



22 July 2009

**Port Waratah Coal Services Limited (PWCS), Newcastle Coal
Infrastructure Group Pty Limited (NCIG) and Newcastle Port Corporation
(NPC) applications for authorisation [A91147 – A91149] –
request for interim authorisation**

REASONS

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided to grant interim authorisation to allow the Applicants to commence the phased-in implementation of the Capacity Framework Arrangements.

However, interim authorisation does not extend to Section 11 of Part B of the Proposed Capacity Framework Arrangements. Under section 11, authorisation is sought ‘for any other conduct which gives effect to the provisions of the Implementation Memorandum’. The ACCC will not grant interim authorisation in circumstances where the proposed provision of a contract, arrangement or understanding has not been described in sufficient detail.

The ACCC grants interim authorisation subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009. The ACCC will revoke the interim authorisation should any of the Applicants fail to execute the Capacity Framework Documents by 31 August 2009.

THE APPLICATION

On 29 June 2009 PWCS, NCIG and NPC (the ‘Applicants’) sought authorisation for certain aspects of a long term solution to the ongoing capacity constraints at the Port of Newcastle. The Applicants subsequently provided a public submission in support of the applications for authorisation on 30 June 2009.

Authorisation is sought to make or give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in the Capacity Framework Arrangements (at Attachment 1 of the supporting submission to the applications for authorisation).

The Applicants submit that the proposed Capacity Framework Arrangements are linked directly to the framework set out in the Implementation Memorandum signed by the Applicants in April 2009.

The proposed Capacity Framework Arrangements include:¹

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

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

- a formal Capacity Framework Agreement between the Applicants which gives effect to the relevant provisions of the Capacity Framework Arrangements
- long term ship or pay contracts for PWCS coal loading terminals and NCIG Stage 2
- Deed of Variation which amends the leases for the land on which the PWCS terminals are located
- Deed of Variation which amends the lease for the land on which NCIG 2 will be located to include the NCIG Nomination and Allocation Procedures for 12 million tonnes per annum of capacity at NCIG Stage 2

¹ The Applicants’ supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, page 2.

- Deed of Undertaking between NPC and NCIG
- An agreement for the lease of the new 'Terminal 4' (T4) between PWCS and NPC, and
- levy protocols for the calculation, charging and collection of an industry levy by NCIG and PWCS to assist with meeting the cost of any Unallocated Expansion Capacity.

The ACCC understands the above mentioned documents are yet to be finalised. The Applicants propose to provide the ACCC with copies of the relevant contracts and documents (or relevant parts of those documents) in which the Capacity Framework Arrangements are reflected as soon as is practicable.²

The Applicants advise that while authorisation is not being sought separately for those documents, this will, as a practical matter, enable the ACCC to see how those documents give effect to the Capacity Framework Arrangements (that is, the conduct for which authorisation is sought).³

The Applicants submit it was not possible for all aspects of the long term solution to be implemented and operational by 1 July 2009, when the ACCC's previous authorisation of the PWCS Stage 1 Allocation system expired. As such, PWCS (as the only export coal terminal currently operating at the Port of Newcastle) proposes to phase-in the long term solution over the last six months of 2009.

The proposed 'phased-in' approach involves the following steps:⁴

- *Phase 1* – involves PWCS offering capacity allocations to existing producers that use the PWCS terminal based on the '2009 Base Tonnage Offer' for the period between 1 July 2009 and 31 December 2009 under a modified PWCS Coal Handling Services Agreement, which will incorporate the PWCS Terminal Access Protocols.
- *Phase 2* – involves PWCS implementing and giving effect to the PWCS Nomination and Allocation Procedure. Pursuant to that procedure, PWCS will offer capacity allocations to existing producers that use the PWCS terminals based on the '2010 Base Tonnage Offer' for the period from 1 January 2010 onwards, and invite demand nominations for additional capacity allocations under the terms of new long term ship or pay contracts to commence on 1 January 2010.

The proposed Capacity Framework Arrangements have been divided into two parts – Parts A and B – to reflect the above phased-in approach.

Part A covers the phasing-in period for implementation of the long term solution between 1 July 2009 to 31 December 2009, and any offer by PWCS and any acceptance of that offer by a producer of the 2009 PWCS Base Tonnage for that period.⁵

² Ibid, page 4.

³ Ibid.

⁴ Ibid, page 6.

⁵ Ibid, page 3.

Also, Part A of the proposed arrangements involves the following conduct:⁶

- before producers can accept individual 2009 Base Tonnage offers from PWCS, they will be required to provide a break down of tonnes at each load point (at their mines), as well as being required to ensure they have contractual entitlements for the delivery of coal from each load point
- for the remainder of 2009, PWCS will not accept an application to load a vessel unless a rail service provider confirms that there is sufficient contractual entitlement for the haulage of coal in respect to that vessel.

Part B of the proposed Capacity Framework Arrangements (which includes Phase 2 of the proposed implementation arrangements for the remainder of 2009) will only commence if the PWCS Capacity Framework Documents⁷ and NCIG Capacity Framework Documents⁸ are executed in full by no later than 31 August 2009, or such other date as may be agreed by the Applicants.⁹

Subject to the relevant documents being executed, PWCS anticipates being able to obtain acceptance of the '2010 Base Tonnage Offers' and binding nominations for expansion capacity under long term ship or pay contracts from producers in September/October 2009.¹⁰

The Applicants expect the documentation in relation to the proposed Capacity Transfer System under Part B of the proposed arrangements will be finalised by 30 November 2009, for implementation from 1 January 2010.

If the pre-conditions under Part B of the proposed arrangements are not satisfied by 31 August 2009 (or such other date as may be agreed by the Applicants), the Applicants submit that any authorisation of Part A of the proposed arrangements could continue until 31 December 2009 while the Applicants (or some of the Applicants) vary the conduct set out in Part B of the proposed arrangements, by lodging a separate application for authorisation with the ACCC.

Regarding the August deadline, the Applicants have advised the ACCC that it is intended that the final versions of the relevant long term documentation will be prepared by 10 August 2009, in order to gain respective Board approvals and execution by 31 August 2009.

⁶ Submission from the Applicants in response to request for information, 13 July 2009, pages 6-7.

⁷ PWCS Capacity Framework Documents: each Deed of Variation to PWCS and NPC amending respective PWCS leases; the Agreement for Lease of T4 between PWCS and NPC; and the Capacity Framework Agreement between PWCS, NCIG and NPC.

⁸ NCIG Capacity Framework Documents: The Deed of Variation between NCIG and NPC amending the terms of the Agreement for Lease for the land on which NCIG Stage 1 and 2 is to be constructed; the Capacity Framework Agreement between PWS, NCIG and NPC; and the Deed of Undertaking.

⁹ The Applicants' supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, pages 3 and 6.

¹⁰ Ibid, page 9.

Request for interim authorisation

The Applicants request urgent interim authorisation of the proposed Capacity Framework Arrangements so that:¹¹

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

Interim authorisation is requested in accordance with the following timeframes:¹²

- for the proposed conduct in Part A of the arrangements, as soon as reasonably practicable (with the ability to implement that conduct retrospectively from 1 July 2009) and
- for the proposed conduct in Part B of the arrangements, as soon as reasonably practicable (even if this occurs after any interim authorisation is granted to Part A of the proposed arrangements).

The Applicants submit the staged approach to the request for interim authorisation reflects both the commercial imperative for PWCS to implement the 2009 Base Tonnage Offer (under Part A of the Capacity Framework Arrangements) before the conduct referred to in Part B. In addition, the Applicants submit that it also reflects the relative simplicity of the conduct proposed under Part A of the arrangements, compared to the more complex arrangements set out under Part B.¹³

THE AUTHORISATION PROCESS

The ACCC can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC typically conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

INTERIM AUTHORISATION

Section 91 of the Act allows the ACCC to grant interim authorisation without making a decision on the merits of the application.

¹¹ The Applicants' supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, page 28.

¹² The Applicants' letter to the ACCC, 30 June 2009, page 1.

¹³ Ibid.

The ACCC will only grant interim authorisation in special circumstances. This is because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

Some of the key factors typically taken into account by the ACCC when assessing an application for interim authorisation include:

- the urgency of the need for interim authorisation
- the extent to which the relevant market will change if interim authorisation is granted
- the possible harm, if any, to the applicant if a grant of interim authorisation is denied
- the possible harm to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied and
- any possible benefit or detriment to the public that the ACCC could assess at the time of considering the request for interim authorisation. However, the ACCC is not required to determine whether the relevant conduct would satisfy the authorisation test.

BACKGROUND

Previous authorisation of the Stage 1 Allocation system at the Port of Newcastle

An authorised capacity balancing system has essentially been in operation at the Port of Newcastle since interim authorisation was first granted by the ACCC in March 2004.

Most recently, the ACCC granted authorisation to PWCS and NCIG for the ‘PWCS Tonnage Allocation Stage 1’ (Stage 1 Allocation system) until 30 June 2009.

In the original supporting submission to the November 2008 application, PWCS and NCIG submitted the Stage 1 Allocation system was designed to provide coal producers with access to terminal capacity and manage the coal vessel queue while the long term arrangements for access and capacity expansion of coal terminal infrastructure were developed and implemented by the industry.¹⁴ PWCS and NCIG sought authorisation until 30 June 2009 for this to occur.¹⁵

The Stage 1 Allocation system was implemented by amending the Coal Handling Services Agreement between each producer and PWCS. Under the Stage 1 Allocation system, the ‘Aggregate Base Tonnage’ for 2009 was 96.7 million tonnes per annum. Each producer received a ‘Producer Base Tonnage’. The Producer Base Tonnage was the greater of each producer’s highest allocation usage between 2004 and 2007 under the capacity balancing systems, or their binding demand nominations with PWCS for 2008, proportionally reduced to an aggregate 95 million tonnes (being the initial declared Coal Chain Capacity for 2009).

¹⁴ PWCS and NCIG supporting submission to the applications for authorisation (A91110-A91112), 19 November 2008, page 18.

¹⁵ PWCS and NCIG’s amendment to the applications for authorisation A91110-A91112, 11 February 2009, page 6.

In its May 2009 determination¹⁶, the ACCC noted that during its consideration of the application, the industry had made significant progress and appeared to be close to finalising a long term solution to the capacity issues in the Hunter Valley coal chain. In particular, the ACCC considered the signing of the Implementation Memorandum to be a significant milestone for the industry and NSW Government, which among other things, contained a commitment by the parties to prepare the necessary documents by 15 June 2009 in order to implement the long term solution. The Implementation Memorandum also set out that existing Hunter Valley coal producers would be invited to sign Long Term Ship or Pay contracts with PWCS, to commence on 1 July 2009.

The ACCC's decision also noted there was still a considerable volume of work to be done by the industry to implement the long term solution by its target date of 30 June 2009, particularly concerning contractual alignment and system capacity issues.

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

Australian Rail Track Corporation – the Hunter Valley Access Undertaking

On 23 April 2009 the Australian Rail Track Corporation (ARTC) lodged a proposed access undertaking for the Hunter Valley rail network (the HV Undertaking) under Part IIIA of the Act. The HV Undertaking sets out proposed price and non-price terms and conditions of access to the Hunter Valley rail network.

The ACCC notes that the HV Undertaking also forms part of the long term solution to the capacity constraints in the Hunter Valley coal chain. ARTC advises that it proposes to negotiate track access agreements for the rest of 2009, including commitments to expand track capacity, to commence on 1 January 2010.

Among other things, the HV Undertaking proposes to introduce a new contractual framework whereby coal producers can contract directly with ARTC for track access. Currently, access rights are generally held by above rail providers.¹⁷

In addition, the HV Undertaking proposes that only access seekers with sufficient capacity allocation at the port will be granted access rights to transport coal on the Hunter Valley rail network.¹⁸

ARTC advises that contracting directly with producers will allow it to obtain greater commitment from producers to the long term investments in capacity that will be needed to meet demand, as well as to provide them with a greater degree of control over the transportation of their coal and the alignment of their contracts across the coal chain.¹⁹

¹⁶ ACCC determination in relation to applications for authorisation A91110-A91112, 13 May 2009, pages ii and 43.

¹⁷ Submission from ARTC, 10 July 2009, page 2.

¹⁸ Ibid, pages 2 and 3.

¹⁹ Ibid.

The ACCC is currently considering submissions received prior to issuing a draft decision in relation to the HV Undertaking.

Phasing in the long term solution for the remainder of 2009

In the current application, the Applicants submit that the industry requested that the long term solution be phased-in by 1 January 2010. The Applicants submit that phasing in the long term solution over this time frame will:²⁰

- assist producers, exporters and other participants in the coal chain to adjust both operationally and commercially to the new operating environment (for example, provide an ‘implementation’ period so producers and service providers can adjust to how coal chain system performance will be measured prior to the commencement of these processes on 1 January 2010)
- enable PWCS to consult with and undertake an education process with its customers in relation to the new operating environment
- provide producers time to obtain internal approvals to enter into 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, and develop a Capacity Transfer System prior to the commencement of the new long term ship or pay contracts from 1 January 2010
- allow PWCS and producers to adjust to the proposed Capacity Framework Arrangements and changes to services provided by other service providers in the Hunter Valley (for example, the proposed ARTC HV Undertaking).

CONSULTATION

Upon receipt of the authorisation application, the ACCC undertook interested party consultation on an urgent basis in order to consider the request for interim authorisation. The ACCC received nine public written submissions from a number of coal producers, the Australian Rail Track Corporation (ARTC) and Asciano.

All interested parties who lodged a submission with the ACCC support the grant of interim authorisation. Copies of public submissions are available on the ACCC’s website www.accc.gov.au/AuthorisationsRegister.

²⁰ The Applicants’ supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, page 5.

REASONS FOR DECISION

Urgency

The Applicants submit that interim authorisation is required as soon as possible to commence the necessary steps to implement the long term Capacity Framework Arrangements. In particular, the Applicants seek interim authorisation so that PWCS is able to make 2009 Base Tonnage Offers to producers and conduct its nomination and allocation processes for 2010 and onwards so that:²¹

- the Applicants, other service providers and the Hunter Valley Coal Chain Logistics Team can determine demand for coal chain infrastructure services (based on long term 'ship or pay' obligations)
- the process for developing contractual alignment across the coal chain can progress, based on producers' Load Point nominations at each mine
- 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
- 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 individual mining operations.

Further, the Applicants submit that it is important that other aspects of the proposed Capacity Framework Arrangements be implemented as soon as possible, so that all industry participants can move forward with the long term solution and take advantage of the momentum that currently exists to develop and give effect to the solution.²²

The ACCC also notes that NCIG has notified PWCS and NPC of its intention to run its nomination and allocation procedures for Stage 2 of its proposed terminal in 2009 under Part B of the proposed arrangements, which also requires coordination with the PWCS nomination and allocation procedure.²³

Coal and Allied supports the Applicants' claim in relation to urgency. In particular, it believes it is important that PWCS is able to make 2009 Base Tonnage Offers to producers and conduct its demand and allocation process for 2010 and onwards as soon as possible so that producers and customers gain certainty in relation to coal export volumes, and producers and service providers can make business planning decisions to align investments in mines and infrastructure in a timely manner.²⁴

²¹ Ibid, pages 10-11.

²² Ibid, page 11.

²³ Submission from the Applicants in response to ACCC request for information, 13 July 2009, page 5.

²⁴ Coal and Allied submission, 8 July 2009, page 1.

Xstrata submits that:

Interim authorisation is critical for PWCS to be able to conduct its Nomination and Allocation process and for PWCS, together with NPC and other critical stakeholders, to take steps to implement contractual alignment across the coal chain.²⁵

Similarly, Asciano considers that:

...interim authorisation to allow the commencement of the process of long term capacity contracting by PWCS and NCIG is warranted...commencement of this process will ensure the full engagement of all Coal Chain parties and further assist the timely finalisation of all detailed aspects of the long term coal chain solution.²⁶

ARTC also supports the request for urgent interim authorisation, given tight timeframes and the need to have port, track and haulage contracts in place before 1 January 2010. In particular, it submits that:

ARTC is proposing to put in place long term track access agreements with coal producers and other access seekers to commence on 1 January 2010...The negotiation of long term ship or pay contracts between terminal operators and coal producers are therefore critical to ARTC's timetable.²⁷

In this context, the ACCC considers that there is some urgency for the Applicants to be able to commence implementing key aspects of the proposed Capacity Framework Arrangements for the remainder of 2009 in order for the long term solution to be fully operational across the Hunter Valley coal chain by 1 January 2010. The ACCC also notes that securing demand nominations from producers under long term ship or pay contracts at the port, is a precursor for effective contract negotiations with other service providers across the coal chain.

Claimed public benefits

The Applicants submit that the 2009 Base Tonnage Offer and other aspects of Part A of the proposed Capacity Framework Arrangements will facilitate contractual alignment across the coal chain, from 1 July 2009, and form the basis for transitioning to all aspects of the long solution from 1 January 2010.²⁸

In turn, the Applicants submit that the long term solution (of which the Capacity Framework Arrangements form a critical part) will produce significant public benefits, including:²⁹

- increased contractual certainty for all participants in the Hunter Valley coal industry, which among other things, will facilitate efficient and substantial infrastructure investment and major capacity expansions in the Hunter Valley
- facilitate alignment of contracted capacity across the coal chain
- increased export revenue, export royalties and employment and

²⁵ Xstrata submission, 8 July 2009, page 1.

²⁶ Asciano submission, 10 July 2009, page 1.

²⁷ ARTC submission, 10 July 2009, page 1.

²⁸ Submission from the Applicants in response to ACCC request for information, 13 July 2009, pages 2, 4.

²⁹ The Applicants' supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, pages 6 – 8.

- demurrage savings and associated benefits arising from the management of the vessel queue off the Port of Newcastle by requiring producers to have sufficient access to both terminal and track capacity before coal can be accepted for export.

Transition to the long term commercial framework

The Applicants submit that in preparing to implement the contractual alignment principles, there is a practical challenge in that System Assumptions are needed to form the base of contracts. System Assumptions underpin the determination of track and terminal capacity and include factors such as realistic interface losses between each element of the coal chain, agreed operating mode(s) of the system (recognising the different operating modes of the PWCS and NCIG terminals), live-run losses, agreed capacities of fixed infrastructure and rail rolling stock specifications and operating parameters.

However, accurate System Assumptions can only be produced by modelling the known coal chain task. In turn, the coal chain task can only be determined after contracts have been executed.³⁰ The Applicants submit that granting interim authorisation to allow the phased implementation of the proposed Capacity Framework Arrangements will enable the industry to resolve this issue.

Coal and Allied supports, and considers necessary, the proposed 'phase-in' of the long term Capacity Framework Arrangements. It considers that the industry and NSW Government has made significant progress from negotiating the long term principles towards now implementing the solution – for instance, drafts of PWCS' long term ship or pay contracts were circulated to producers in early June 2009, the industry is now in the process of establishing the Hunter Valley Coal Chain Coordinator that will ensure the efficient operation of the coal chain as a whole, and the terminal operators have made significant progress with the NPC in discussions regarding lease arrangements.

Coal and Allied is 'confident that the work required by the industry for implementation of the proposed conduct, if it maintains its high intensity, will be successfully completed by the August 31 date'.³¹

Similarly, Xstrata submits:

...the period between 1 July 2009 and 31 December 2009 forms an integral component of, and is critical to the development of, the long term solution that coal producers have been striving for since the first application in this series of applications.³²

Peabody submits:

With the long term Capacity Framework in the final stages of development, Peabody considers that the authorisation of the transitional arrangements which are essential for the effective introduction of the Capacity Framework...will bring with it significant public benefits without any discernable public detriment.³³

³⁰ Ibid, page 18.

³¹ Coal and Allied submission, 8 July 2009, page 3.

³² Xstrata submission, 8 July 2009, page 1.

³³ Peabody submission, 8 July 2009, page 1.

Gloucester Coal submits:

The transition from the status quo to the environment described in the substantive application involves considerable change management within both producer and service provider organisations and contractually between producers and service providers. The Transition period from now to the end of 2009 gives an opportunity for this change to be effected.³⁴

Idemitsu Australia Resources also agrees that ‘interim authorisation will allow the orderly progression to the commencement of the long term solution by 1 January 2010’.³⁵

The ACCC considers the key public benefit claim in relation to the request for interim authorisation relates to the timely transition to the long term commercial framework in the Hunter Valley coal chain, which in turn, should provide sufficient certainty regarding coal volumes to underpin efficient investment across the entire coal chain. The ACCC considers this to be a significant public benefit.

The ACCC maintains its view that any unnecessary delay in the implementation of a long term commercial framework in the Hunter Valley is likely to result in significant detriment in the form of forgone coal exports. In this regard, the ACCC considers the timely implementation of the Capacity Framework Arrangements, in accordance with the timeframes set out within the applications for authorisation, is a critical issue.

Management of the vessel queue

The Applicants submit that there is a reasonable level of demand for Hunter Valley thermal coal. In the absence of any other capacity balancing mechanism beyond 30 June 2009, when the previous authorisation expired, the Applicants estimate that the vessel queue could increase to peak at levels in excess of 70 vessels.³⁶

In this regard, the Applicants submit that 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 this represents demurrage savings of over US\$150 million.³⁷

Coal and Allied agrees that a large queue of vessels will re-form at the Port of Newcastle without interim authorisation. In particular, it submits:

...one week after the expiry of the previous authorisation, there is a queue of around 49 vessels off the Port of Newcastle.³⁸

³⁴ Gloucester Coal submission, 8 July 2009, page 1.

³⁵ Idemitsu Australia Resources submission, 10 July 2009, page 1.

³⁶ The Applicants’ supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, page 22.

³⁷ Ibid.

³⁸ Coal and Allied submission, 8 July 2009, page 2.

The ACCC considers that without the implementation of the 2009 Base Tonnage Offer, or some other capacity balancing mechanism at the Port of Newcastle, the vessel queue is likely to be larger, with resultant higher demurrage costs being incurred by producers. Regarding the likely size of the queue, the ACCC notes the vessel queue under the previously authorised Stage 1 Allocation system trended upwards towards the end of the authorisation period, averaging 40 vessels in June 2009. For the first five months of 2009, the vessel queue averaged 26 in January, 17 in February, 16 in March, 27 in April and 29 in May.³⁹

The Applicants submit that a contributing factor to the larger vessel queue in June 2009 was that producers utilised upper flexibility provisions under the Stage 1 Allocation system, which countered the allocation reductions under that system.

Regarding the management of the vessel queue at an optimal level for the rest of this year under the proposed 2009 Base Tonnage Offer (Part A of the Capacity Framework Arrangements), the Applicants submit that PWCS will be able to revise the flexibility provisions or reduce allocations on a pro rata basis should an excessive vessel queue develop or be forecast to develop at PWCS.⁴⁰

In addition, the ability of PWCS to deny vessel nominations from producers that are not also able to demonstrate matching track and above rail entitlement is likely to reduce the ability of producers to 'stack' the vessel queue.

Possible harm to industry participants

The ACCC notes Asciano's submission that the 'most critical issue for the ACCC is whether the achievement of the long term solution for the coal chain will be assisted or hindered by the granting of the proposed interim authorisation'.⁴¹

If interim authorisation is not granted

The Applicants submit that without interim authorisation of the proposed Capacity Framework Arrangements, they will not be able to proceed to commence the implementation of 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 ACCC grants final authorisation.⁴²

Among other things, the Applicants consider this would then delay the implementation of the above mentioned arrangements (including capacity expansions) and involve substantial uncertainty for the coal industry for the remainder of 2009. The Applicants also consider a large vessel queue is likely to re-form at the Port of Newcastle.⁴³

Issues surrounding the management of the vessel queue are discussed in the Public Benefits section above.

³⁹ Submission from the Applicants in response to ACCC request for information, 13 July 2009, page 6.

⁴⁰ Ibid, page 5.

⁴¹ Asciano submission, 10 July 2009, page 1.

⁴² The Applicants' supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009, page 29.

⁴³ Ibid.

A number of interested parties agree that without interim authorisation, the implementation of the long term solution is likely to be delayed.

In particular, Coal and Allied submits:

...the coal industry in the Hunter Valley needs to retain certainty and stability of port arrangements throughout this process in order to continue at its current momentum...During this period all parties need to focus on the task of finalising the relevant documentation without the additional distractions and uncertainties that would result from a failure to obtain interim authorisation.⁴⁴

ARTC considers the negotiation and agreement of long term ship or pay contracts between producers and the terminal operators are critical for its own timetable. In this regard, ARTC submits:

A delay in the negotiation of such agreements will delay capacity expansion not just at the Port of Newcastle but at all levels of the Hunter Valley coal chain.⁴⁵

The ACCC notes that without interim authorisation, the Applicants have advised that PWCS and NCIG will not be able to obtain binding long term nominations from producers and proceed further in relation to contractual alignment.

The ACCC considers that delays in implementing these processes at the port are likely to hinder effective contract negotiations between producers and other service providers. In turn, this may ultimately delay investment decisions and the timely achievement of contractual alignment across the coal chain.

If interim authorisation is granted

The ACCC has previously concluded that port-based capacity balancing systems, which relied on pro-rata reductions of producers' demand nominations, do not provide appropriate commercial incentives for efficient investment in additional coal chain capacity.

The Applicants submit that the proposed phasing-in period for the remainder of 2009, including the 2009 Base Tonnage Offer, is not simply an extension of a capacity balancing system at the port.

A number of interested parties support the Applicants position on this issue. In particular, Coal and Allied believes:

...the "phase-in" approach is fundamentally different from the previous Capacity Balancing System (CBS) since it forms part of the long term solution.⁴⁶

Similarly, Xstrata submits that the proposed conduct:

...is not an extension of the CBS because it includes steps to implement contractual alignment by way of assigning responsibility for system losses to responsible parties based on underlying commercial contracts.⁴⁷

⁴⁴ Coal and Allied submission, 8 July 2009, page 3.

⁴⁵ ARTC submission, 10 July 2009, page 1.

⁴⁶ Coal and Allied submission, 8 July 2009, page 2.

⁴⁷ Xstrata submission, 8 July 2009, page 1.

Further, Bloomfield Collieries also notes that aspects of the long term solution are proposed to be introduced during the transition phase between 1 July 2009 and 31 December 2009, including:⁴⁸

- nomination of a producer's demand for each load point, which will assist in coal chain planning (previously, only a total demand figure was required)
- quantification and notification of the impact that any change in a producer's nominated load point demand mix has on coal chain capacity and
- the requirement that a producer has access to port, track and above rail capacity before a coal loading nomination is accepted by PWCS (previously, only port capacity was required).

The ACCC notes that while there are similarities between the 2009 Base Tonnage Offer under Part A of the proposed Capacity Framework Arrangements and the previous Stage 1 Allocation system – namely, both systems are implemented under the Coal Handling Services Agreement and involve similar methodology for calculating individual producers' base tonnage allocations – the ACCC notes there are key features under Part A of the proposed arrangements which introduce aspects of the long term solution, including:

- producers will be required to provide a break down of their 2009 Base Tonnage Offers into tonnes at each load point (at their mines)
- PWCS will decline to supply coal handling services if a producer has inadequate track or train delivery entitlements in respect of an application for a vessel to be loaded at the port.

The ACCC considers that the above features, combined with the terminal operators commencing negotiation of long term ship or pay contracts over the next few months, starts to introduce appropriate commercial incentives across the Hunter Valley coal chain, which has not occurred under previous capacity balancing systems.

The ACCC also notes that the industry has made significant progress in developing the long term Capacity Framework Arrangements. Therefore, the ACCC considers that granting interim authorisation is unlikely to hinder the achievement of the long term solution in the Hunter Valley.

⁴⁸ Bloomfield Collieries submission, 8 July 2009, page 1.

Conclusion

In assessing the request for interim authorisation, the ACCC has had regard to the following issues:

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

The ACCC has decided to grant conditional interim authorisation to allow the Applicants to commence the phased-in implementation of the Capacity Framework Arrangements. Interim authorisation is subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009.

The ACCC acknowledges the significant amount of work conducted by the industry and NSW Government since the Greiner Review in 2008 and more recently to finalise the principles of the long term solution to the capacity constraints in the Hunter Valley coal chain. However, the ACCC notes the program of work for the implementation of the solution is still not complete – for instance, work continues between the parties to finalise NCIG's and PWCS' Capacity Framework Documents, as well as the ongoing schedule of work⁴⁹ between the terminal operators and ARTC to ensure their contractual arrangements are aligned.

Further, the ACCC notes the timeframes proposed in the current application involve a step back from original commitments made by the Applicants under the Implementation Memorandum – which was to finalise the necessary suite of legal documents by 15 June 2009 to implement the long term solution. In the current applications for authorisation, the Applicants have committed to execute the suite of Capacity Framework Documents by 31 August 2009 (or such other date that may be agreed to by all of the parties).

The current applications also foreshadow the possibility of a separate authorisation application for varied conduct being lodged with the ACCC in the future, should all of the Applicants fail to execute all of the necessary documents by the August deadline.

The ACCC has made the execution of the Capacity Framework Documents by 31 August 2009 a condition of the grant of interim authorisation. This is in accordance with the timeframes set out within the applications for authorisation. Execution of the documents by the 31 August deadline will also allow the ACCC to progress its consideration of the substantive applications for authorisation.

⁴⁹ Appendix 1 of Attachment 2 to the Applicants' supporting submission to the applications for authorisation (A91147-A91149), 30 June 2009.

Accordingly, the ACCC expects the Applicants to continue to work together to finalise the suite of legal documentation by their 31 August 2009 deadline. The ACCC will revoke interim authorisation if any of the Applicants do not comply with the 31 August 2009 deadline.

GRANT OF INTERIM AUTHORISATION

The Applicants seek authorisation to make or give effect to a provision of a contract, arrangement or understanding which involves the proposed conduct set out in the Capacity Framework Arrangements (provided at Attachment A to this Reasons paper).

The ACCC grants interim authorisation to the Applicants to:

- A. make the contracts or arrangements described in Parts A and B of the proposed Capacity Framework Arrangements, except for Section 11 of Part B.
- B. give effect to provisions of the contracts or arrangements described in Parts A and B of the proposed Capacity Framework Arrangements, except for Section 11 of Part B.

Interim authorisation is subject to a condition that the Applicants execute their respective Capacity Framework Documents by 31 August 2009. The ACCC will revoke interim authorisation if any of the Applicants fail to execute their respective Capacity Framework Documents by 31 August 2009.

Interim authorisation commences immediately, and will remain in place until the date the ACCC's final determination comes into effect or unless revoked.

The ACCC may review its decision on interim authorisation at any time. The ACCC's decision in relation to interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

Next steps

The ACCC is currently undertaking public consultation on the substantive applications for authorisation. The deadline for submissions to be lodged with the ACCC is 24 July 2009.

Attachment A - 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 1:

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 month.