



PUBLIC VERSION

Genesee & Wyoming Australia Pty Ltd

Submission in opposition to the applications for authorisation under section 88(1) and 88(7) of the *Trade Practices Act 1974* (Cth) [A91068 – A91070] and application for an interim authorisation

30 November 2007

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***SUBMISSIONS OF
Genesee & Wyoming (Australia) Pty Ltd***

Introduction

1. The following submission is in response to the 16 November 2007 application by Pacific National (NSW) Pty Limited ("**PN**"), QR Limited ("**QR**") and Port Waratah Coal Services Limited ("**PWCS**") ("**the Applicants**") for an authorisation pursuant to Subsections 88(1) and 88(7) of the *Trade Practices Act 1974* (Cth) ("**Act**") for the making of or giving effect to an arrangement in respect of the transport to and export of coal through the Port of Newcastle.
2. Genesee & Wyoming (Australia) Pty Ltd ("**GWA**") has standing to make submissions pursuant to section 90(2) of the Act, which provides that the ACCC is required to take into account submissions by "any other person".

Who is GWA

3. GWA is the Australian subsidiary of Genesee & Wyoming Incorporated ("**GWI**"), an international operator of short line and regional freight train railroads in the United States, Canada, Australia and Bolivia. GWI is a substantial company with a long and successful history. The 2006 Annual Report of GWI forwarded to the ACCC by mail under covering letter from Fenwick Elliott Grace dated 27 November 2007 provides evidence to the ACCC of the financial and operational stability of GWI and GWA.
4. GWI has been operating in Australia through GWA since 1997. GWA is poised to expand its existing Australian operations into the Hunter Valley region and to become the third provider of rail freight operations to Hunter Valley coal producers.

The application

5. The Applicants seek both an interim authorisation and an authorisation. The application for interim authorisation does not state a set period or limit on its duration.

GWA understands that the Applicants seek an interim authorisation that would endure until the ACCC makes a final determination as to the authorisation.

6. For the reasons set out below GWA is of the view that:
 - 6.1. the interim authorisation should not be granted;
 - 6.2. the public detriment that would arise from the granting of the interim authorisation exceeds any public benefit that might otherwise arise.
7. For reasons set out in further detail herein, GWA submits that any interim authorisation will have similar detrimental effects to a final determination approving the authorisation. Therefore, in this submission, unless the context indicates otherwise, GWA refers to the potential interim authorisation and the potential authorisation together as the "**Authorisation**".

Executive summary of GWA's submission

8. The Authorisation would have the effect of precluding GWA from committing to substantial planned investments in freight wagons, locomotives, staff and infrastructure in the Hunter Valley region. This will, in turn, have knock on detrimental effects on the Hunter Valley coal industry and the public at large.
9. This submission sets out details of the steps GWA will shortly undertake to give effect to its proposed Hunter Valley operations. In short, GWA will:
 - 9.1. order a large contingent of new rail freight wagons in December 2007;
 - 9.2. enter into agreements to lease locomotives for hauling the new wagons;
 - 9.3. hire staff and relocate experienced management employees to work in the Hunter Valley;
 - 9.4. enter into contracts with coal producers for the transport of coal from existing, expanding and new mines in the Hunter Valley; and
 - 9.5. avail itself of the "common user" Port of Newcastle to export the coal.
10. GWA is currently accredited to operate freight trains in New South Wales. GWA has held positive discussions with Australian Rail Track Corporation ("**ARTC**") in

respect of obtaining access to the Hunter Valley Rail network. GWA has also held positive discussions with PWCS in respect of using the facilities at the Port of Newcastle for the export of coal transported to the port by its freight trains.

11. The planned investment by GWA in respect of the above operations is significant. There will be a clear benefit to the relevant market and the public in terms of additional employment, increased capacity for the transport of coal and increased competition in the transport of coal, resulting in improvements to access, efficiency and cost. The planned investment will enable smaller coal producers to secure transportation services for their product to the Port of Newcastle. These benefits will flow on to the larger Australian community. In view of the foreshadowed future expansion of the port facilities, GWA will be positioned to play its part in complementing that expansion with a corresponding capacity to provide additional freight services.
12. For the reasons set out in the submission, GWA says that the granting of the interim authorisation and any final authorisation would clearly not be in the public interest and would in fact occasion significant public detriment. Such detriment will include:
 - 12.1. restriction on growth in the market;
 - 12.2. restriction on the ability of smaller producers to transport produce;
 - 12.3. promotion of a marked lack of competition on price, service standards and overall volumes;
 - 12.4. reduced investment and expansion incentives.
13. Once an assessment and balancing is undertaken of the public benefits claimed by the Applicants, as against the countervailing public detriment which will entail if the Authorisation is granted, the clear conclusion is that the detriment resulting from the lessening of competition outweighs any claimed benefit.
14. The Applicants have failed to discharge the onus contained in section 90 to satisfy the ACCC that the Authorisation should be granted.

15. GWA notes the counterfactual scenario offered to the ACCC by the Applicants namely that the CBS will lapse on 31 December 2007 and, in the absence of the Authorisation, there will be no regulation of the shipping queues that have marked previous periods of uncontrolled activity on the rail network and the port.
16. GWA contends that notwithstanding this, the solution is not to impose a system, via the VQMS, which is anti-competitive with consequent significant detriment to the market and the public interest.
17. GWA submits that no Authorisation is likely to lead to a greater benefit to the public than granting the Application.

GWA's Haulage Capacity in the Hunter Valley

18. GWA estimates that its haulage capacity from July 2008 in the Hunter Valley would be approximately 10 million tonnes per annum, and that haulage at capacity could (depending on demand and finalization of contractual arrangements) be secured and operational within 8 months.
19. GWA anticipates initially mobilizing one fleet (comprising approximately 80 wagons) by no later than June 2008, with a second fleet (comprising a further 80 wagons) operating by July 2008.

Locomotives

20. GWA has engaged in discussions with a lessor of locomotives, Chicago Freight Car Leasing ("CFCL") with a view to securing a long term lease of the required locomotives for use in the Hunter Valley. Attached as **Attachment 1** is the confirmation received from CFCL. CFCL has confirmed that the locomotives required are presently available for long term lease, and foresees that this availability will continue until at least early next year. After that time, it is possible that CFCL will enter into another lease, and if a contractual commitment is not in place with CFCL by early next year, CFCL may lease the locomotives to another entity.

Wagons

21. GWA would have its Hunter Valley coal haulage wagons built in China, then assembled and tested in Australia. GWA has been informed by its manufacturer in China that provided an order for 160 wagons is finalized and placed by GWA by no later than 31 December 2007 it can provide 80 of the wagons in sufficient time to be delivered, assembled, tested and rendered operational by June 2008 with the balance a month later. The quotation is enclosed in **Attachment 2** to GWA's confidential submission.
22. However, such a time frame is entirely dependent on GWA placing its order with the manufacturer by 31 December 2007. If this deadline is missed, the lead time to construct and assemble wagons may very well exceed 6 months, depending on the other contractual commitments of the manufacturer at the time the order is placed.

Employees and Crew

23. Based on its haulage contracts in operation in other regions, GWA anticipates that each fleet will require approximately 10 – 12 crew members, comprising an operational manager and experienced staff. GWA has an excellent relationship with the relevant union, and a sound reputation in the industry, and anticipates no difficulties filling the positions required with suitably experienced crew and personnel.
24. GWA is prepared to relocate experienced managers to the Hunter Valley region to supervise operations and train the crew. This will enable the crew to commence operations efficiently and with minimum downtime.

Maintenance and Support

25. GWA is party to an ongoing and long term maintenance agreement with EDI Rail Pty Ltd ("**EDI**") for the maintenance of GWA's rollingstock at various sites across Australia. EDI operates an open access facility in the Hunter Valley at Cardiff.

GWA has participated in preliminary discussions with EDI in relation to the proposed arrangements in the Hunter Valley commencing in 2008. EDI has indicated that it will have capacity from 2008 onwards to service and maintain GWA's rollingstock (including wagons and locomotives) at its Cardiff facility.

26. GWA has a long term contractual relationship with EDI, and EDI is intimately familiar with GWA's rollingstock and operations, and its maintenance and service requirements and standards. This will allow the rapid introduction and implementation of an effective and efficient service and maintenance arrangement.

GWA's relationship with Hunter Valley Coal Producers

27. GWA has met with 5 coal producers in the Hunter Valley who have expressed interest in contracting with GWA for coal haulage to the Port of Newcastle. Details of the coal producers are set out in **Attachment 3** to GWA's confidential submission.
28. GWA anticipates entering into Letters of Intent with several of the abovementioned coal producers shortly. GWA anticipates, as a result of discussions with the producers, that some producers will contract with GWA once their existing haulage agreements expire or terminate.

Track Access Arrangements

29. GWA has held meetings with senior staff from the ARTC, including ARTC's Hunter Valley General Manager, Denise McMillan, to discuss arrangements for track access in 2008 and beyond.
30. ARTC has confirmed that the Hunter Valley rail network has additional unused capacity and can provide train paths for the operation of GWA's trains.
31. Details and notes of the meetings and discussions held between GWA and ARTC are included at **Attachment 4** to GWA's confidential submission.

Accreditation

32. GWA is presently accredited in New South Wales as an operator. GWA was formerly called Australia Southern Railroad Pty Ltd and has been accredited since **21 March 2001**. A copy of GWA's accreditation certificate and related documents is attached at **Attachment 5**. Mutual recognition of this accreditation is in place in Queensland, Victoria, South Australia, the Northern Territory and Western Australia.
33. GWA will shortly make an application to the Rail Safety Regulator in NSW to vary its existing accreditation to cover coal haulage. GWA anticipates from past experience that such a variation can be secured within an estimated period of 2 – 3 months and certainly well within the time frame within which it is anticipated GWA will commence operations in the Hunter Valley.
34. The Applicants have provided some background information on ARTC.¹ However, the Applicants have not pointed out that the NSW Rail Access undertaking pursuant to which PN and QR have access agreements with ARTC also provides for access to the Hunter Valley Rail Infrastructure by other accredited operators such as GWA.

Long Term Commitment and Investment

35. GWA views its future prospective operations in the Hunter Valley region as a long term commitment to commence in 2008 and to continue for the foreseeable future. GWA is committed to a substantial long term investment into its Hunter Valley operations, including an expansion of rollingstock, crew and maximum haulage capabilities.
36. GWA is a substantial company with extensive assets and resources available to it. A copy of GWA's 2006 Annual Report, which includes its balance sheet has been forwarded to the ACCC under cover of a separate letter on 27 November 2007. GWA

¹ paragraph 3.4 of the Submission

owns 100% of GWA and is fully supportive of GWA's plans to expand into the Hunter Valley.

37. GWA notes that the port facilities are to be expanded in the coming years. When that expansion occurs, GWA will be ready and able to provide additional above rail capacity to the producers who seek to take advantage of the increase port capacity by increasing their export volumes. If the VQMS is adopted, it may well be that there is an ongoing lack of capacity in above rail services due to the disincentive (during its duration) to alternative rail providers to commit to investment in the Hunter Valley.

Access to Port of Newcastle

38. PWCS has informed GWA that it will accept GWA as a rail operator subject to it meeting the interface requirements and involvement with the HVCCLT processes. Subject to these formalities, GWA has obtained approval in principle from PWCS to access the Port of Newcastle. Correspondence and notes of meetings in relation to these issues is enclosed at **Attachment 6** to GWA's confidential submission.

The relevant legal principles

39. Given that the VQMS discriminates against new or emerging players in the market, there is no doubt that the Applicants would be in contravention of s 45 of the Act if they were to engage in the VQMS without the Authorisation. Further, engaging in the conduct described in the VQMS is likely to cause damage to third parties such as GWA, reduce competition for PN and QR and, in all likelihood, hinder and/or irreversibly prejudice GWA's involvement in the haulage and export of coal from the Hunter Valley.

Section 88 authorisations

40. The ACCC is empowered by s 88(1) of the Act, upon the application of a corporation, to grant an authorisation to the corporation to make a contract or arrangement or arrive at an understanding where a provision of the proposed contract, arrangement or

understanding would be, or might be, an exclusionary provision or would have the purpose, or might have the effect, of substantially lessening competition within the meaning of s 45 of the Act and to give effect to such a provision. Section 88(7) provides a similar mechanism for the authorisation of conduct that would otherwise be in breach of ss 45D, 45DA and 45DB.

41. The Commission's powers to grant authorisations are limited by s 88(1). By virtue of the provisions of s 90(6) of the Act the Commission cannot make a determination granting an authorisation under s 88(1) in respect of a provision (not being a provision that is or may be an exclusionary provision):

*"unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding ... would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result if ... the proposed contract or arrangement were made or the proposed understanding were arrived at, and the provision concerned were given effect to."*²

42. A similar provision is found in s 90(8) of the Act whereby the Commission cannot make a determination granting an authorisation under s 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision:

*"unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place."*³

² Section 90(6) of the Act

³ Section 90(8) of the Act

43. There is authority to the effect that these tests, while differently drafted, are substantially the same.⁴
44. The guiding principles which apply to the authorisation test were summarised in *Re Queensland Stock and Station Agents Association*⁵ in the following terms:
- "First, it is for the parties seeking authorisation to satisfy the Tribunal that benefit to the public is likely and that there will be sufficient public benefit to outweigh any likely anti-competitive detriment;*
- Secondly, since the likely benefits and detriments to be considered are those that would result from the proposed conduct, the Tribunal is required to consider the likely shape of the future both with and without the conduct in question; and*
- Thirdly, that task will generally entail an understanding of the functioning of relevant markets with and without the conduct for which authorisation is sought."*
45. GWA submits that the correct interpretation of the relevant "market" is the supply of services to facilitate the sale and purchase of coal. In particular, the market includes the supply of rail transport services in the Hunter Valley and the supply of ship loading facilities at the Port of Newcastle.
46. GWA notes that the ACCC, in making its earlier determination as to the CBS, concluded that there were two relevant markets; the global market for coal (or at least the Asian coal market) and the market for the provision of coal loading services for bulk coal carrying ships in the Newcastle area.⁶ However, this determination did not involve consideration of the capacity of the Hunter Valley rail network and ACCC may, therefore, reach a different conclusion as to the relevant market in the present

⁴ *Re Media Council of Australia Authorisation; Re Australian Consumers' Association Application* (1987) 88 FLR 1

⁵ At 267

⁶ Para 7.10 of ACCC determination of 23 May 2007

case. In any event, it is to be assumed that the ACCC's finding that the global market for coal falls within the definition of "market" is in fact a short hand reference to the impact of global demand on the supply, haulage and export of Australian coal, and ACCC did not in fact intend that the interests of the global coal market are to be taken into account in assessing benefits and detriment. Such a conclusion is consistent with the object of the Act as expressed in section 2:

*"The object of this Act is to **enhance the welfare of Australians** through the promotion of competition and fair trading and provision for consumer protection."*
(emphasis added)

47. It is also consistent with the Federal Court's finding that "the public" means "the Australian public".⁷ Clearly, therefore, the ACCC's consideration must be directed toward the Australian public and Australian markets in assessing whether to grant authorisation.
48. In light of these matters, GWA in its submission focuses on the market for the supply of rail services in the Hunter Valley to facilitate the sale and purchase of coal. To the extent the international coal market is relevant, it is confined to any impact this has on the demand for, and purchase of, coal from the Hunter Valley region.

Vessel Queue Management System

49. The Applicants' submissions in support of the Application are prolix and it is difficult to discern with any degree of certainty the basis of them. At the heart of the Application is the Vessel Queue Management System ("VQMS"). Much is devoted to the description of the VQMS, but the following simple analogy conveys the methodology.
50. Consider the relevant market as a cake that would be ideally cut into 10 slices. There are 12 hungry persons, waiting to eat the cake. One simple solution, the CBS

⁷ *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385

solution, to such a dilemma would be to allocate smaller slices of cake to each of the 12. No individual would be entirely happy with the outcome, but each would be similarly disadvantaged. The Applicant's solution is breathtakingly simple; divide the cake into two portions and leave it to the two largest persons to decide who will receive any of the cake. Those who do not have an existing relationship with the Applicants are unlikely to receive much, if anything at all.

51. The VQMS will:
 - 51.1. have the effect of substantially lessening competition within the meaning of section 45 of the Act;
 - 51.2. is an exclusionary provision within the meaning of section 45 of the Act; and
 - 51.3. is a provision to which sections 45D, 45DA and 45DB would apply.
52. For the ACCC to approve the Application, it must consider the factors set out in part VII of the Act.

Public Benefit / Public Detriment

53. For the Authorisation to be granted, the exercise of balancing or weighing matters of public benefit and public detriment must be performed. When that exercise is complete, the ACCC must reach a positive view that there is a resultant benefit to the public which would outweigh any detriment to the public that would result from any lessening or likely lessening of competition before it can determine to grant Authorisation.
54. For the ACCC to reach this view, it must take a "forward looking" view. That is, it must compare the position which would exist, or would be likely to exist, in the future if the Authorisation was granted with the position which would exist, or would be likely to exist, in the future if the Authorisation was not granted.⁸

⁸ Re Queensland Independent Wholesalers Ltd (1995) ATPR 41-438 at 40,928, 40,960; Re Media Council of Australia (1996) ATPR 41-497 at 42,241; Re AGL Cooper Basin and Natural Gas Supply Arrangements (1997) ATPR 41-593 at 44,175.

55. The phrases "benefit to the public" and "detriment to the public" contained in s 90(6) have been the subject of previous decisions:

"Public benefit has been, and is, given a wide ambit by the Tribunal as, in the language of QCMA (at 17,242), 'anything of value to the community generally, any contribution to the aims pursued by society including as of one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress'; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency".⁹

"The assessment of any benefit to the public and of any lessening of competition which would, or would be likely to, result from the proposed conduct can only be made in the overall context of the function performed by the applicants, of the industry in which they operate, and of the market or markets which would be affected by such conduct."¹⁰

56. To the extent that the test for authorisation of an exclusionary provision as set out in s 90(8) is distinguishable from the test for a non-exclusionary provision set out in s 90(6),¹¹ GWA submits that the overall public benefit can only be measured by taking into account the detriments that would flow from the Authorisation and weighing those against the claimed benefits.

⁹ Re 7-Eleven Stores (supra) at 42,677

¹⁰ Re Concrete Carters Association (Vic) (1977) 31 FLR 193 at 202

¹¹ On the face of sub-sections 90(6) and 90(8) it would appear that a different test was intended by the legislature for each of exclusionary and non-exclusionary provisions

57. The "public" which must be considered is broader than simply consumers, and extends to the Australian public.¹²
58. The public benefits which the Applicants have listed in section 1.9 of the submission are not compelling once a balancing exercise is undertaken and are, in a number of respects, simply speculative. Most notable in this regard are the claimed benefits of improved investment incentives and reduced environmental risk. Little elaboration is given to explain how these claimed benefits will flow from the VQMS.
59. Significantly, the VQMS will not deliver many of the matters which the Courts have previously held to constitute a public benefit, such as fostering economic development, expansion of employment, promotion of equitable dealings in the market and growth in export markets.¹³ To the contrary, the VQMS will erode many of these factors.
60. To the extent ACCC is required to consider the countervailing public detriment in the event the Authorisation is granted, GWA submits that, contrary to the Applicant's submission that any detriment will be minimal or non-existent,¹⁴ approval of the Authorisation (and the VQMS) will give rise to substantial public detriment by virtue of the lessening of competition:
- 60.1. There is capacity in the rail system for a new haulage service provider which will increase the total tonnage carted. The VQMS will disallow this and will thereby severely limit any growth in the market;
- 60.2. Smaller coal producers with less market clout will be forced to accept whatever terms PN and QR impose on haulage due to their lack of bargaining power and may ultimately be forced to scale down their operations or potentially face cessation of operations entirely due to inability to ship their product;

¹² *Re Howard Smith Industries Pty Ltd, op cit*

¹³ *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108

¹⁴ Pages 13 and 16 of the Applicants' Submission

- 60.3. The VQMS will operate to curtail any overall growth in the Hunter Valley haulage capacities, and will thereby discourage or render unnecessary any expansion of the Port of Newcastle's facilities, thereby placing a significant brake on the expansion of the market as a whole. Indeed, a rail system operating at full capacity and consequent vessel queues is more likely to stimulate ongoing investment in increasing the capacity of the Port of Newcastle;
- 60.4. The VQMS will promote and result in a marked lack of competition on price, service standards and overall volumes which, again, is detrimental to the expansion of the market as a whole and to the servicing of producers, particularly the smaller producers with less market power;
- 60.5. In the event the duopoly of PN and QR is rendered unable to perform haulage services for any reason, haulage of coal will be rendered impossible due to the limited number of participants providing haulage services. In the event even one of PN and QR is unable to perform contracted haulage services for a period of time (for any reason), there will be insufficient participants to step in at short notice and take up the shortfall leading to substantial delays and backlog;
- 60.6. The VQMS will not provide any mechanism to address short term spikes in demand for haulage once the total capacity of each of PN and QR is reached which will again have a negative impact on expansion and operation of the market.
61. The Applicants' bold assertion that "The proposed VQMS will have very limited if any public detriment"¹⁵ is fallacious. The authorities indicate that any impairment to economic efficiency will amount to a public detriment.¹⁶ The matters listed in the above paragraph clearly indicate that economic efficiency has the potential to be

¹⁵ Page 16 of the Applicant's submissions

¹⁶ *Re QCMA (1976) ATPR 40-012*

severely compromised under the terms of the VQMS which will, on the authorities, amount to a significant public detriment.

62. Any public benefits that might arise from the VQMS would be considerably outweighed by the detriments arising from the lessening of competition and the continuation of existing inefficiencies that will inevitably accompany the VQMS.

Interim Authorisation

63. While this submission generally does not distinguish between the interim and the final authorisation, it is appropriate to make some comment about the test that should be applied to the Application in respect of the interim authorisation given the GWA factual matrix. The starting point is to set out the relevant law on the test for the granting of an interim authorisation.

64. In *Queensland Timber Board* the Tribunal set out the principles that apply to an interim authorisation. Relevantly, those principles included the following:

(a) *The policy of the Act is clearly opposed to arrangements in restraint of trade and other anti-competitive practices. An applicant for final authorization has a substantial onus to discharge in satisfying s 90(5).*

(b) *A person appealing in good faith against the refusal of authorization by the Commission should not be effectively denied his right of appeal by the refusal of an interim authorization. This would apply, for example, if the arrangement once departed from could not be re-instated in the event of a final decision favourable to the applicant.*

(c) *Possible harm or prejudice to the applicant falling short of denial of the right of appeal will clearly be relevant.*

(d) *In the same way, possible harm to other parties must be considered.*

(e) *The ultimate concern of the Tribunal must always be the benefit of the public, so that any possible detriment or benefit to the public must be given full weight.*

- (f) *In some cases it may be thought preferable not to disturb the existing position pending a final decision. The good or bad effects of the existing situation will usually be clearer than the possible effects of a change in that situation.*
- (g) *The length of time which is likely to elapse between the granting of the interim authorization and the scheduled or anticipated date for hearing, will often be important. However, this consideration can be controlled to some extent by the granting of an interim authorization for a fixed period of time, subject to review at the end of that period, or by the refusal of an authorization while reserving liberty to apply if circumstances change or new material comes to light.*

- 64.1. Paragraph (d) above refers to possible harm to other parties that might be occasioned by the granting of the interim authorisation. In the present circumstances, not only would GWA suffer harm by the granting of the interim authorisation, but the harm may in fact be irreversible. The window of opportunity may be closed by the time that the final decision has been made, whatever that decision.
- 64.2. Paragraph (e) reiterates that the Tribunal has as its ultimate concern the benefit of the public. GWA relies on the matters set out in the remainder of this submission in support of its assertion that the granting of the interim authorisation would be of significant detriment to the general public, to GWA and to the new and emerging coal producers in the Hunter Valley.
- 64.3. Paragraph (f) points out the danger of granting an interim authorisation that might have unknown effects. In the submission of GWA, the tenuous evidence of the Applicants as to a public benefit by granting the interim authorisation should put the ACCC on guard as to the potential dangers of the proposed VQMS.

65. In respect of any interim authorisation, GWA submits that, if granted, and subsequently reversed in the final determination, irreversible damage will be done to the potential for growth in the industry.¹⁷ As outlined above, the window of opportunity for GWA to enter the market may no longer be open or commercially feasible after December 2007.

Comments on the Applicant's submissions on capacity

66. It is remarkable and noteworthy, given the extent of the submissions that accompany the Application, that there is no clear statement provided by the Applicants as to:
- 66.1. the present capacity of the Hunter Valley Rail network;
 - 66.2. the present capacity of the rollingstock operated by the Applicants;
 - 66.3. the present capacity of the Port of Newcastle.
67. The submissions of the Applicants cite figures that might, at first blush, appear to define the above matters, but on each occasion, closer examination reveals that the figures are references to demand, contracted amounts, or speculative estimates. No hard verified data is supplied, although a plethora of estimates, projected and past demand figures are offered.
68. The Applicants in the accompanying letter of Mallesons Stephen Jaques refer to "Coal Chain capacity" and state that the term will be defined in the submission.¹⁸ The submission defines "Coal Chain" as the "capacity of the Hunter Valley coal chain", in distinction to the capacity of the demand for coal haulage and loading services at the Port of Newcastle. Accordingly, "Coal Chain capacity" must be taken to refer only to the capacity of the Hunter Valley rail network to deliver coal to the Port of Newcastle.

¹⁷ See *Queensland Timber Board (1975) op cit*

¹⁸ Letter from Mallesons Stephen Jaques dated 16 November 2007

69. The following quotations extracted from the Submissions of the Applicants demonstrate that the actual capacity problems are obfuscated in a plethora of different terminology.

“The Coal Chain continues to confront capacity constraints. Demand for rail contracts for 2008 is in excess of Coal Chain capacity of 95mt and demand for port capacity is in the order of 116mt”.¹⁹

“This is reflected in the high demand for coal haulage and loading services for 2008 and beyond as follows;

- *PN and QR will have aggregate contracted haulage agreements in excess of 95mt, being the expected total Coal Chain capacity for 2008”*.²⁰

“PWCS has aggregate binding demand nominations from producers of approximately 116mt for 2008 and indicative nominations of 144mt for 2009”.²¹

“Coal Chain capacity for the Hunter Valley has been forecast for 2008 at approximately 95mt. accordingly, the forecast levels of demand will exceed the forecast Coal Chain capacity in 2008. Aggregate producer forecast demand for port capacity for 2008 is approximately 116mt, such that aggregate demand for coal loading services will exceed coal chain capacity in 2008 by approximately 21mt, based on forecast coal chain capacity of approximately 95mt”.²²

“For example, the HVCCLT has estimated that for 2008, total system capacity will be in the order of 95mt (noting it could be less and it is hoped improvements may stretch it to 97mt). In contrast, the Rail Providers estimate their aggregate level of

¹⁹ Submissions paragraph 1.3 – 3rd bullet point

²⁰ Page 4.9 of Submissions

²¹ Page 5.1 of Submissions

²² Page 5.2 of Submissions

*rail capacity to be 105mtpa and PWCS estimates its stand alone capacity to be 102mtpa.*²³

*“The proposed VQMS will only come into operation when aggregate Coal Chain demand exceeds Coal Chain capacity which the HVCCLT has indicated will be 95mt for 2008.”*²⁴

(Emphases added)

70. GWA submits that it would have been a simple matter for the Applicants, who are experienced operators of either rail or port facilities, to state with clarity the following figures:
- 70.1. the number of tonnes of coal that PN and QR are able to deliver to the Port of Newcastle in 2007 (making due allowance for maintenance and the usual contingencies);
- 70.2. the number of tonnes of coal that PWCS can load on to ships in 2007.
71. Instead, the ACCC has been provided with a range of numbers, leading to little certainty as to whether the problems with maximising throughput in the system arise in part from constraints of inefficiency, lack of rollingstock or ad hoc maintenance routines. The closest the Applicants come to providing the critical information is the statement *"In contrast, the Rail Providers estimate their aggregate level of rail capacity to be 105mtpa and PWCS estimates its stand alone capacity to be 102mtpa."* However, they then go on to assert that due to other factors, the overall system capacity is 95mtpa.
72. If it is the case that the PWCS capacity is 102mtpa and that the rail providers can only provide 95mtpa, there is a clear case for allowing GWA to supplement that capacity

²³ Paragraph 1.5 of submissions at page 8.6

²⁴ Paragraph 1.7 of the submissions – page 10

to increase the total system capacity to that of the PWCS. This would necessarily be in the public interest.

73. The onus of proof is on the Applicants to demonstrate that there is a public benefit in adopting the VQMS. In the submission of GWA, they have failed to do so. There is no certainty that adopting the VQMS will maximise export quantities.
74. In any event, given that the Applicants have proposed a "lesser of port or rail" approach and the CBS was based on an approach dictated by the capacity of the port, as a matter of logic, it is inescapable that the maximum capacity of the Rail network is less than the capacity of the Port. This simple approach of itself demonstrates the public benefit of allowing GWA to compete in the market for the transport of Coal and to ensure that the Port is kept operating at peak capacity.
75. In view of the limited time within which GWA's responding submission has had to be prepared and made to the ACCC, GWA has had insufficient time to have modelled any increased capacity that would result from an additional rail operator on the network. It is currently obtaining that model and requests permission to provide it to the ACCC when it is completed with a view to the ACCC considering the model before it makes any decision as to the interim authorisation.
76. GWA has noted that there are some obvious areas in which the capacity of the combined rail and port facilities can be increased by the introduction of a new rail operator with a competitive approach and international experience in the efficient transport of freight. GWA's information in respect of these matters is supported by the confidential attachments to its submission. In particular GWA notes that:
 - 76.1. improved management of the stockpile of coal would lead to an increased capacity of the combined rail/port facility. GWA considers that its input into this management would be likely to lead to increased efficiencies;
 - 76.2. currently, PN carries out its provisioning and refuelling of its trains on track 3 on Kooragang Island. While that occurs, the loading of coal is delayed. Proper and efficient management of rollingstock would not delay the

operation of the port. The approach of PN in delaying loading while carrying out work on its rollingstock in circumstances where there is an excess of demand over supply capacity is symptomatic of an incumbent operator without real competition. GWA understands that this practice reduces capacity of the combined port and rail facilities by 5 mtpa. This exemplifies why the ACCC should not grant any authorisation that further limits competition in this area;

- 76.3. similarly, approximately 4 mtpa is lost due to controllable rail events that are a direct result of management issues within PN, i.e. locomotive failures, wagon failures and crew issues.
- 76.4. GWA has been informed that the system capacity should be based on 80% of below rail capacity of 146 mtpa or 116.8 mtpa.
- 76.5. GWA understands that PWCS accepted a take or pay quantity of 116 mtpa for 2007. This provides a clear match between 80% of theoretical below rail capacity and the capacity that PWCS has contracted for 2007 and indicates that there is a need for additional above rail capacity to bring combined above and below rail capacity up to the theoretical maximum. These figures will be further developed in the model that GWA will provide to the ACCC.
77. GWA has had limited access to the historic records of operation of the rail and port facility at Newcastle, and limited time in which to analyse the records that are publicly available. The information contained in the following subparagraphs is extracted from the HVCCLT website²⁵ and collectively supports GWA's view that improved efficiency would result from the introduction of a lean, competitive and experienced rail freight provider. HVCCLT's Coal Chain Performance Reports provide a performance overview split into Cargo Assembly, Shiploading and Coal Chain Demand:

²⁵ www.hvcclt.com.au/

77.1. HVCCLT Newsletter April 2006.

“Cargo assembly is the main system constraint within the coal chain” –

The cargo assembly component of the chain includes the train logistics. The Coal Chain Performance Reports show that cargo assembly throughput reductions are mainly due to member unplanned losses, and also asset availability. These include train logistics issues. For example:

77.2. Newsletter June 2007 –

“Unplanned capacity losses ... ran at ... worse than the target ... Losses worse than target were attributed mostly to rolling stock ...”

77.3. Newsletter January 2006 –

“The worse than planned outcome was driven by two key impacts being asset availability (reduced by a two day train strike, ... and rolling stock constraints)” ... “A combination of train ... asset failures across the month meant that the delivered capacity was reduced” ... “The difference between the planned and the Achieved Throughput is explained by the reliability of the coal chain assets. If assets do not operate as planned (e.g. due to breakdown, labour not being available as planned, extended maintenance etc) then the planned throughput rate will not be achieved”

77.4. Newsletter April 2007 –

“During March the coal chain underperformed ... A combination of locomotive, track ... coincided in March to keep our inbound performance about 420kt less than we were targeting” ... “Unplanned capacity losses of members were high, with locomotive and track issues in particular driving variance to plan”

78. Given the limited information that is available to the public and the limited time which GWA has had to respond to the Application, the cogency of the above material is persuasive. Further investigation and clarification may reveal even more material that demonstrates the improvements that could be made to capacity by a co-operative approach in which a third rail provider was introduced into the Hunter Valley in order to sharpen the focus of the existing rail providers.

General comments on the Applicants' submissions

79. In the following section, GWA provides some comment on the submissions made by the Applicants in order to set in context some of the material that lies within its field of expertise.

Access to below rail infrastructure

80. The Applicants submit; “there is nothing in the capacity, planning process or proposed allocation of capacity under the VQMS that affects the access of the [current] rail providers to below rail infrastructure.”²⁶ It is conceded that, if adopted, the VQMS will not affect PN or QR’s below rail access. However adoption of the VQMS will effectively prevent the access of any third party to the Hunter Valley rail network as no coal producer would be likely to enter into a contract with a rail provider unless the coal producer (or their agent) could also negotiate contracts with PWCS for export of the coal. If the VQMS is adopted, PWCS would be precluded from negotiating such contracts.

Impact of VQMS on new and expanding coal producers

81. In the context of explaining the failure of the industry participants to support an ongoing port based solution to the bottleneck that exists in the Hunter Valley, a solution that would see the continuation of the CBS in some form, the Applicants state:

“some producers were concerned that their 2007 capacity allocations would be further diluted under a port – based allocation methodology to make way for new and expanding mines which may or may not have rail contracts to move coal to port while the existing diluted producers had firm take or pay rail contracts and had planned rail to match their mine production (PWCS notes that this is exacerbated by the

²⁶ paragraph 3.4 of the Submission

common user provisions which mean that existing users must give ground unloading to new users at the Terminal)”.²⁷

82. However, it is patently obvious that the VQMS system does not address the issue of new and expanding mines which are not party to existing rail contracts. If it is accepted that the opening of new mines and/or the expansion of existing mines is in the public interest, an assertion which is unlikely to be challenged, it would seem incontrovertible that the VQMS both ignores such possibilities and effectively precludes such expansion during its currency.
83. If such expansion is precluded for the next 12 months, it may well be that those who would have otherwise participated in the expansion by investing capital will consider that the time for investment has passed because the opportunity for recovering funds is reduced. The mining industry is notoriously cyclical. Booms such as those currently being experienced do not last forever. If Australia is denied an opportunity to expand its infrastructure and capacity to participate in the early phase of the boom, the existing participants are likely to benefit, but not the public.

The "lesser of port or rail" approach

84. The Applicants submit that the:
- “lesser of port or rail” approach... will most adversely affect those producers (of which there are only a few) whose demand for rail and port capacity is not adequately provided for in contracts with the Service Providers”.*²⁸
85. The above quotation neatly summarises the nub of GWA’s argument. Adoption of the VQMS will cement into history the status quo. The two existing providers of rail capacity and those who have contracted with them in the past will be protected from the pain of expansion and growth at the expense of new and emerging participants. The price for that protection is curtailment of the expansion of the capacity of the

²⁷ paragraph 1.4 of the Submission

²⁸ Page 7, Submission

Hunter Valley rail network. There is no basis for allowing the rate of growth to be dictated by those participants who dominate the market and are already in positions of strength. This cannot be in the public interest.

86. The Applicants state that “under the CBS, reference to port contracts as the means to allocate to capacity means that rail contracts have not been enforced, thereby leading to a situation where investment in rollingstock is less likely to occur”.²⁹ The plain fact is that adoption of the VQMS will ensure that the only parties with any incentive to invest in rollingstock will be the existing participants. Other parties who wish to enter the market would be effectively precluded.
87. Further, the assertion that investment in rolling stock is less likely to occur under the CBS (presumably than under the VQMS) is symptomatic of the attitude of the Applicants. In contrast to this approach, and as set out above, GWA is willing and poised to make significant investment in rolling stock in order to provide additional capacity to the rail network in the Hunter Valley without requiring the industry participants to agree to a closed shop to ensure that it operates at full capacity. If the VQMS is adopted, this investment by GWA will not occur and the status quo will, in all likelihood, be preserved for the foreseeable future.

Impact of Interim Authorisation

88. In the event interim authorization is granted by ACCC, GWA will, clearly, not be in a position to enter into leases with CFCLA, nor to place an order for the construction of wagons by 31 December 2007.
89. In the event interim authorization is granted, any steps by GWA to procure rollingstock for Hunter Valley will be delayed until a contrary decision is made by the ACCC. It is anticipated that such a delay would prove fatal to GWA's possible plans to expand into the Hunter Valley. By this time, the lessor of locomotives, CFCLA,

²⁹ Page 9, Submission

may have entered into leasing arrangements with another party, and alternative locomotives will need to be sourced. Furthermore, the Chinese manufacturer of wagons may, and indeed, is quite likely to, be party to other contractual arrangements which will further extend the 6 month lead time for the construction of wagons. These observations are made against the background of a booming economy where the ongoing opportunities for such lessors and manufacturers make it difficult for purchasers to obtain rollingstock in a timely fashion.

90. As outlined below, GWA has a limited window of opportunity to establish operations in the Hunter Valley and any delay, even if comparatively short, is likely to make it unviable for GWA to do so.

Impact of Final Authorisation

91. In the event final authorization is granted by ACCC, and the VQMS is approved for the 2008 calendar year (and assuming for present purposes the ACCC does not authorize any extension of the operation of the VQMS), any steps by GWA to procure rollingstock for Hunter Valley will be delayed until, at the earliest, December 2008.
92. Steps could not be taken prior to December 2008 as GWA would need to be certain that no extension to the VQMS would be granted before placing orders for rollingstock and finalizing contractual arrangements. GWA cannot say with any certainty whether it will be able to source sufficient quantities of rollingstock in 12 months time and, if so, what the lead time on any such orders would be. It is quite possible, indeed probable, that G&WA may experience some difficulties procuring sufficient rollingstock at that time, due to competing contractual arrangements.
93. In any event, there is a limited window of opportunity during which it is financially viable for G&WA to invest in and establish operations in the Hunter Valley market. By late 2008, coal producers in the Hunter Valley will, presumably, have entered into and/or renewed long term haulage arrangements with either PN or QR. Those that have not will, by virtue of the VQMS, be unable to haul, and thereby, sell their

product and will have ceased operation. It is then most unlikely to be a financially viable proposition for G&WA to enter the market and expend the funds to commence operations in the Hunter Valley.

The Applicant's reasoning

94. The Application appears to be predicated upon the assumption that the payment of demurrage is not in the public interest. The purpose of the VQMS is said to be the reduction of the queue of ships, with a view to reducing the charges raised by ships for waiting at sea for their load of coal.
95. The Applicants state that demurrage costs are paid by the producers to their customers as compensation for the excessive waiting time.³⁰
96. As to the amount of demurrage paid, GWA notes that the figure of \$5.43 per tonne quoted by the Applicants in respect of queues of 60 to 70 ships is a total cost.³¹ While the Applicants speculate as to a potential saving of \$400 million by introducing the VQMS, there is no supporting evidence for the assertion and no submission as to who would pay that cost if the VQMS was not introduced.
97. In response to this argument, the Applicants might contend that the cost of Australian coal would become uneconomic if such costs were to be born by the purchasers of coal. However, the price of coal has risen sharply since 2004 from approximately \$45 per tonne to \$100 per tonne. Applying a commonsense commercial approach, given the high demand for the commodity and the rate of increase in price, the small percentage cost of demurrage as quoted by the Applicants is unlikely to result in a significant detriment to the Australian community.

³⁰ Page 38, Application's Submission

³¹ Page 3, Applicant's Submission

Short Duration of Authorisation

98. The Applicants submit, in support of the Application, that the Authorisation sought is only for a period of 12 months "as the service providers and the Hunter Valley producers continue working on the development of a long term solution for 2009 onwards",³²
99. Even a 12 month duration of the VQMS will promote a delay in finalisation by the parties of a long term solution and will entrench the operation of the VQMS with a resultant likelihood that an application will be made in 12 months time to extend its operation.
100. The knowledge that a 12 month respite has been obtained from the need to finalise long term arrangements will inevitably result in such negotiations losing their urgency and other commercial considerations coming to the fore. This is likely to give the result that the parties are unlikely to enter serious negotiations for the long term arrangements for some time, possibly toward the end of the initial duration of the VQMS. On the other hand, if ACCC does not grant the Authorisation, the resultant need for immediate further discussion will focus the parties' minds and promote discussions and negotiations with a view to putting in place sensible long term and commercial arrangements which are in compliance with the Act.
101. In any event, even a short term Authorisation will have significant and potentially irreversible detrimental effects on the market. As outlined in further detail below, GWA is most unlikely to be in a position to enter the haulage market at any time beyond 2008 and even an Authorisation for a 12 month period, as claimed, will fall outside the narrow window of opportunity for GWA to enter the haulage market in the Hunter Valley. Thus, granting the Authorisation may result in a long term restriction of competition in the haulage industry in the Hunter Valley with the attendant detriments which will ensue.

³² Page 18 of the Applicants' Submission

Counterfactual

102. As outlined above, in the event the Authorisation is declined, the counterfactual situation is that the CBS will terminate, on its terms, on 31 December 2007 and no formal system will be in place to replace it.
103. The Applicants contend that this will result in the massive delays and disorganisation that were experienced pre-CBS. This may be so. However, the solution is not to impose a system, via the VQMS, which is anti-competitive with consequent significant detriment to the market and the public interest. Although it is contended by the Applicants that the VQMS will be a short term arrangement only, the reality is that it is most likely to become rapidly entrenched. The detrimental effects will be experienced in the short to medium term, and may not be able to be rectified even if the operation of the VQMS is not extended beyond its initial 12 month duration.
104. In the event no formal system is in place on 1 January 2008, the current and interested participants will, of necessity, need to participate in urgent discussions, whether formally or informally, to reach agreement on an alternative system to put in place, whether that be based on the previous CBS (or a variation thereof) or a new arrangement. The commercial reality is such that an agreement is likely to be reached in a relatively short time frame.
105. GWA is of the view that the decision by two of the Applicants, PN and QR, to refuse to continue to support the CBS³³ should be seen by the ACCC as an attempt to exert commercial pressure on the ACCC and the parties who oppose the Authorisation. Indeed, this is evident in the many acknowledgements by the Applicants that the CBS worked efficiently and delivered substantial public benefits.³⁴ The commercial reality is that, in the absence of the Authorisation, the parties are most likely to enter (by

³³ Expressed at page 13 of the Applicants' Submission

³⁴ See for example Applicant's Submission paragraph 1.4: "*The industry discussions acknowledged that the current CBS mechanism for administering allocation worked efficiently*"; Applicant's Submission paragraph 1.3: "*As evidenced by the operation of the current CBS, matching demand and Coal Chain capacity has delivered substantial public benefits...*"

necessity) into negotiation with a view to adopting the CBS, some modification of the CBS or another mutually acceptable arrangement.

Confidentiality and Exclusion from Public Register

106. GWA requests that the information and documents contained within its Confidential Submission be excluded from the public register pursuant to section 89(5) of the *Trade Practices Act 1974* (Cth) ("**Act**"):
 107. The grounds upon which GWA seeks such an exclusion are as follows:
 - 107.1. The information contained in the documents and materials is commercially sensitive, in light of GWA's discussions and negotiations with prospective customers and prospective contracts for 2008;
 - 107.2. The information and material is confidential and is not in the public domain;
 - 107.3. The information and material contains details of the costs of producing and marketing goods and services;
 - 107.4. It would be detrimental to GWA's commercial interests if the information and material was revealed to prospective customers, contractors and its rail haulage competitors.
 - 107.5. In light of the above, GWA asks that ACCC exercise its discretion under section 89(5A)(b) of the Act to exclude the documents from the public register in this matter.
108. Accordingly, two copies of GWA's submission in this regard are provided, one full copy for ACCC's purposes and one "public register" version with the excluded information omitted.

Conclusion

109. For the reasons set out above, GWA submits that the Commission should refuse the interim authorisation and the authorisation.

110. If you have any questions, GWA would be pleased to assist by providing further information.

Genesee & Wyoming Australia Pty Ltd – per Fenwick Elliott Grace

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