipated volume of coal and likely method of operating (including rolling stock configuration) for long term access contracts

14 days following issue of 6 month CHSA (to be effective from when ACCC authorisation is granted)	PWCS Receive Producers acceptance of 6mth offer for up to 96.7Mtpa by load point	
31 August	Issue final forms Terminal Access Protocol <ul style="list-style-type: none"> o LTSOP Note: Final forms will be subject to finalisation of <ul style="list-style-type: none"> o System Assumptions and associated Conditions Precedent o Capacity Transfer System o HVCCC Role with regard to Reporting 	Pre-application review - ARTC, HVCCLT & Producers undertake modelling exercise to confirm assumptions Contract negotiation - Conclude contract schedules
By mid-September		Contract negotiation - ARTC to independently verify [model] capacity and commercial obligations of proposed contracts
By 30 September	PWCS Receive executed 10 yr LTSOP's commencing 1 Jan 2010 for <ul style="list-style-type: none"> o Base Tonnage Offers o Addn 1Jan 2010-30 Jun 2010 offers to NCIG Producers o Binding Nominations from Non-NCIG Producers 	Contract Negotiation <ul style="list-style-type: none"> o Finalise Access Holder Agreement contract terms o Enter into Operator Sub-Agreements with Access Holder endorsement
1-15 October	PWCS Capacity Assessment and Review. Advice to HVCCLT to input detailed tasks, volume and timeframes based on contracts received. Subject to potential review process by NPC	
15 – 31 October	ARTC, PWCS and NCIG via HVCCLT to finalise System Assumptions.	ARTC to participate in the finalisation of System Assumptions
Early Nov 2009		ARTC to review and adjust Producers' commitments under the Access Holder Agreement where necessary to reflect the final System Assumptions
Nov 09	Based on final System Assumptions; <ul style="list-style-type: none"> o Input System Assumptions into contracts. o Input Conditions Precedent into Contracts with regard to system assumptions and access. o Finalise Capacity Transfer System o Finalise HVCCC Role with regard to Operations and Reporting 	
Nov 2009	PWCS to execute LTSOP contracts and return to Producers	
By 30 November		Implementation - Provide rules to HVCCLT to ensure contract delivery is enabled
Dec 2009	<ul style="list-style-type: none"> o Any producer that has not received close to its nominated entitlement has a right to cancel its Nomination. o If this occurs, PWCS to conduct an iterative exercise to re-distribute any consequent capacity. 	

1 January 2010	Implementation - Access under Agreements commences	Implementation - Agreements commence
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Note:

1. **Contracts are already in place for NCIG Stage 1. NCIG will advise arrangements in respect of NCIG Stage 2 as those contracts are developed.**
2. **Additional train contracts will flow once certainty of track and terminal access rights has been provided by the above process.**

Appendix 2
Staged Changes to HVCC Operational Parameters
associated with the implementation of Long Term Contracts

Parameter	Current	Phase 1 – Long Term Transition (1/7/09 – 31/12/09) *	Phase 2 - Long Term (From 1/1/10) *
Allocation Quantity	<ul style="list-style-type: none"> • In accordance with the PWCS Tonnage Allocation Stage 1 and Coal Handling Services Agreement. 	<ul style="list-style-type: none"> • PWCS will make a base tonnage offer to each Producer in accordance with the Terminal Access Protocols (96.7Mtpa) for the period 1/7/09 – 31/12/09. Producers accept their base tonnage offer and divide into load points. • ARTC is being asked to provide an arrangement that provides an equivalent effect to PWCS • The HVCCLT will determine projected coal chain capacity and confirm Terminal System Capacity and Track System Capacity based upon Producers' load point allocations up to 31/12/09. • In accordance with the Contractual Alignment Principles, a Producer's access may be the lesser of their PWCS and ARTC capacities. • Throughout the period Producers together with their Service Providers are to manage their contractual performance/obligations to ensure shipping queue lengths do not become unreasonable. • Should the the HVCCLT determine through the period that there is unutilised train capacity, then to the extent that contracts allow, this spare capacity should be offered to the applicable Producers. • PWCS, having regard to shipping queues formed as a result of impacts at PWCS, may in priority order: <ol style="list-style-type: none"> 1) Ask for voluntary allocation reductions 2) Reduce the flex down from 180kt 3) As a last resort may make pro-rata allocation reductions • PWCS may make capacity available above 96.7Mtpa, which will be shared by those Producers who desire it on a pro rata basis. • 	<ul style="list-style-type: none"> • In parallel with Phase 1, PWCS will: <ol style="list-style-type: none"> 1) Make a base tonnage offer to each Producer (97.4 Mtpa) from 1/1/10 for 10 years. Producers accept their base tonnage in accordance with the Terminal Access Protocols; and 2) Seek binding nominations for 10 year load point allocations from Non-NCIG Producers in accordance with the Terminal Access Protocols. • ARTC will call for long term ToP nominations commencing 1/1/10 • PWCS and ARTC are finalising their long term take or pay contract documents. The contracts and processes will be consistent with the principles of the IM. • In accord with the Contractual Alignment Principles, a Producer's access may be the lesser of their PWCS and ARTC capacities.
Allocation Periods	<ul style="list-style-type: none"> • Monthly for Large Producer • Quarterly for Small Producer 	<ul style="list-style-type: none"> • Monthly for Large Producers • Quarterly for Small Producers 	<ul style="list-style-type: none"> • Under development • PWCS & ARTC and others have met with the aim of developing aligned provisions

Parameter	Current	Phase 1 – Long Term Transition (1/7/09 – 31/12/09) *	Phase 2 - Long Term (From 1/1/10) *
Allocation Usage	<ul style="list-style-type: none"> Measured in tonnes railed for individual vessels having arrived off the Port in the allocation period. 	<ul style="list-style-type: none"> Measured in tonnes railed for individual vessels having arrived off the Port in the allocation period. 	<ul style="list-style-type: none"> Under development PWCS & ARTC and others have met with the aim of developing aligned provisions
Flexibility	<ul style="list-style-type: none"> Tonnage flexibility of +/- 180,000 tonnes (rolling) and a 5 day overlap at the end of each period. 	<ul style="list-style-type: none"> Tonnage flexibility of +/- 180,000 tonnes (subject to reduction to address queue) and a 5 day overlap at the end of each period. At 31/12/09, unless otherwise advised by PWCS, to enable a transition to Phase 2 - Long Term, a Producer's flex is to be zero. 	<ul style="list-style-type: none"> Under development PWCS & ARTC and others have met with the aim of developing aligned provisions Currently PWCS and ARTC are exploring the concept of "tolerance" (ie a Producer's contracted volume is unable to be exceeded in the longer term however variations may be acceptable within the period) rather than existing "flex" provisions (which allow a Producer to have a nominal contract volume with a 180kt swing at all times)
Transfers	<ul style="list-style-type: none"> Transfers on a tonne for tonne basis at any time up to end of overlap period. 	<ul style="list-style-type: none"> Transfers on a tonne for tonne basis at any time up to 31/12/09. No transfers into 2010 or beyond. Producers are encouraged to transfer as soon as they become aware that they have excess capacity, to ensure that the Coal Chain has the best chance of maximizing its capacity HVCCLT/HVCCC to monitor transfers and educate Producers on their impact by publishing statistics on transfer effects 	<ul style="list-style-type: none"> Approval of transfers is to have regard to impact on other producers and system capacity. PWCS & ARTC and others have met with the aim of developing aligned provisions
Application for Services	<ul style="list-style-type: none"> Application at PWCS to have vessel loaded. PWCS confirms allocation and vessel suitability. 	<ul style="list-style-type: none"> Application at PWCS to have vessel loaded. PWCS confirms allocation and vessel suitability Should alternative provisions be determined for the Long Term then the HVCCLT/HVCCC will provide information to the Producers on the potential impacts 	<ul style="list-style-type: none"> PWCS to have regard to track and train entitlements when approving applications. HVCCLT recommend a single application be made to move coal from load point to vessel/stockpile via a common portal with HVCCLT confirming entitlements.

Parameter	Current	Phase 1 – Long Term Transition (1/7/09 – 31/12/09) *	Phase 2 - Long Term (From 1/1/10) *
Order of Loading	<ul style="list-style-type: none"> • Turn of arrival with out of turn loading. 	<ul style="list-style-type: none"> • Turn of arrival with out of turn loading. 	<ul style="list-style-type: none"> • PWCS is considering an alternative model for sequencing of vessels to better align with the new contractual frameworks of Producers with their Service Providers, and shall consult with producers accordingly. Until such time, Turn of arrival (subject to track, train and terminal contracts) will continue to be the basis for determining order of loading.

Appendix 3

Schedule 5 of the Implementation Memorandum Contractual alignment

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

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

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

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

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

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

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

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

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

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

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

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

3. Track and Terminal service providers will ensure that Access Rights to their respective infrastructure are not triggered in excess of the lesser of the Track and Terminal System Capacity (Producers with access contracts will also be able to opportunistically access ad-hoc capacity where available and on the basis that it does not infringe on the contracted access rights of other Producers). Producers will have a right

to have the Track System Capacity and Terminal System Capacity audited against aggregate Access Rights.

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

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

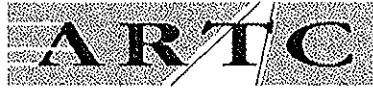
4. Producers can choose to hold non-aligned access contracts on track and terminal, however will only be able to access system capacity based on the lesser of their contracted Track System Capacity or Terminal System Capacity
5. The responsibility of the Track and Terminal Service Providers to jointly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

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

1. **System Assumptions:** A document containing the underlying agreed System Assumptions underpinning the determination of Track and Terminal System Capacity. This could become a schedule to all Access Contracts
2. **Hunter Valley Coal Chain Starting Point:** A statement as to how the initial Access Rights will be granted under the first Track and Terminal access contracts

3. **Access Protocols and Process:** The process through which Access Seekers join the Access Queue and the mechanism by which Track and Terminal Access is managed until an Access Seeker becomes an Access Holder
4. **Contract Performance Management:** The process and mechanism by which system capacity is managed and performance and consumption of system capacity is reported and any adjustments to contracted Access Rights are made.

Appendix 4 - Letter of Intent - Transitional Arrangements



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23 June 2009

Hunter Valley Network: Letter of Intent - Transitional arrangements

As you are aware, the Hunter Valley coal chain and its participants have been working on contractual arrangements to reflect the outcome of the industries agreement entered into by all the participants from the Greiner Review. As part of that process ARTC has lodged a voluntary access undertaking covering ARTC's Hunter Valley rail network with the ACCC for approval (**Hunter Valley Access Undertaking or HVAU**).

Once the HVAU is accepted by the ACCC, it will replace the existing NSW Rail Access Undertaking under which ARTC currently grants access to the Hunter Valley network. The ACCC is currently considering the HVAU.

In order to manage the transition and give long term certainty to producers, ARTC is proposing a stepped process to transition to the new contractual arrangements contained in the HVAU.

The proposed arrangements are designed to:

- provide a process so that ARTC and producers have long term track access arrangements in place to commence on 1 January 2010 in line with the commencement with the new long term port arrangements; and
- provide interim arrangements for the period 1 July to 31 December 2009 (**Interim Period**).

Existing track capacity during the Interim Period

ARTC considers that it has sufficient track capacity to meet the port allocations of producers for the Interim Period. This view has been based on modelling undertaken with the Hunter Valley Coal Chain Logistics Team (**HVCCLT**).

On this basis, ARTC believes that producers primary concern should not be about the sufficiency of track access during the Interim Period but rather that the allocation of that track access will continue to be done in a way which is directly aligned to the port through the HVCCLT as is currently occurring.



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Contractual arrangements

ARTC has been exploring contractual options for the Interim Period with a view to providing producers with greater certainty during this period.

Long term contracts rather than heads of agreement

It initially considered entering into heads of agreements with producers under which it committed to provide track access equivalent to the port allocations for the Interim Period as had been proposed during Contractual Alignment Group (CAG) discussions.

ARTC has concluded that this is not feasible for the following reasons:

- Committing track access directly to producers is a new model which requires the introduction of new contractual mechanisms to reflect the commitments. It is likely that it would have taken substantial time to agree a binding heads of agreements for a six month period when the focus needs to be on the longer term solution.
- Committing track access rights to producers would require changes to existing haulage agreements between rail operators and producers to reflect that the track access would be committed to producers for the Interim Period.
- In any case, ARTC will not have the systems and processes in place to deal with committing track access directly to producers before 1 January 2010.

There were also proposals discussed at CAG for ARTC to simultaneously negotiate heads of agreements with producers for the longer term arrangements. ARTC is of the view that it is better to simply negotiate long term contracts to commence 1 January 2010 as is happening at the port rather than spend the time negotiating heads of agreement.

Consideration of the ad-hoc model for the Interim Period

Currently, track access for the purposes of coal trains is contracted to Queensland Rail Network (QR) and Pacific National (PN) until 30 June 2009.

ARTC has discussed with industry the introduction of an ad hoc model for the Interim Period. ARTC had proposed that the existing track access agreements with each of QR and PN be extended to cover the Interim Period but these agreements would be amended to remove the contracted capacity rights, ie the existing train paths that relate to the transportation of coal. In effect, these contracts will be "bare" terms and conditions relating to trains that operate on the Hunter Valley network. All track capacity for coal trains would be granted on an ad hoc basis to align with port allocations.

The intention was to have a "business as usual" approach to allocation of train paths in the Hunter Valley but with greater transparency and certainty as to how this occurs. The operators would continue to pay ARTC for track access rights.



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However, rail operators advised it was likely that the rail haulage agreements (many of which extend beyond 30 June 2009) would need to be amended or waivers obtained to reflect the rail operator's loss of contracted track access. While one operator was agreeable in principle, it requires time to manage this issue. The other operator did not agree to an approach under which it no longer had contracted track access.

Given these issues, ARTC proposes to extend the existing track access agreements with each of PN and QR to cover the Interim Period and for the extension to include their existing contracted rights to track access subject to the operator having rail haulage agreements in place to transport coal equivalent to the access rights provided.

ARTC notes, however, that it is clear that some existing long term rail haulage agreements will need to be modified to reflect the new track access arrangements to commence 1 January 2010.

Proposed arrangements for the Interim Period

As a result, ARTC will take the following approach for the Interim Period.

- It will offer an extension to QR and PN of their existing track access contracts for six months until 31 December 2009 on the terms discussed above. This date coincides with the timetable for producers and ARTC entering into long term access contracts which commence 1 January 2010 (see below).
- During this six month period, producers will need to arrange both above rail and below rail rights with their rail operators as currently occurs.
- In the meantime, ARTC expects that producers who are contracting for direct access and their rail operators will need to renegotiate their rail haulage agreements to reflect the new arrangements to apply from 1 January 2010. Similarly, to the extent necessary, operators will need to negotiate changes to their rail haulage agreements to reflect that ARTC will not be extending their existing capacity rights under the old arrangements. From 1 January 2010, rail operators will need to have Access Holder Agreements and/or Operator Sub-Agreements.

Transition timetable

The first step in the transition process has been the meetings conducted by ARTC with coal producers and operators. In these sessions ARTC provided an overview of the proposed transitional arrangements.

Following this consultation, ARTC proposes that the transitional arrangements as set out below, should be implemented.



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Proposed timetable

By 30 June	ARTC and rail operators to confirm six month extensions to their existing track access agreements, including contracted track access rights, as discussed above.
By 3 July	Producers to identify the anticipated volume of coal and likely method of operation (including rolling stock configuration) to ARTC for the purpose of long term track access contracts. An information request form is attached. Producers may provide different scenarios. This information is purely indicative; it is not binding. However, ARTC will expect negotiations on the long term contracts to be based on volumes consistent with those notified and subject to modelling below and notes that the ARTC will not ultimately be providing track access unless the producers can show equivalent port capacity.
By 31 August	ARTC, HVCCLT, the ports, producers and above rail operators undertake a modelling exercise to confirm the System Assumptions to apply to the Hunter Valley Coal Chain taking into account nominated volumes. This modelling will confirm the availability of System Capacity or the new infrastructure required to achieve the System Capacity necessary for the proposed contracted volumes. ARTC to negotiate (in parallel with modelling process) and conclude contract schedules with producers/applicants for coal access rights (subject to modelling confirmation). The schedules will contain track related assumptions consistent with the System Assumptions.
By mid-September	ARTC to independently verify track capacity and the commercial obligations contained in the proposed schedules. ARTC must be satisfied that it can meet its proposed contractual commitments.
By 30 September	ARTC and producers/applicants for coal access rights to finalise and agree the long form Access Holder Agreements. These will be based on the Indicative Access Agreement lodged with the ACCC as part of the HVAU. ARTC to enter into Operator Sub-Agreements and Access Holders to endorse their Operator Sub Agreement(s).
By 30 November	ARTC to provide rules to the HVCCLT to enable delivery of contracted requirements
1 January 2009	Access Holder Agreements and Operator Sub Agreements to commence



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Next steps

- 1 Please provide to ARTC the indicative volume and operation information using the attached information request by 3 July 2009. ARTC agrees that this information is provided on a confidential basis and will not be disclosed to any other person other than ARTC's advisers who are also under obligations of confidentiality and the HVCCLT for the purposes of modelling.
- 2 ARTC recommends that producers and operators start undertaking legal and commercial review of the Access Holder Agreement and Operator Sub-Agreement attached to the HVAU as these documents will form the basis of negotiation later in the year.
- 3 The introduction of the new model under which producers will contract directly with ARTC for track access may require changes to existing rail haulage agreements and ARTC encourages those parties to renegotiate these agreements to the extent necessary to reflect the new arrangements. ARTC's intention is to have one "cut over" date on to the new arrangements. At this stage, this is 1 January 2010 to align with the new long term port arrangements.

Non-binding letter of intent

The purpose of this letter is to document the proposed transitional arrangements and the steps that ARTC proposes to take during the Interim Period. This letter of intent is not a legally binding document and does not create a legal relationship between ARTC and its addressee.

If you have any queries, please do not hesitate to contact Simon Ormsby on (08) 8217 4314 or Gavin Carney on (08) 8217 4189.

Yours sincerely

David Marchant
Chief Executive Officer



AUSTRALIAN RAIL TRACK CORPORATION LTD

[Duplicate and complete for each load point. If there is more than one load point on a balloon loop, then those load points may be aggregated.]

Load point:

Start date:

Volumes (in tonnes)*:

2010	2011	2012	2013	2014	2015	2016	2017	2018	2019

* If volume is expected to increase in stages during the year please indicate the quarter in which the increase will commence

Expected Train Configuration	% of above volume expected to be hauled under this configuration
3 x 90 class* + 90 x 121 tonne wagons	
2 x 5000 class* + 74 x 121 tonne wagons	
3 x 82 class* + 72 x 100 tonne wagons	
If other - please specify details	

* or equivalent motor power

Provided commercial in confidence to ARTC.



AUSTRALIAN RAIL TRACK CORPORATION LTD

AUSTRALIAN RAIL TRACK CORPORATION LTD ACN: 081 455 754 / ABN: 75 081 455 754
Off Sir Donald Bradman Drive, Passenger Rail Terminal Rd, Mile End SA 5031; PO Box 10343, Gouger St, Adelaide SA 5000
Tel: (08) 8217 4366 Fax: (08) 8217 4578 Website: www.artc.com.au

Attachment 3 - PWCS Shareholders

PORT WARATAH COAL SERVICES LIMITED

SHAREHOLDER NAME	%	NO. OF SHARES
Newcastle Coal Shippers Pty Limited	36.9491%	49,001,000
Coal & Allied Industries Limited	16.0018%	21,221,250
R W Miller (Holdings) Limited	13.9982%	18,564,000
Tomen Panama Asset Management S.A.	10.0000%	13,261,750
Japan Coal Development Co., Ltd.	4.1039%	5,442,500
Bloomfield Collieries Pty Limited	3.4611%	4,590,000
Nippon Steel Australia Pty Ltd	3.3171%	4,399,108
Mitsui & Co., Ltd	2.8861%	3,827,500
Mitsubishi Corporation	1.9862%	2,634,100
Sojitz Corporation	1.1745%	1,557,592
JFE Steel Corporation	2.1874%	2,900,880
Sumitomo Metal Australia Pty Ltd	1.0452%	1,386,180
Itochu Coal Resources Australia Pty Limited	1.0171%	1,348,900
Kobe Steel, Ltd.	0.6022%	798,660
Nisshin Steel Co. Ltd.	0.2146%	284,580
Taiheiyo Cement Corporation	0.1759%	233,250
Kanematsu Corporation	0.1173%	155,500
Marubeni Corporation	0.1173%	155,500
Sumitomo Corporation	0.1173%	155,500
Tokyo Boeki Steel & Materials Ltd	0.1173%	155,500
Ube Industries, Ltd.	0.1173%	155,500
Sumitomo Osaka Cement Co., Ltd	0.0879%	116,625
Idemitsu Kosan Co., Ltd.	0.0586%	77,750
Mitsubishi Materials Corporation	0.0586%	77,750
Nippon Oil Corporation	0.0586%	77,750
Tokuyama Corporation	0.0293%	38,875
Total Capital	<u>100.000%</u>	<u>132,617,500</u>

Attachment 4 - Implementation Memorandum

Implementation Memorandum

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

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

Draft 6 – Execution version

Gilbert+Tobin

2 Park Street
Sydney NSW 2000
Australia

GPO Box 3810
Sydney NSW 2001

T +61 2 9263 4000
F +61 2 9263 4111

DX 10348 SSE

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Date:

Parties

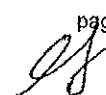
- 1 **Newcastle Port Corporation**, a statutory corporation established under the Ports Corporatisation and Waterways Management Act 1995 (NSW) of the cnr Scott Street & Newcomen Street, Newcastle NSW 2300 (**NPC**)
 - 2 **Port Waratah Coal Services Ltd ABN 99 001 363 828** of Curlew Street, Kooragang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

1 Defined terms and interpretation

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

2 Nature of this document

- (a) The purpose of this document is to record the key agreed principles for and a framework for the implementation of, a long term solution for access to and expansion of export capacity at the Port of Newcastle (**Capacity Framework**).
- (b) Subject to paragraph (c), this document is not a legally binding or enforceable document and does not constitute an offer by any party that is capable of acceptance by any other party.
- (c) The parties agree that clause 13 of this document will be legally binding and enforceable on execution of this document by all parties.
- (d) Notwithstanding clause 13 of this document (including but not limited to the obligation under that clause for the parties to comply with the Implementation Procedure set out in Schedule 4):
 - (i) nothing in this document constitutes (or is intended to constitute) a contract, arrangement or understanding between the parties within the meaning of section 45 of the Trade Practices Act 1974 (Cth) in respect of the implementation of the Capacity Framework; and
 - (ii) the parties must not execute, act in accordance with, or otherwise give effect to, a contract, arrangement or understanding in respect of the implementation of the Capacity Framework, including through the execution of any of the documents described in the Implementation Procedure in Schedule 4 or otherwise, without first obtaining authorisation from the



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

3 Nomination and allocation

3.1 Nomination and allocation procedure

- (a) PWCS must ensure that the PWCS Nomination and Allocation Procedure is consistent with the PWCS Nomination and Allocation Principles set out in part 1 of Schedule 2.
- (b) NCIG must ensure that the NCIG Nomination and Allocation Procedure is consistent with the NCIG Nomination and Allocation Principles set out in part 2 of Schedule 2.
- (c) Before conducting the NCIG Nomination and Allocation Procedure, NCIG must notify PWCS and must coordinate with PWCS to ensure that, in the year that the NCIG Nomination and Allocation Procedure is conducted, the NCIG Nomination and Allocation Procedure is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

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

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

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

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

3.4 Long term ship or pay contracts

- (a) Subject to clauses 8 and 9.1(c), a Producer that wishes to obtain access to Capacity that is to be allocated at the terminals according to the Nomination and Allocation Procedures must be offered a 10 year evergreen long term ship or pay contract (**Long Term Ship or Pay Contracts**) with the relevant Terminal Operator, provided that nothing in this paragraph (a) prevents the Terminals Operators from also offering other contracts with shorter terms to Producers.
- (b) The parties acknowledge that the terms and conditions of the Long Term Ship or Pay Contracts for each Terminal Operator:
 - (i) must be consistent with the requirements of the Capacity Framework set out in this document; and
 - (ii) will be developed in conjunction with the development of the Nomination and Allocation Procedures.

4 Expansion by PWCS

4.1 When is obligation to expand triggered?

- (a) Subject to paragraph (b) and clause 4.3, if:
 - (i) the Aggregate PWCS Contracted Allocations from time to time exceeds the Aggregate PWCS Available Capacity at that time (**Capacity Shortfall**); and
 - (ii) the Capacity Shortfall cannot be fulfilled through voluntary Contracted Allocation Reductions,

PWCS must expand the PWCS Terminals to provide additional Capacity which, at a minimum, satisfies the Capacity Shortfall. However, PWCS will not be required to expand to meet any nominations for expansion capacity at the PWCS Terminals which nominate for allocations of less than 10 years.

- (b) Subject to clause 4.3, if the existing PWCS Terminals are not capable of being expanded further to provide the additional Capacity that is necessary to satisfy the Capacity Shortfall, PWCS must build a new terminal to provide that additional Capacity. However, for the avoidance of doubt, nothing in this clause 4 precludes any person other than PWCS from undertaking a project to construct a new terminal.
- (c) If at any time PWCS is required to build a new terminal under paragraph (b) (other than Terminal 4, which is specifically addressed in clause 10), then:
 - (i) PWCS must use its best endeavours to identify and acquire appropriate sites for that new terminal; and
 - (ii) before commencing any work to undertake the construction of that new terminal PWCS must first use its best endeavours to expand the PWCS Terminals that exist at that time to satisfy the relevant Capacity Shortfall.

4.2 Time for completion

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

- (i) in the case of Master Plan Completion Phase 1, two years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises;
 - (ii) in the case of Master Plan Completion Phase 2, two years after the later of:
 - (A) the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises; and
 - (B) the date on which PWCS is able to access the Hunter River following completion of the relevant part of the BHP Billiton Hunter River Remediation project; and
 - (iii) in any other case, within 2 years after the date on which the relevant Capacity Shortfall referred to in clause 4.1(a)(i) arises.
- (b) If PWCS is required to build a new terminal under clause 4.1(b) then, subject to clause 4.3, that terminal must be capable of meeting the Capacity Shortfall in respect of which the obligation to build the terminal was triggered within 4 years after the date on which that Capacity Shortfall arises.
 - (c) Without limiting clause 4.3, if having used its best efforts to obtain finance for the purposes of undertaking a particular PWCS Expansion, PWCS is unable to obtain such finance then:
 - (i) PWCS may submit a request to the Minister to be relieved of its obligation to undertake that PWCS Expansion, in which case PWCS must provide all information, records and personnel that the Minister requires in order to consider such request; and
 - (ii) having considered the request, the Minister may (in the Minister's absolute discretion) agree to relieve or suspend PWCS of its obligation to undertake that PWCS Expansion.

4.3 Process for review

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

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

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

- (k) PWCS or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under this clause 4.3 by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
 - (i) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision; and
 - (ii) by agreement with PWCS, appoint one of those persons to review the decision of the Reviewer.

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

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this paragraph (m) will be extended by the period of the delay.

4.4 Delay or shortfall in expansion

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

4.5 BHP Billiton Hunter Remediation project

The parties acknowledge that the BHP Billiton Hunter River Remediation project will constrain the capacity of PWCS to fully expand the PWCS terminals until after the completion of that project.



5 Interim solution for capacity shortfalls at PWCS

5.1 Obligation to compress

- (a) Subject to clause 5.2, if there is a PWCS Expansion Delay or a PWCS Expansion Shortfall at any time giving rise to a Capacity Shortfall, the Contracted Allocation of the Producers will be compressed in the following order:
- (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed (**Voluntary Compressed Allocation**), the PWCS Contracted Allocation of those Producers will be compressed as follows:
- (A) if the aggregate Voluntary Compressed Allocation exceeds the relevant Capacity Shortfall, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Capacity Shortfall; and
- (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Capacity Shortfall, the PWCS Contracted Allocation of those Producers will be compressed by the amount that each of them have elected to compress;
- (ii) second, if the compression referred to in paragraph (a)(i) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:
- (A) if that Producer's Voluntary Compressed Allocation equals or exceeds that Producer's Unutilised Allocation, the Producer will not be subject to further compression under this paragraph (a)(ii);
- (B) if that Producer's Voluntary Compressed Allocation is less than that Producer's Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:
- (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
- (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the relevant Capacity Shortfall; and
- (iii) third, if the compression referred to in paragraphs (a)(i) and (a)(ii) does not satisfy the Capacity Shortfall, the PWCS Contracted Allocation of each Producer (including Producers who have compressed under paragraphs (a)(i) and (a)(ii)) will be compressed pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the earlier to occur of the following:
- (A) the aggregate Compressed Allocation of all Producers is equal to the relevant Capacity Shortfall; and

- (B) the Compressed Allocation of that Producer under paragraph (a)(i) and this paragraph (a)(iii) (but not under paragraph (a)(ii)) is equal to the General Compression Limit of that Producer.
- (b) If the relevant Capacity Shortfall referred to in paragraph (a) cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the Contracted Allocation of the relevant Producer (or Producers) who are seeking allocations of Capacity to be made available by the relevant PWCS Expansion will be compressed by the residual Capacity Shortfall.

5.2 Limitations on obligation to compress

- (a) Clause 5.1(a)(ii) and clause 7.4(a)(ii) will not apply to a Producer if the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (i) **delays:** the failure of that Producer to meet the Utilisation Threshold in the relevant period is caused by a delay:
 - (A) in the development of a new project of that Producer;
 - (B) in the expansion of an existing project of that Producer;
 - (C) in the expansion of associated track facilities or channel works; or
 - (D) resulting from adverse geological and/or mining conditions affecting mine production,

which is outside the reasonable control of that Producer; or
 - (ii) **NCIG Excluded Stage 2 Capacity:** in respect of any NCIG Producer:
 - (A) the Contracted Allocation of that NCIG Producer is no greater than the projected maximum production of that NCIG Producer from new and existing mines;
 - (B) at the time that NCIG Stage 2 is Committed, that NCIG Producer has specified a period (**Nominated Deferral Period**) during which any part of its Contracted Allocation which comprises allocations of Excluded Stage 2 Capacity (**Relevant Allocation**) will not be used by that NCIG Producer, provided that the Nominated Deferral Period may be extended by up to 3 years if that NCIG Producer gives notice of the extension 2 years prior to the end of the initial Nominated Deferral Period; and
 - (C) during the Nominated Deferral Period, the NCIG Producer has used its best efforts to transfer the Relevant Allocation for the duration of the Nominated Deferral Period, including by making a bona fide open offer to the market to transfer the Relevant Allocation on customary terms, including by offering to transfer the Relevant Allocation in accordance with clause 6.1,

and those clauses will also not apply to a Producer that has otherwise offered to transfer all Unused Allocations of that Producer in accordance with clause 6.1, but only to the extent that so much of the Unused Allocations as are not actually transferred.

- (b) Clause 5.1(a)(iii) only applies to a Producer whose Group Contracted Allocation at the time the relevant Capacity Shortfall arises is 5 Mtpa or more.

- (c) If a Producer is an NCIG Producer then, for the purposes of calculating:
 - (i) the pro rata proportion of the PWCS Contracted Allocation of that Producer to be compressed under clause 5.1(a)(iii);
 - (ii) the extent to which the compression of that Producer's PWCS Contracted Allocation will be reduced under clause 5.3(a)(ii); and
 - (iii) the amount which represents that Producer's General Compression Limit, the Excluded Contracted Allocation of that Producer will be subtracted from that Producer's Contracted Allocation.
- (d) Unless and until an election made by an NCIG Producer in accordance with paragraph 8.3(b) (if any) and that election becomes effective, the Excluded Stage 1 Allocation of that NCIG Producer (including any Contracted Allocation Usage applicable to that Excluded Stage 1 Allocation) will not apply when determining the Utilisation Threshold of that NCIG Producer, provided that:
 - (i) the NCIG Producer has developed proposal (including terms and conditions) for transferring the Excluded Stage 1 Allocation which optimises the potential transfer of that Excluded Stage 1 Allocation; and
 - (ii) the Reviewer has agreed with that proposal.
- (e) If:
 - (i) there is a PWCS Expansion Shortfall; and
 - (ii) that PWCS Expansion Shortfall was caused or contributed to by failure in the design of the Expansion to deliver the required Capacity,

then the Contracted Allocation of NCIG Producers that is contracted pursuant to an offer made under clause 3.3 will not be subject to compression under clause 5.1(a)(iii) in respect of that PWCS Expansion Shortfall.

5.3 Reducing compression

- (a) Subject to clause 5.2, if the Capacity Shortfall that is caused by a PWCS Expansion Delay or a PWCS Expansion Shortfall is reduced then compression will reduce accordingly such that:
 - (i) first, if a Producer has elected to compress an amount of its PWCS Contracted Allocation under clause 5.1(a)(i) and at any time that Producer wishes to decompress that amount, the amount compressed will be reduced pro rata amongst the Producers who have elected to decompress under this subparagraph (a)(i) in the proportion that their Voluntary Compressed Allocation (as may be reduced under paragraph (b)) bears to the aggregate Voluntary Compressed Allocation of all such Producers;
 - (ii) second, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(iii) will be reduced pro rata amongst the Producers to whom that clause applies in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under clause 5.1(a)(ii) will be reduced pro rata amongst the Producers to

whom that clause applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocations of all such Producers.

- (b) For the purposes paragraph (a)(i), the Voluntary Compressed Allocation of a Producer will be reduced by any portion of that Producer's PWCS Contracted Allocation which would have been compressed under clause 5.1(a)(ii) had that Producer not elected to compress under clause 5.1(a)(i).

5.4 Cessation of compression

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

5.5 Calculating compression and decompression

- (a) The Reviewer will be responsible for calculating the extent to which each Producer is required to compress and decompress under this clause 5 and under clause 7.4.
- (b) Subject to paragraph (c), the Terminal Operators must:
 - (i) promptly provide the Reviewer with all relevant information that is needed for the Reviewer to accurately calculate the extent to which each Producer is required to compress under this clause 5 and under clause 7.4; and
 - (ii) meet all of the reasonable costs and expenses incurred by the Reviewer in calculating the extent to which each Producer is required to compress or decompress under this clause 5 and under clause 7.4.
- (c) Any information provided by Terminal Operators to the Reviewer under paragraph (b) which is marked as confidential must not be disclosed by the Reviewer to any person except:
 - (i) with the prior written consent of the relevant Terminal Operator;
 - (ii) to the Reviewer's directors, employees, officers and advisers who have a need to know the information for the purposes of the Reviewer calculating the extent to which each Producer is required to compress or decompress under this clause 5 and under clause 7.4, provided that the Reviewer ensures that prior to any such disclosure the person or entity is bound by obligations of confidentiality at least equivalent to those in this clause;
 - (iii) where the Reviewer is compelled by law to disclose that information provided that the Reviewer:
 - (A) only discloses such information as it is legally required to disclose;
 - (B) takes reasonable steps to maintain the confidentiality of, and obtain confidential treatment for, the information so disclosed; and
 - (C) promptly provides relevant Terminal Operator with written notice of any request for disclosure describing the requirements and circumstances surrounding the required disclosure and any other relevant information so that Terminal Operator or the owner of the confidential information may take appropriate steps to protect such information;

- (iv) where that information is already known to the Reviewer at the time it is disclosed by the relevant Terminal Operator and the Reviewer is not otherwise prevented from disclosing it; and
 - (v) where that information is developed independently by the Reviewer.
- (d) A Producer or NPC (where NPC is not the Reviewer) may seek a review of the Reviewer's decision under clause 5.5(a) by notifying the other party and the Minister. Upon receipt of such notice the Minister will:
- (i) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision of the Reviewer; and
 - (ii) appoint one of those persons to review the decision of the Reviewer.

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

- (e) Subject to paragraph (f), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (f) If a review that is conducted under this paragraph (d) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this paragraph (f) will be extended by the period of the delay.

6 Capacity transfers

6.1 Producers must offer unused Contracted Allocations for transfer

- (a) If there is any portion of a Producer's Contracted Allocation that will not be used by that Producer for any period and for any reason (**Unused Allocations**) then, during that period the Producer must use its best efforts to transfer the Unused Allocations on customary terms, including by making a bona fide offer to transfer the Unused Allocations in accordance with Capacity Transfer System contemplated in paragraph (b) and the remainder of this clause 6.
- (b) The parties acknowledge that a transparent centralised system will be established to facilitate and manage the offering and acquisition of Unused Allocations (**Capacity Transfer System**).
- (c) Any Producer that does not comply with the obligation to offer Unused Allocations in accordance with paragraph (a) will not be entitled to claim relief from anti-hoarding compression under clause 5.2(a) in respect of those Contracted Allocations.

6.2 Transfer of allocations at NCIG Terminals

Producers must not charge fees for another to use a portion of its Contracted Allocation at NCIG Terminals (**Relevant Portion**) if those fees exceed the fees which are charged to that Producer for the Relevant Portion by NCIG by more than 5%. Producers must not implement a fee structure which is designed to circumvent this clause 6.2.

6.3 Transfer of allocations at PWCS Terminals

The maximum fee that a Producer may charge to transfer any or all of its Contracted Allocation at PWCS Terminals (**Relevant Portion**) to another Producer is 5% of the fee charged by PWCS for the Relevant Portion. Producers must not implement a fee structure which is designed to circumvent this clause 6.3.

7 NCIG Stage 2

7.1 Development of NCIG Stage 2

- (a) NCIG must not commence construction of NCIG Stage 2 unless it has first offered to allocate 12 Mtpa of Capacity at NCIG Stage 2 to Non-NCIG Producers under Long Term Ship or Pay Contracts in accordance with the NCIG Nomination and Allocation Procedure.
- (b) In January and July of each year, NCIG must update PWCS and NPC of its progress for Commitment of NCIG Stage 2 and advise whether it intends or reasonably expects to commence the NCIG Nomination and Allocation Procedure within the next 6 months.
- (c) NCIG confirms that, pursuant to the shareholders arrangements for NCIG, each individual member of NCIG is entitled to trigger a feasibility study for the construction of NCIG Stage 2 and, if the feasibility study principles are met (being the principles set out in the shareholders agreement), the board of NCIG must not unreasonably withhold its approval to commence the process for the construction of NCIG Stage 2.

7.2 Time for completion of NCIG Stage 2

- (a) NCIG Stage 2 must be capable of delivering the Capacity that is contracted by Non-NCIG Producers at NCIG Stage 2 within the following time periods:
 - (i) if NCIG Stage 2 is Committed on or before 31 December 2009, within 4 years after the date on which NCIG Stage 2 is Committed; and
 - (ii) otherwise, within 2 years (or such other time period determined in accordance with clause 7.3) after the date on which NCIG Stage 2 is Committed.
- (b) For the purposes of paragraph (a), NCIG must notify each of NPC and PWCS of the date on which NCIG Stage 2 is Committed within 7 days after that date.

7.3 Process for review

- (a) Subject to paragraph (b), the obligation to Complete NCIG Stage 2 under clause 7.2 will be suspended if a Force Majeure Event prevents NCIG Stage 2 being Completed.
- (b) If the obligation to Complete NCIG Stage 2 is suspended under paragraph (a), that obligation will recommence at a time determined by the Reviewer or when the relevant Force Majeure Event ceases to prevent NCIG from Completing NCIG Stage 2.

- (c) If clause 7.2(a)(ii) applies then, at any time prior to the date on which NCIG Stage 2 is Committed, NCIG may trigger a review under this clause 7.3 of the time in which NCIG Stage 2 is required to be Completed under that clause by submitting a request to NPC.
- (d) The time for Completion of NCIG Stage 2 under clause 7.2 will be extended if:
 - (i) the Reviewer (acting reasonably and in good faith) is satisfied that:
 - (A) there are Engineering Limitations that will delay Completion of NCIG Stage 2 beyond the scheduled time for Completion; or
 - (B) notwithstanding that NCIG has taken all reasonable and prudent steps to obtain all Development Consents necessary to undertake NCIG Stage 2 in a timely manner (including by taking steps to identify ways of redesigning NCIG Stage 2 in a manner that would assist in obtaining the Development Consents), the Development Consents necessary to undertake NCIG Stage 2 will not be obtained within a time that would reasonably allow NCIG to Complete NCIG Stage 2 in accordance with the relevant timeframe specified in clause 7.2; or
 - (ii) there is a Force Majeure Event that will delay Completion beyond the scheduled time of Completion.
- (e) The length of any extension of time to be given under paragraph (d) will be determined by the Reviewer (acting reasonably and in good faith), having regard to:
 - (i) in respect of an extension of time for Engineering Limitations, the length of time it would reasonably take to remedy or otherwise address the relevant Engineering Limitations;
 - (ii) in respect of an extension of time for delays in obtaining Development Consents, the length of time it would reasonably take to obtain the Development Consents, including the period of time it would reasonably take to modify engineering designs to comply with the likely terms of any Development Consent; and
 - (iii) in respect of an extension of time for a Force Majeure Event, the nature and extent of the relevant Force Majeure Event and its likely duration.
- (f) It is a condition of any extension of time that is granted under paragraph (d) that:
 - (i) NCIG must take all reasonable and prudent steps to minimise the impact that the relevant Engineering Limitations or Force Majeure Event (as applicable) may have on the implementation of NCIG Stage 2 (including the time for Completion of NCIG Stage 2); and
 - (ii) if Capacity can be realised from NCIG Stage 2 it must be made available to relevant Non-NCIG Producers, notwithstanding that such Capacity may not fully satisfy the Capacity required under clause 7.1.
- (g) Subject to paragraphs (h), (i) and (j), NCIG must:
 - (i) provide the Reviewer with all relevant information that is requested by the Reviewer for the purposes of making a determination under paragraphs (d) or (e) (including by preparing and presenting submissions to the Reviewer);

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

- (i) identify the appropriate professional body having regard to the nature of the review and ask the president (or relevant equivalent) of that body to nominate a number of experts qualified to review the decision; and
- (ii) by agreement with NCIG, appoint one of those persons to review the decision of the Reviewer.

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

- (l) Subject to paragraph (m), the determination of an expert appointed to review the decision of the Reviewer will be final except in circumstances of manifest error.
- (m) If a review that is conducted under paragraph (k) is not finalised and a determination made within 2 months of the date on which the Reviewer made its initial determination, the determination of the Reviewer will be final. If the Reviewer or NPC fails to respond to requests for information from the appointed expert within the required time or otherwise delays the review process the 2 month period referred to in this paragraph (m) will be extended by the period of the delay.

7.4 Delay or shortfall in Stage 2

- (a) If there is an NCIG Stage 2 Delay or an NCIG Stage 2 Shortfall the Contracted Allocation of the Producers will be compressed in the following order to accommodate all or part of the Non-NCIG Stage 2 Allocations at the PWCS Terminals:
 - (i) first, if one or more Producers elect for a portion of their PWCS Contracted Allocation to be compressed (**Voluntary Compressed Allocation**), the PWCS Contracted Allocation of those Producers will be compressed as follows:
 - (A) if the aggregate Voluntary Compressed Allocation exceeds the Non-NCIG Stage 2 Allocations, the Voluntary Compressed Allocation of each Producer will be reduced pro rata in the proportion that their Contracted Allocation bears to the aggregate Contracted Allocation of all such Producers until the aggregate Voluntary Compressed Allocation equals the relevant Non-NCIG Stage 2 Allocations; and
 - (B) if the aggregate Voluntary Compressed Allocation is less than or equal to the relevant Non-NCIG Stage 2 Allocations, the PWCS Contracted Allocation of those Producers will be compressed by the amount that each of them have elected to compress; and
 - (ii) second, if the compression referred to in paragraph (a)(i) does not satisfy the Non-NCIG Stage 2 Allocations, subject to clause 5.2(a) the PWCS Contracted Allocation of each Producer that has failed to meet the Utilisation Threshold for the 18 month period immediately prior to that time will be compressed pro rata in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers as follows:
 - (A) if that Producer's Voluntary Compressed Allocation equals or exceeds that Producer's Unutilised Allocation, the Producer will not be subject to further compression under this paragraph (a)(ii);
 - (B) if that Producer's Voluntary Compressed Allocation is less than that Producer's Unutilised Allocation then the PWCS Contracted Allocation of that Producer will be compressed until the earlier to occur of the following:

- (1) the aggregate Compressed Allocation of that Producer equals the Unutilised Allocation of that Producer during that 18 month period; and
 - (2) the aggregate Compressed Allocation of all Producers to whom sub-paragraphs (a)(i) and (a)(ii) applies equals the Non-NCIG Stage 2 Allocations.
- (b) If the Non-NCIG Stage 2 Allocations cannot be satisfied in full by the aggregate of the Compressed Allocation of Producers in accordance with paragraph (a) the NCIG Producers (on a pro rata basis) must transfer to Non-NCIG Producers such amount of their Contracted Allocation as is necessary to satisfy the Non-NCIG Stage 2 Allocations in accordance with the following timetable:

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

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

- (ii) second, the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b) will be reduced pro rata amongst those NCIG Producers in the same proportion that the NCIG Producers initially transferred their Contracted Allocations; and
 - (iii) third, the amount of any PWCS Contracted Allocation that is compressed under paragraph (a)(ii) will be reduced pro rata amongst the Producers to whom that paragraph applies in the proportion that their Unutilised Allocation bears to the aggregate Unutilised Allocation of all such Producers.
- (f) For the purposes paragraph (e), the Voluntary Compressed Allocation of a Producer will be reduced by any portion of that Producer's PWCS Contracted Allocation which would have been compressed under paragraph (a)(ii) had that Producer not elected to compress under paragraph (a)(i).
- (g) At the time that the relevant NCIG Stage 2 Delay or NCIG Stage 2 Shortfall which triggered the obligation to compress or transfer Contracted Allocations under paragraphs (a) and (b) comes to an end:
- (i) compression under paragraph (a); and
 - (ii) the obligation for NCIG Producers to transfer Contracted Allocations to Non-NCIG Producers under paragraph (b),
- will also come to an end.
- (h) If NCIG Producers do not transfer to Non-NCIG Producers the relevant amount of Contracted Allocations that is required under paragraph (b) within the time that is required, the PWCS Contracted Allocation of the NCIG Producers will be reduced to cover the shortfall on a pro rata basis in the proportion that the PWCS Contracted Allocation of each NCIG Producer bears to the aggregate PWCS Contracted Allocation of all NCIG Producers. However, nothing in this paragraph (h) limits the obligation of the NCIG Producers to transfer the required Contracted Allocations.

8 NCIG Producer nominations for expansion capacity at PWCS

8.1 Application of this clause

- (a) Nothing in this clause 8 limits the entitlement of an NCIG Producer to nominate for Unallocated Expansion Capacity at the PWCS Terminals in accordance with clause 9.1(c).
- (b) If a Producer becomes an "NCIG Producer" after 1 January 2009 because:
 - (i) a Non-NCIG Producer acquires a NCIG Producer after that date;
 - (ii) a Non-NCIG Producer acquires a source mine identified in an NCIG ship or pay agreement after that date;
 - (iii) an NCIG Producer acquires a Non-NCIG Producer after that date; or
 - (iv) an NCIG Producer acquires a source mine of a Non-NCIG Producer after that date and the output of that mine was shipped through the PWCS Terminals before the date of the acquisition,

for the purposes of this clause, any mine or mines (**The Specified Mine or Mines**) of that Producer which exists as at that date will be treated as if it continued to be owned by a Non-NCIG Producer and that Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage in respect of the Specified Mine or Mines.

- (c) A Producer who is entitled to continue to nominate for expansion capacity at the PWCS Terminals under paragraph (b) must not do so for the purposes of increasing the capacity allocations available any mines other than the Specified Mine or Mines referred to in paragraph (b).

8.2 Period before commitment of NCIG Stage 2

Each NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage until the later to occur of the following:

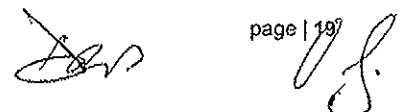
- (a) 1 January 2010; and
- (b) the date on which NCIG Stage 2 is Committed.

8.3 While Excluded Stage 1 Allocation is excluded from anti-hoarding calculations

- (a) Further to clause 8.2, an NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage until that NCIG Producer has made an election under paragraph (b).
- (b) An NCIG Producer may elect to include its Excluded Stage 1 Allocation when determining that NCIG Producer's Utilisation Threshold, in which case the NCIG Producer must nominate a date on which the election will become effective (**Stage 1 Election Trigger Date**).
- (c) If an NCIG Producer makes an election under paragraph (b) and is not otherwise prevented from nominating for expansion capacity under the provisions of this clause 8 then:
 - (i) subject to sub-paragraph (c)(ii), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage; and
 - (ii) the nomination referred to in paragraph (c)(i) must not nominate a start date for delivery date of such capacity allocations which is earlier than the Stage 1 Election Trigger Date.

8.4 Period during Nominated Deferred Period

- (a) Further to clause 8.2 and 8.3, if an NCIG Producer has specified a Nominated Deferral Period in accordance with clause 5.2(a)(ii), then:
 - (i) subject to paragraph (b), that NCIG Producer will not be entitled to nominate for any capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage until the expiry of the Nominated Deferred Period; and
 - (ii) at any time during the Nominated Deferred Period that NCIG Producer may elect to surrender its right to extend the Nominated Deferral Period in accordance with that clause, in which case the NCIG Producer must nominate a date on which the election will become effective (**Stage 2 Election Trigger Date**).



- (b) If an NCIG Producer makes an election under sub-paragraph (a)(ii) and is not otherwise prevented from nominating for expansion capacity under the provisions of this clause 8 then:
 - (i) subject to sub-paragraph (b)(ii), that NCIG Producer may nominate for capacity allocations at the PWCS Terminals in excess of its PWCS Base Tonnage; and
 - (ii) the nomination referred to in paragraph (b)(i) must not nominate a start date for delivery date of such capacity allocations which is earlier than the Stage 2 Election Trigger Date.

9 Levy and unallocated expansion capacity

9.1 Conditions for Levy to apply

- (a) A Terminal Operator may elect to apply the Levy whenever:
 - (i) that Terminal Operator Completes an Expansion; and
 - (ii) the Contracted Allocation for that Expansion is less than the Capacity that is made available by that Expansion (**Unallocated Expansion Capacity**),
provided that NCIG must not apply the Levy to any Excluded Stage 2 Capacity.
- (b) Subject to paragraph (c), the Terminal Operator will use its best endeavours to allocate the Unallocated Expansion Capacity to any Producer either under a Long Term Ship or Pay Contract or under any short term contractual arrangement in accordance with the Nomination and Allocation Procedures.
- (c) Whilst NCIG has not Committed to NCIG Stage 2, NCIG Producers will only be entitled to nominate for allocations of Unallocated Expansion Capacity at PWCS Terminals under fixed term contractual arrangements for the maximum term then available not exceeding 2 years.
- (d) If the Levy is applied in respect any Unallocated Expansion Capacity, the Levy will cease to apply when that Unallocated Expansion Capacity is subsequently allocated under a Long Term Ship or Pay Contract.
- (e) Where the relevant Unallocated Expansion Capacity is allocated under any short term contractual arrangement the Levy will be adjusted accordingly.

9.2 Purpose of the Levy

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

9.3 Levy protocols

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

10 Terminal 4

10.1 Agreement for Lease

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

10.2 Ensuring integrity of Capacity Framework

PWCS acknowledges that the structure of the ownership and control of Terminal 4 must be such that the provisions of this document will apply to the provision of Capacity at Terminal 4 in the same way as they apply to all other terminals owned and controlled by PWCS and that for that purpose NPC will be entitled to require that the terms of the agreement for lease for Terminal 4 will include such provisions as NPC (acting reasonably) believes are necessary to give effect to this principle.

10.3 Governing principles for Terminal 4

Without limiting clause 10.2, NPC and PWCS will ensure that the terms of the agreement for lease for the land on which Terminal 4 is to be constructed are consistent with the following principles:

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

11 Coal Chain Coordination

11.1 Information

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

11.2 Interference

- (a) Terminal Operators acknowledge that construction works in the coal chain, including at the Terminals, may impact on others using the coal chain during integration of expansion works.
- (b) PWCS will:
 - (i) take all reasonable steps to ensure that the design, construction and operation of Terminal 4 does not interfere with the ability of NCIG to construct and efficiently operate its fully constructed facility;
 - (ii) where there is any such interference, use its best efforts to minimise that interference; and
 - (iii) consult with NCIG regarding any potential interference.
- (c) NCIG will:
 - (i) take all reasonable steps to ensure that the design, construction and operation of NCIG Stage 2 does not interfere with the ability of PWCS to construct and efficiently operate its fully constructed facilities;
 - (ii) where there is any such interference, use its best efforts to minimise that interference; and
 - (iii) consult with PWCS regarding any potential interference.
- (d) For the avoidance of doubt, nothing in this clause 11.2 will detract from or limit a Terminal Operator's rights at law.

12 Contractual alignment

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

13 Process for final agreement

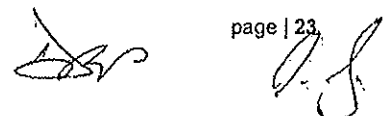
- (a) Each party to this document must:
 - (i) comply with the Implementation Procedure set out in Schedule 4;
 - (ii) in good faith, attend and participate in scheduled discussions and negotiations with a view to agreeing the documentation that is required to implement the Capacity Framework documented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



- (iv) use all reasonable endeavours to resolve any disputes in an efficient and professional manner.
 - (b) The Terminal Operators must work together and cooperate with all other relevant industry participants to facilitate development of a solution to achieve contractual alignment.
-

14 Long form documents

- (a) For the purposes of clause 13, Schedule 3 provides an indicative overview of the documents that will be required to implement the Capacity Framework.
- (b) The parties acknowledge that the long form documentation will include an appropriate dispute resolution regime to address disputes which arise in respect of matters which are relevant to the Capacity Framework. For the avoidance of doubt, such dispute resolution provisions will not apply in respect of any dispute regarding the decision of the Reviewer or any expert appointed to review the decision of the Reviewer.
- (c) To the extent that the long form documentation comprises bilateral arrangements between Government and one of the Terminal Operators, Government will not agree to make any material amendment to the provisions of those arrangements that are relevant to the Capacity Framework without first:
 - (i) engaging in a transparent process with industry participants regarding the proposed amendments; and
 - (ii) considering the submissions of industry participants regarding whether Government ought to agree to the proposed amendments.

Two handwritten signatures in black ink are located at the bottom right of the page. The first signature is on the left and the second is on the right, both appearing to be initials or short names.

Schedule 1 — Dictionary

1 Dictionary

In this deed:

Aggregate PWCS Available Capacity means the aggregate Capacity of the PWCS Terminals from time to time.

Aggregate PWCS Contracted Allocations means the aggregate of all Contracted Allocations at PWCS Terminals.

Associate means, in relation to a person:

- (a) a Related Body Corporate of that person;
- (b) a person, or the trustee or manager of a trust, which Controls that person;
- (c) a person, or the trustee or manager of a trust, which that person Controls;
- (d) a Related Body Corporate of a person included in paragraph (a), (b) or (c);
- (e) a partnership or an incorporated or unincorporated joint venture in which the person, or any one or more of the persons mentioned in paragraph (a), (b), (c) or (d), holds an interest;
- (f) a body corporate, or the trustee or manager of a trust, which one or more of the persons mentioned in paragraph (a), (b), (c), (d) or (e) alone or together Controls;
or
- (g) the trustee of a trust (including a discretionary trust) of which a person included in paragraph (a), (b), (c), (d) or (e) is a beneficiary (whether or not through one or more other trusts, including discretionary trusts).

For the purposes of this definition, a reference to a partnership or an unincorporated joint venture is also a reference to the persons who are parties to that partnership or unincorporated joint venture.

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

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

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

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

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

Completed means, in respect of an Expansion, that Expansion is commissioned, available to receive coal and is capable of satisfying the Capacity that is required to be satisfied by that Expansion under this document.

Compressed Allocation means:

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

Contracted Allocation means, in respect of a Producer, the aggregate amount of Capacity which the Terminal Operators are contractually bound to make available to that Producer.

Contracted Allocation Reduction means a reduction in the Contracted Allocation of a Producer at the PWCS Terminals as agreed between that Producer and PWCS from time to time.

Contracted Allocation Usage means, in respect of a Producer at any time, the use by that Producer of that Producer's Contracted Allocation, not including any part of that Producer's Contracted Allocation that has been transferred to another Producer through a capacity transfer or swap, plus:

- (a) that Producer's use of any Contracted Allocation of another Producer that is acquired through a capacity transfer or swap;
- (b) any portion of that Producer's PWCS Contracted Allocation which has been compressed under clause 5.1 and under clause 7.4 during the 18 month period immediately prior to that time; and
- (c) any portion of that Producer's Contracted Allocation which has not been used by the Producer as a direct result of a Force Majeure Event.

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

Development Consents means all licences, consents, approvals, permits, authorisations, certificates of registration or other concessions issued by a government authority which are required to be obtained or entered into in respect of any part of any Expansion.

Engineering Limitations means, in respect of an Expansion:

- (a) the time for delivery of the Expansion in the most efficient and effective manner (having regard to the then prevailing practice for comparable terminals in Australia) will exceed the time in which that expansion is required to be Completed under this document; or
- (b) any engineering limitation in the construction of that Expansion that:
 - (i) is of a type that a reasonable and prudent person of sufficient experience, knowledge, qualification and skill would not have foreseen or allowed for when preparing the project plan and project timeline for that Expansion, including:
 - (A) a latent condition affecting the site the subject of the Expansion; or
 - (B) any delay or excessive lead times in the supply of major items of equipment by a supplier;

- (ii) is beyond the reasonable control of the relevant Terminal Operator and not attributable to an employee, agent or Related Body Corporate of that Terminal Operator;
- (iii) the relevant Terminal Operator or any Related Body Corporate of that Terminal Operator could not reasonably have provided against before executing this document;
- (iv) the relevant Terminal Operator could not reasonably have avoided or overcome; and
- (v) has been notified to the Reviewer promptly after the date on which the relevant Terminal Operator undertaking that Expansion became aware of that engineering limitation (whether before or after commencement of construction of that Expansion).

Excluded Contracted Allocation means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1 or through Excluded Stage 2 Capacity.

Excluded Stage 1 Allocation means any part of a Producer's Contracted Allocation which is to be provided through NCIG Stage 1.

Excluded Stage 2 Capacity means that portion of the Capacity available at NCIG Stage 2 which is not required to be offered for allocation to Non-NCIG Producers in accordance with clause 7.1.

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

Force Majeure Event means an event or circumstance which:

- (a) In relation to a party:
 - (i) is beyond that party's reasonable control and not attributable to an employee, agent or Related Body Corporate of that party;
 - (ii) that party or any Related Body Corporate of that party could not reasonably have provided against before executing this document; and
 - (iii) that party could not reasonably have avoided or overcome; and
- (b) is not substantially attributable to any breach of this document by one or more of the other parties,

and so long as the requirements of paragraphs (a) and (b) have been satisfied, may include:

- (c) an act of God, lightning, storm, flood, hurricane, typhoon, cyclone, volcanic activity, fire, earthquake, explosion or peril of navigation;
- (d) theft, malicious damage, strike, lockout, boycott or any a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party;
- (e) a state-wide or national industrial dispute directly affecting work on the site not caused or contributed by the affected party
- (f) act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, terrorism, insurrection, civil commotion, epidemic, rebellion, military or usurped power or martial law;

- (g) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (h) embargo, power or water shortage;
- (i) confiscation by order of any government;
- (j) the introduction of or change to legislative requirements or regulations applicable to an Expansion;
- (k) a direction by a municipal, public or statutory authority (not caused by a failure of the affected party to comply with legislative requirements);
- (l) a delay by a municipal, public or statutory authority (not caused by the affected party);
- (m) the affected party is unable to secure a lease from the applicable NSW State Government authority or department for land that is needed to carry out an Expansion but for which that affected party does not already hold a lease; or
- (n) failure by a financier to meet its commitment to provide funding for an Expansion where that failure is not due to the financier exercising or not exercising (as the case may be) any rights it has against the affected party under the financing documents or otherwise.

General Compression Limit means, in respect of a Producer:

- (a) 5% of that Producer's Contracted Allocation in the calendar year in which that Producer's Contracted Allocation is first compressed for a PWCS Expansion Delay or PWCS Expansion Shortfall under clause 5.1(a)(iii); and
- (b) for each calendar year thereafter in which that PWCS Expansion Delay or PWCS Expansion Shortfall (and any other concurrent PWCS Expansion Delay or PWCS Expansion Shortfall) subsists, an additional 5% of that Producer's Contracted Allocation.

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

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

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

Implementation Procedure means the procedure set out in Schedule 4.

Levy means the levy referred to in clause 9.

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

Mtpa means million tonnes per annum.

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

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

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

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

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

NCIG Stage 1 means the terminal operated by NCIG up to a total Capacity of 30 Mtpa.

NCIG Stage 2 means any expansion (or part thereof) of the terminal operated by NCIG in excess of the total Capacity that can be delivered by NCIG Stage 1.

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

NCIG Stage 2 Shortfall means the extent to which the Capacity available at NCIG Stage 2 falls short of meeting the Non-NCIG Stage 2 Allocations.

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

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

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

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

Producer means any person who, by virtue of its ownership, management rights or some other means:

- (a) exercises effective operational control over; or
- (b) has, in relation to its dealings with the Terminal Operators, authority to represent the interest of,

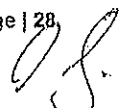
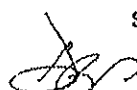
one or more mines producing coal for export through the Hunter Valley Coal Chain.

Producer Group means, in respect of a Producer, that Producer and each Associate of that Producer.

PWCS Base Tonnage means the base tonnage to be allocated to Producers at the PWCS Terminals in the year 2009 and 2010 (respectively) in accordance with the PWCS Nomination and Allocation Principles.

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

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



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

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

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

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

PWCS Terminal means each terminal operated by PWCS.

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

Terminal Operators means each of PWCS and NCIG.

Unallocated Expansion Capacity has the meaning given in clause 9.1(a)(ii).

Unutilised Allocation means, in respect of a Producer, the difference between the amount that is 95% of that Producer's Contracted Allocation for a relevant period of time and that Producer's Contracted Allocation Usage during that period.

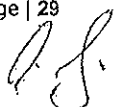
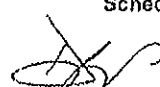
Utilisation Threshold means, in respect of a Producer, that Producer's Contracted Allocation Usage is at least 95% of that Producer's Contracted Allocation on average over a period of 18 consecutive months.

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

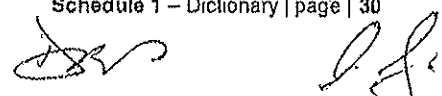
2 Interpretation

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

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



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



Schedule 2 — Nomination and Allocation Principles

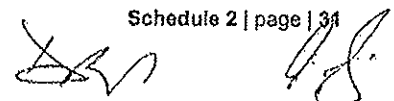
1 PWCS Nomination and Allocation Principles

Contracting Principles

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

Base Tonnages

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



G PWCS Base Tonnage for 2010

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

H Base Tonnage Offer

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

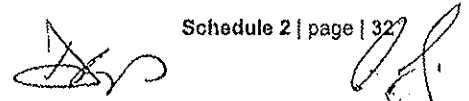
For the avoidance of doubt, the aggregate PWCS Base Tonnage for NCIG Producers totals 24.413 Mtpa.

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

I Base Tonnage Acceptance

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

Allocation of Capacity for 1 January 2010 to 30 June 2010



- J. Any additional capacity above that required to satisfy the Base allocation will be offered for allocation in the period 1 January 2010 to 30 June 2010 only to all existing Producers at PWCS on a pro rata basis based on their respective Base Allocation.

Allocation of Capacity for 1 July 2010 and beyond

- K. Allocation of capacity above that required to satisfy the Base allocation for the period from 1 July 2010 and beyond will occur in accordance with the Annual Capacity Nomination and Allocation Process set out below.

Annual Capacity Nomination and Allocation Process

L Expansion Planning

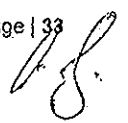

- (i) PWCS will review its Capacity, system assumptions and expansion plans each year in conjunction with Coal Chain master planning conducted by the HVCCC.

M Demand Assessment

- (i) PWCS will undertake an annual demand assessment process with Producers each year. This process will include submission of nominations for 10 year Load Point Allocations, notice of renewals or extensions of existing 10 year Load Point Allocations and notice of any offers of voluntary Load Point Allocation reductions.
- (ii) In the year in which NCIG intends to Commit to NCIG Stage 2, the timing of the annual demand assessment process will be coordinated with NCIG, such that the NCIG Nomination and Allocation process is conducted before or in conjunction with the PWCS Nomination and Allocation Procedure where reasonably possible.

N Nominations

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



(2) with the approval of NPC, is 1 January in the 5th year after the nomination is submitted, provided that NPC is satisfied that:

(I) the Producer nominating for that capacity establishes that the nomination is for a planned mine with infrastructure that has extended lead times for delivery; and

(II) the nomination will not have any adverse effect on nominations for allocations which may commence earlier.

c. Provide reasonable security as required by PWCS;

d. Provide a JORC Code compliant Statement of Marketable Coal Reserves for the relevant mines detailing total marketable coal reserves and which demonstrates, at least 10 years of coal production is feasible with respect to the Load Point Allocation sought at PWCS;

e. Provide information relating to the development status of the source mine, including development consent and other approvals to operate;

f. Provide a timeline for coal production, where the nomination relates to a new or expansion project;

g. Provide relevant information required for system assumptions and contractual alignment; and

h. Provide a duly executed and binding CHSA for the nominated allocation, if the Producer has not already done so.

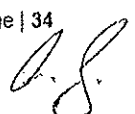
(i) If for any reason a nomination does not result in a contract through the nomination and allocation process then that nomination shall have no continuing effect including having any priority under the Priority Rules below.

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

○ Renewal and Extension

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

(ii) An end of Load Point Allocation extension of up to 3 years may be exercised by Producers with 5 years remaining on their Load Point Allocation.



P Voluntary Reduction Offer

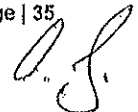
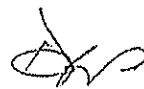
- (i) A Producer may offer to PWCS a voluntary reduction to a Load Point Allocation. PWCS may reallocate the Load Point Allocation (up to the amount volunteered) to another Producer in accordance with this nomination and allocation process.

Q Capacity Assessment and Review

- (i) PWCS will assess its Capacity availability and its ability to meet aggregate nominations and existing Contracted Allocations. If necessary, PWCS will finalise its detailed expansion plan to fulfil the nominations. If necessary, a review will be conducted in accordance with clause 4.3 of the Implementation Memorandum. This assessment will take into consideration contractual alignment. Allocation
- (ii) PWCS will contract Load point Allocations with Producers. Contracted Allocations which cannot be satisfied by existing Capacity at the PWCS Terminals, will commence within the time required under clause 4.2 of the Implementation unless, a Review has been undertaken with the Reviewer and an alternative date for the delivery of capacity is established. If PWCS cannot satisfy the nominations in full, priority rules will apply.

R Priority Rules

- (i) Existing Load Point Allocations will not be diluted;
- (ii) Where nominations are made in the same year, nominations starting sooner will be prioritised over nominations starting later provided that:
 - a. where there is no available PWCS capacity in 1st year after the nomination is submitted then, nominations in 1st and 2nd year will have equal priority; and
 - b. where there is no available PWCS capacity in 1st or 2nd year after the nomination is submitted then, nominations in 1st, 2nd and 3rd year will have equal priority;
 - (i) Where nominations are made in the same year to start at the same time, nominations will be prioritised according to development status and first coal production. Provided that for the 2009 nomination process only, nominations in the 2009 nomination process for which an expression of interest was submitted under clause N(iv) above, take priority over other nominations for the 2009 nomination process for which no expression of interest was submitted;
 - (ii) Nominations submitted in the same year that become contracts take priority over nominations submitted in later years;
 - (iii) Each priority group is satisfied in full before the next priority group; and



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

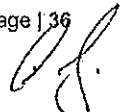
S Capacity Delivery

- (i) PWCS will deliver Capacity within the contracted timeframe.
- (ii) If necessary, a review will be conducted during an expansion in accordance with clause 4.3 of the Implementation Memorandum.
- (iii) If capacity is delivered part way through a year the Load Point Allocation will reflect the partial year.
- (iv) If there is a PWCS Expansion Delay or a PWCS Expansion Shortfall compression will apply in accordance with clause 5 of the Implementation Memorandum.
- (v) Compressed Allocation will be reallocated to Producers who have Load Point Allocations impacted by the PWCS Expansion Delay or a PWCS Expansion Shortfall.
- (vi) Where the Compressed Allocation is insufficient to satisfy the impacted Producers, priority rules will apply:
 - a. Load Point Allocations commencing in a particular year will take priority over Load Point Allocations starting in a later year;
 - b. Where Load Point Allocations commence in a particular year, Load Point Allocations where the source mine has all approvals to operate and sufficient track access will take priority;
 - c. Each priority group is satisfied in full before the next priority group; and
 - d. If Load Point Allocations within a priority group cannot be satisfied at the one time, each Producer will be offered their pro-rated share.

Excess Capacity

T Excess Capacity Announcement

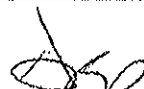
- (i) PWCS will make an announcement when it has any Unallocated Expansion Capacity and invite nominations for that Unallocated Expansion Capacity. Nominations must not exceed the amount of Unallocated Expansion Capacity or any time period stated in the announcement.
- (ii) If NCIG has not committed to NCIG stage 2, NCIG Producers may only nominate for Load Point Allocations for capacity contracts for the maximum available period



not to exceed 2 years in length. If NCIG stage 2 has been Committed, all Producer's nominations will be treated the same as all other Producers.

(iii) In allocating the Unallocated Expansion Capacity, the following priority rules will apply:

- a. Nominations commencing sooner will take priority over nominations commencing later;
- b. Nominations for a longer time period will be prioritised ahead of nominations for shorter time periods; and
- c. If nominations within a priority group cannot be satisfied:
 - i. If NCIG Stage 2 has not been Committed, nominations by Non-NCIG Producers within a priority group will be prioritised ahead of nominations by NCIG Producers within that priority group;
 - ii. All else being equal, each Producer will be offered their pro-rated share.



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

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

Step 1: EOI Process: Invite Expressions of Interest (inclusive of an NCIG standard-form Confidentiality Deed) from all Non-NCIG Producers. NCIG will consult with PWCS as to the timing of the nomination and allocation process in accordance with the Implementation Memorandum.

Step 2: Provide Information Package and form of SoP to Non-NCIG Producers who have signed the Confidentiality Deed (**Nominating Non-NCIG Producers**); Initiate independent due diligence on Nominating Non-NCIG Producers.

Step 3: Receive nominations. Nominations must include:

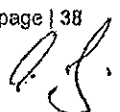
- (i) a commitment to ship a minimum of 3 Mtpa (throughput) when Stage 2 of the terminal is operating at full capacity on the terms of the SoP;
- (ii) a nominated source mine(s) for which registered mining title is held;
- (iii) development consent for the source mine(s), subject only to conditions of a formal nature;
- (iv) a JORC Code compliant Statement of Marketable Coal Reserves for the source mine(s) showing total Marketable Coal Reserves; and which demonstrates 11 years of coal production for exporting through NCIG CET;
- (v) consent by the applicant to participate in the due diligence enquiries to be conducted on behalf of the financiers for NCIG Stage 2;
- (vi) lodgement of cash or a bond.

Step 4: Assess nominations against the criteria and requirements established for the financing of NCIG Stage 2 and those applicants that facilitate the most efficient and effective operation of the terminal, including on the basis of the information provided by Nominating Non-NCIG Producers in Step 3 and the outcome of the due diligence process (**complying nominations**). If complying nominations for less than or equal to 12 Mtpa, go to Step 6. If complying nominations for more than 12Mtpa, go to Step 5.

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

- (a) is consistent with the principle that allocations of capacity are provided to as many of those Nominating Non-NCIG Producers as possible (including by reducing nominated allocations where appropriate, subject to the relevant Nominating Non-NCIG Producers confirming such reduction); and
- (b) takes account of the views of the HVCCLT regarding the optimisation of coal chain utilisation.

Step 6: Confirm indications with successful applicants. Applicants sign provisional SoPs, subject only to the occurrence of Financial Close and submit Bid Bond (the terms of provisional SoPs and Bid Bond will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2 in excess of the 12 Mtpa). Any non-allocated tonnes remaining



from the 12 Mtpa will be available for further nomination by all Producers (including NCIG Producers) by re-applying Steps 1-6 (with changes as necessary to acknowledge that NCIG Producers may participate in the process).

Step 7: At Financial Close, applicants sign a binding SoPs. The terms of SoPs signed by Non-NCIG Producers will be the same as the terms signed by NCIG Producers for allocations at NCIG Stage 2.

Schedule 3 — Documents matrix

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

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

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

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

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**Schedule 4 —
Implementation procedure**

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

Schedule 5 — Contractual alignment

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

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

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

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

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

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

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

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

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

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

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

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

3. Track and Terminal service providers will ensure that Access Rights to their respective infrastructure are not triggered in excess of the lesser of the Track and Terminal System Capacity (Producers with access contracts will also be able to opportunistically access ad-hoc capacity where available and on the basis that it does not infringe on the contracted access rights of other Producers). Producers will have a right to have the Track System Capacity and Terminal System Capacity audited against aggregate Access Rights.

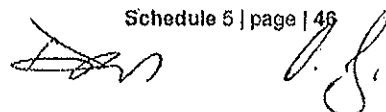
Producer's Access Rights = Lesser of Producers Terminal System Capacity and Track System Capacity

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

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

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

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

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Execution page

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

Signature of witness

Signature of authorised representative

Name of witness (print)

Name of authorised representative (print)

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

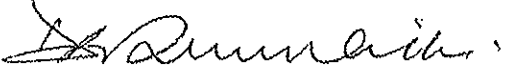
Signature of witness

Signature of authorised representative

Name of witness (print)

Name of authorised representative (print)

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



Signature of witness



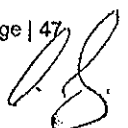
Signature of authorised representative

DAVID SOMERVILLE

Name of witness (print)

ANTHONY GALLIGAN

Name of authorised representative (print)



Attachment 5 - NCIG Shareholders

Shareholder	Percentage
Hunter Valley Energy Coal Pty Limited	35.47%
Peabody Pacific Pty Ltd	17.68%
Felix Resources Ltd	15.40%
Donaldson Coal Pty Ltd	11.61%
Whitchaven Coal Ltd	11.06%
Centennial Coal Company Ltd	8.79%

*Based on ordinary shares held in NCIG Holdings Pty Ltd,
which owns 100% of the shares in NCIG*

In addition, ANZ Specialist Asset Management Limited holds all of the A Class Series A Hunter Infrastructure Preference Securities issued in NCIG Holdings Pty Ltd and BHP Billiton Finance Limited holds all of the S Class Series A Hunter Infrastructure Preference Securities issues in NCIG Holdings Pty Ltd.

Confidential Attachment 6 - Newcastle Coal Producers - contact details

Producer / Service Provider	Contact	Title	Email
Anglo Coal Australia Pty Limited			
Austar Coal Mine Pty Limited			
BHP Billiton Energy Coal			
Bloomfield Collieries Pty Limited			
Centennial Coal Company Limited		[CONFIDENTIAL]	
Coal & Allied (Rio Tinto Coal Australia Pty Ltd)			
Donaldson Coal Pty Ltd			
Gloucester Coal Limited			
Idemitsu Australia Resources Pty Limited			
Integra Coal Operations Pty Ltd			
Peabody Pacific Pty Limited			
White Mining limited			
Whitehaven Coal Mining Pty Ltd			
Xstrata Coal Australia Pty Ltd			

The Commission already has contact details for other service providers in the Hunter Valley.