Submission in response to public exhibition of Port Waratah Coal Service's proposal to develop new coal loading facilities on Kooragang Island, Newcastle (application number 10_0215).

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To Whom it May Concern:

Please accept this submission in response to the public exhibition of Port Waratah Coal Service's proposal to develop new coal loading facilities on Kooragang Island, Newcastle (Application Number 10_0215).

I am aware of many other submissions from local community groups and individuals objecting to the T4 development, raising a wide range of concerns about this development, including, but not limited to:

- damaging global climate change impacts from the burning of the coal that would be exported through this development
- detrimental health and amenity impacts on local residents from transportation, storage and loading operations associated with the development, primarily as a result of coal dust pollution (including fine particulate pollution) and noise
- detrimental health and social impacts on people and communities living and working around the current and future mines that will generate the coal facilitated by this development, and along the transport corridors that will carry that additional coal
- damaging impacts on the Kooragang wetlands and Hunter River ecosystems, and associated fauna, including a significant number of threatened and endangered species
- potential exacerbation of existing contamination of the site, including groundwater pollution
- the lack of credible data and analysis supporting the ostensible economic benefits for the development, including purported employment benefits and flow-on economic effects
- potential detrimental impacts on the fishing industry, arising from damage to the estuarine ecosystem from harbour deepening associated with the development
- the extent to which the development intensifies the current dead-end economic trajectory dependent on the exploitation of non-renewable resources, and impedes the necessary transition to a low-carbon economy and clean, renewable energy sources.
- the apparent lack of strategic context for this proposal in relation to major relevant strategic level planning frameworks that are under consideration, but yet to be finalised (e.g., the Upper Hunter Regional Strategic Land Use Plan, the Newcastle Port Strategy, and the NSW planning reform process).

I believe that these issues are well covered in other submissions, and I share the concerns raised in those submissions, and the views and arguments they present regarding the *inherent* lack of merit of the proposal itself, the failure of the EA to sufficiently consider many of these impacts, and the inadequacy of many of the measures proposed in the EA to prevent or mitigate the significant

damaging environmental, social and economic impacts of the proposed development. The development proposal should certainly be rejected on all these grounds.

I am also concerned that the development application process has provided such a limited opportunity for members of the community, who are often poorly resourced, to examine the voluminous documentation associated with this development. The meagre extension to the standard exhibition period that was granted in response to community concerns about this does not reflect the commitments to improved public participation that were made by the current Coalition government, and does little to build community confidence that NSW Planning and Infrastructure will regard public submissions with due seriousness. The significance and complexity of this development application warrants a much longer period of public consultation, and much more proactive facilitation of that consultation by the state government than has been demonstrated in this case.

However, this submission focuses on an important specific aspect of the proposal that I have not seen raised in any detail in other submissions: the claim by the proponents that the need for the development arises as a "legal obligation" under the Capacity Framework Arrangement (CFA - sometimes referred to as the "Long Term Commercial Framework", or LTCF), authorised by the Australian Competition and Consumer Commission in December 2009, which became fully operative in January 2010.

Port Waratah Coal Services has repeatedly claimed that the need for its T4 proposal arises from a "legal obligation" or a "legal requirement". The company has made this claim at various community information meetings, and in printed pamphlets that were widely circulated in the local Newcastle community (e.g., "T4 - Growing with our Region, Information Sheet, Issue No.1, May 2011", which states that:

> PWCS has a legal obligation to ensure sufficient terminal capacity to meet the long term needs of the region's coal producers. This legal obligation was established under the Long Term Commercial Framework (LTCF), which came into effect on 1 January 2010.
> [http://www.pwcs.com.au/pages/design/links/uploaded/T4infosheet_fourpages_A4_email.pdf]

After requests (including from me) for the company to withdraw the claim on the grounds that it created the highly misleading impression that the proposal somehow arose from a requirement of a statutory nature, or from a relevant government agency, later wording was adopted that sometimes - but not always - qualified the claim: e.g., use of the phrase "a legal obligation *to clients...*" [my emphasis] used in the first (but not in subsequent) reference to this "obligation" on the PWCS web page on the T4 development [http://www.pwcs.com.au/pages/projects/t4.php.

The *T4 Environmental Assessment*, prepared for Port Waratah Coal Services Limited, 1 February, 2012 by EMGA Mitchell McLennan, (T4 EA), repeats the claim that the application for approval of T4 has arisen due to PWCS's obligations under the CFA, elevating it to the fundamental basis for proposing the T4 development. The Introduction to the T4 EA document (T4 EA, Part A, Introduction and T4 Project Details, Chapter 1), states:

> Additional capacity is required at the Port of Newcastle to accommodate contracted and projected future coal exports. The required investment is underpinned by Capacity Framework Arrangements (CFAs), which provide a long-term operational framework for the Hunter Valley Coal Chain. The CFAs

were developed by the NSW Government and the coal industry and were authorised by the Australian Competition and Consumer Commission (ACCC) in December 2009.

Under the CFAs, PWCS has entered into long-term contracts with coal producers. The CFAs include contractual obligations that PWCS must ensure its terminal facilities have enough capacity to meet the contracted coal throughputs. PWCS's existing contracts with coal producers exceed the approved capacity of CCT and KCT and demand for port capacity is forecast to increase further in coming years. Therefore, in accordance with the CFAs, PWCS must gain approvals and construct and operate a new terminal (for example the T4 Project), at either the location proposed in this environmental assessment (EA) or an alternative location within the Port of Newcastle or nearby. (T4 EA, Introduction, p.1)

The EA contains other similar references to these "obligations" under the CFA as the key justification for the T4 proposal.

Given that this claim is so fundamental to PWCS's attempt to establish the need for T4 - in its own publicity and in the formal EA itself - it would be reasonable to expect a high degree of relevant detail in the EA documentation in relation to it, including:

- reference to the particular provisions in the Capacity Framework Arrangement document (as authorised by the ACCC in December 2009) that apply to PWCS in relation to T4, and
- how PWCS believes T4 does or will meet any terms or requirements of those relevant provisions.

In fact, the 4,000 plus page T4 EA is almost silent on these crucial matters, and provides scant information that would allow a reader to ascertain either the particular provisions in the CFS that PWCS believes apply to the T4 proposal, or to consider the grounds on which this fundamental claim for the T4 proposal is based.

The EA does not refer to, or even quote from, the specific provisions of the CFA document that applies to T4, and the EA does not appear to provide any specific information that would allow a reader to ascertain whether PWCS's claims in relation to the relevant CFA provisions are correct. Throughout the T4 EA, references to such matters are made in the form of unsubstantiated statements (such as "PWCS's existing contracts with coal producers exceed the approved capacity of CCT and KCT", in the passage quoted above).

This is surprising, given the brevity and specificity of the relevant provision in the CFA, contained primarily in clause 6, the beginning of which states:

**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.

Note that under clause 6(a)(i)A, the "obligation to expand" requires a "capacity shortfall", and that the clause defines this in precise terms (i.e., when "aggregate PWCS contracted allocations" exceed "aggregate PWCS available capacity"). Given the precision of this clause, PWCS's repeated claim that these provisions in the CFA have been triggered, and the centrality of that claim to PWCS's own argument in relation to the need for T4, it is remarkable that the EA does not provide any information to substantiate this fundamental claim. The EA does not even provide a specific figure for the company's "aggregate contracted allocations", or quantify the extent to which that amount exceeds PWCS's aggregate available capacity. A recent article in the *Newcastle Herald* ("Rio move raises doubts over coal-loader", Ian Kirkwood, 4 May, 2012) reported that PWCS claims to have 176.7Mtpa in take or pay contracts with coal providers. If this is correct, and that amount constitutes the aggregate contracted allocation to which clause 6(a)(i) of the CFA refers, then the figure should be expressly provided in the EA document, and clearly identified as the amount relevant to the CFA clause. The volume of the EA documentation, and the difficulty of searching it, makes it impossible to be categorical about this, but I am experienced in examining such documents and after several reasonable attempts I have been unable to locate such data in it. Figures provided in the EA on future capacity demands are couched in terms of estimates or projections rather than in the more precise terms of "contracted allocations", which is a crucial component of the calculation of the claimed "capacity shortfall" upon which PWCS's justification for T4 is based.

It is clearly unacceptable for PWCS to omit such basic information from its T4 EA, and on these grounds alone NSW Planning and Infrastructure should defer further consideration of the proposal until such time as it has been provided.

For the purpose of examining the veracity of any stated aggregate contracted allocation (once provided), it will also be necessary for PWCS to provide a breakdown of that amount, specifying the relevant companies and/or mines involved in the contracts, and the associated contract tonnages and dates, and identifying the relevant periods during which aggregate contracted allocations exceed aggregate available capacity. This specific information must be known to PWCS, since invoking the trigger in clause 6(a)(i) of the CFA requires the company to know its aggregate contracted allocation, and this can only be calculated from the individual contracts. PWCS must provide these details to the development assessment staff of NSW Planning and Infrastructure and to the public, both to substantiate the fundamental claim underpinning the company's T4 proposal, and to allow development assessors and the community the opportunity to examine and interrogate that claim. Given the fundamental importance of this information to the proposal, and PWCS's apparent failure to include it as part of the T4 documentation currently on exhibition, further consideration of the development should be deferred until such time as PWCS has provided these details. When it is provided, the community must also be given a sufficient extension of time to

examine and respond to it, especially given doubts that have already been raised in relation to claims in the EA about future capacity demand.

Of course, the CFA is not a planning document, and its use by PWCS as the fundamental basis for justifying the need for T4 is itself problematic.

The purpose of the CFA is to exempt the parties to the agreement from provision of the Commonwealth Trade Practices Act 1974 in relation to conduct that might otherwise place them in breach of that Act, especially (in this case) in relation to the restraint of trade, exclusive dealing and cartel provisions of that Act. In relation to any planning approvals associated with T4, the CFA itself provides (in clause 6(e)(i)) for suspension of the "obligation to expand" provisions under 6(e)(i) in circumstances where PWCS, acting in good faith, is unable or unlikely to obtain a relevant development consent. Even if this were not the case, invoking an agreement that relates to commercial arrangements between parties operating as commercial entities, for the purpose of exempting them from what might otherwise be conduct in breach of Trades Practices law, is a highly dubious basis on which to found a planning argument for a development application as significant as T4.

Since PWCS has insisted on advancing and pursuing its claim in relation to its obligation under the CFA as its fundamental justification for the T4 proposal, the company must at least provide the necessary information to justify this claim, as this submission has argued. In this sense, the matters to do with the T4 EA and the CFS canvassed in this submission are threshold matters, relevant to whether the T4 application even warrants further consideration.

But, at an even more fundamental level, if PWCS's claims in relation to the provisions of the CFA are appropriately clarified and examined, they must not be regarded as - in themselves - sufficient to demonstrate the need for T4 on planning grounds, or elevated above proper planning considerations in the assessment of the T4 application. To do so would be to further erode public confidence in the integrity of the NSW planning system. The T4 application may not even warrant further consideration under the very terms argued by its proponent, and such consideration should certainly be deferred pending provision of the necessary information. But the concerns that have been raised about the development and the T4 EA on a range of legitimate planning grounds by many groups and individuals also justify the refusal of the development, as unacceptable on environmental, social and economic grounds.

Sincerely

John Sutton

7 May 2012

*Disclosure statement: I have no interest of a pecuniary nature in this development. This submission is being made on the basis of public interest issues associated with the development application process and the impact of the proposed development itself.*