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Lodgment and Details

Document Lodged:	Expert Report
File Number:	ACT 2 of 2020
File Title:	Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

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Dated: 22/04/2021 2:54 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

Report of Dr Rhonda Smith

Prepared for the Australian Competition and Consumer Commission in ACT 2 of 2020 – Application by Port of Newcastle Operations Pty Limited

Authorisation for Collective Bargaining: NSW Minerals Council & 10 Coal Producers

1. I am a Senior Lecturer in the Economics Department and a Senior Fellow in the Law School at the University of Melbourne. My Curriculum Vitae is provided at Attachment 1.

2. I have been asked to prepare an independent expert report providing an opinion in answer to a number of questions (see Attachment 2). In answering these questions, I have made a number of assumptions of fact. Most of these are set out below. However, some further assumptions made in answering specific questions are explicitly stated elsewhere in the report.

3. A list of the materials supplied to me for the purpose of preparing my report is provided at Attachment 3 to this Report in accordance with the expert witness practice note. Any other materials are identified in footnotes.

4. I acknowledge that my opinions are based wholly or substantially on my specialised knowledge arising from my training, study or experience. I acknowledge that I have read the Federal Court's Expert Evidence Practice Note and the Harmonised Expert Witness Code of Conduct and agree to be bound by them. I have made all the inquiries which I believe are desirable and no matters of significance which I regard as relevant have, to my knowledge, been withheld.

Assumptions of Fact

5. At the end of 2019 Port of Newcastle Operations Pty Ltd (PNO) invited coal producers, vessel agents, vessel operators and FOB coal consignees to enter into bilateral long term discounted pricing arrangements (or deeds). The deed offered to producers (the Producer Deed) includes discounted navigation service charges and wharfage prices set by PNO. It is the terms and conditions of this Producer Deed that the Applicants seek to collectively negotiate with PNO.[1]

[1] ACCC Final Determination, paragraph 1.20.

6. The NSW Minerals Council sought authorisation on behalf of itself and ten coal producers located in the Hunter Valley region of NSW to:

   i. collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of coal (and any other minerals) through the Port;

   ii. discuss amongst themselves matters relating to (i) above; and

   iii. enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port.

   (collectively, the Proposed Collective Bargaining Conduct).[2]

   Authorisation was sought for a period of ten years.

7. The Proposed Collective Bargaining Conduct is voluntary for all parties, including the operator of the Port of Newcastle, and does not include boycott activity by the coal producers.[3] Each coal producer can (a) independently determine whether to accept any negotiated terms and conditions offered by PNO following collective negotiations, and (b) each coal producer may undertake independent negotiations with PNO at any time.[4]

8. The Proposed Collective Bargaining Conduct 'does not include the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/ capacity projections for individual users.'[5]

[2] ACCC, Final Determination, paragraph 1.3

[3] ACCC, Final Determination, paragraph 1.4

[4] ACCC, Final Determination, paragraph 1.29

[5] ACCC, Final Determination, paragraph 1.5

9. PNO operates the Port of Newcastle after acquiring a long term lease from the NSW government in 2014.[6] This lease obliges PNO to make certain payments to the NSW Ports Authority.[7]

10. I assume that coal produced by the coal producers in the Hunter Valley region is mostly exported and coal producers compete with numerous suppliers in other countries and that the producers are price takers on the international market for thermal coal.[8] I assume also that the outlook for thermal coal is uncertain and not favourable due to concerns about climate change.

The factual and counterfactual

11. In order to respond to the questions below, it is necessary to compare the future where coal producers have the ability to negotiate collectively (the factual) with the future where negotiations between the coal producers and PNO are only able to be undertaken on a bilateral basis. In each case it is assumed that the outlook for coal exports is uncertain in light of concerns about climate change.

12. PNO states that it will not engage in collective negotiations with the coal producers. In so doing it implies that there are no benefits (public or private) that will flow from the ability of the coal producers to collectively negotiate. On this view, the factual and the counterfactual will both relate to a future where negotiation is bilateral rather than collective.

13. Such a refusal could be regarded as an exercise of market power. In my opinion, PNO possesses substantial market power in relation to the supply of port services to port users. Given this, it is able to refuse to collectively negotiate with the coal producers. If PNO were subject to competition, it would not be profit maximising to refuse to

[6] ACCC, Final Determination, paragraph 1.15

[7] ACCC, Final Determination, paragraph 2.5

[8] ACCC, Final Determination, paragraph 4.77.

negotiate because it would likely result in a loss of business. The refusal has implications for the competitiveness of coal exports from the Hunter Valley region either because any price increases that would be avoided/reduced through collective bargaining will be passed through directly reducing competitiveness; or they will be absorbed by the coal producers thus reducing profitability and reducing willingness to invest and this may indirectly reduce competitiveness on international markets.

14. Even if PNO refuses to engage in collective negotiations, the ability of the coal producers to engage in the conduct that would be required for collective negotiation will better equip each producer to engage in bilateral negotiations.

15. I assume that 'the ACCC is not required to attempt to predict the likely outcome of the collective negotiations on the relevant issues. The ACCC's role is to assess whether proposed collective bargaining conduct is likely to result in public benefits if the parties engage in the conduct.'[9]

16. Nevertheless, in my opinion, it is quite probable that PNO will change its stance at least within the 10 year period for which authorisation is sought:

    i. While the coal producers are dependent on access to the port in order to export their coal, I assume that PNO derives a very high percentage of its revenue from servicing these exporters and, as noted above, I assume that the future outlook for thermal coal exports is very uncertain and not favourable and that coal producers in the Hunter Valley region are price takers on the international market for thermal coal. A reduction in coal exports reduces the extent to which port infrastructure is used and, if supply of infrastructure services is subject to economies of scale (as would be expected where there are high fixed costs), this will reduce efficiency and profits.

[9] ACCC, Final Determination, p.2

ii. Given this, it is reasonable to expect that the coal producers and PNO will have a mutual interest in ensuring that there are no unnecessary impediments or disincentives for the export of coal through the Port of Newcastle. This, in turn, suggests that this may cause PNO to reconsider its stance in relation to collective negotiation.

iii. Other possible developments at the Port may require the agreement of the coal producers and PNO may decide that it is more effective and less costly to negotiate collectively.

Question 1

Which market(s) are relevant to a consideration of the authorisation application?

17. Market definition is the first step when undertaking a competition analysis. Consequently, it begins from the product/s and the location/s that give rise to the competition concern. In relation to an application for authorisation, it enables the assessment of public benefit/s and detriment/s.

18. The NSW Minerals Council and ten coal producers in the Hunter Valley region of NSW sought 'authorisation for ten years to enable them to collectively negotiate terms of access for coal vessels entering the channels and berthing at the Port. The group also sought authorisation to jointly discuss and negotiate common industry issues, such as proposed capital expenditure at the Port and allocation of costs.'[10]

19. This suggests that it is the market in which these port services are supplied that will need to be defined. The product at issue is access to and provision of port services in relation to the export of (mainly) thermal coal. These services are supplied at the Port of Newcastle by the port operator. For the purpose of defining the market in which these services are supplied, it is helpful to assess demand- and supply-side

[10] ACCC, Final Determination, paragraph1.3, 1.23-1.24.

responses to a small but significant non-transitory increase in the price of the services (SSNIP) by a hypothetical monopolist port operator.

20. These port services are an input into the export of coal produced in the Hunter Valley region (as well as some other minerals[11]). In my opinion, the coal producers could not substitute some other service for this service in response to a SSNIP. On the supply side, similarly, substitutability is not possible. Thus, given the lack of responsiveness to the SSNIP, in my opinion there is a relevant market for the supply of port services which enables ships to enter the port in order to be loaded with coal (or possibly other minerals).

21. This conclusion is supported by the lack of response in terms of the quantity of coal exported through the Port of Newcastle to price increases which have been applied since 2014, when the port was privatised, and which are far in excess of a SSNIP.[12] In other words, there was a very strong incentive to use alternative export facilities but no response to it.

22. By a similar process of reasoning, in my opinion, the geographic dimension of the market is the Port of Newcastle where the service is supplied. Coal (and other minerals) are bulky and the cost of transport to the port is relatively high. I assume that the Port of Newcastle is the nearest suitable port through which Hunter Valley coal producers can export their coal.[13] This suggests that if the coal producers were to seek to export through an alternative port, the additional cost of transport would outweigh the typical 5% SSNIP applied when defining markets. Consequently, it would not be rational to substitute one port for another.

23. In addition, I assume that the coal producers have access to and use an established logistics system to move coal from the mine to the port. I assume that this would not

[11] ACCC, Final Determination, paragraph 1.3

[12] Affidavit of Simon Byrnes, Graph, p.5 and paragraph 17

[13] ACCC, Final Determination, paragraph 1.12.

be available to serve an alternative port and would not be constructed in response to a 5% SSNIP in the cost of port services.

24. Consequently, the geographic dimension of the market for access to port services for exporting coal from the Hunter Valley region is, in my opinion, limited to the Port of Newcastle.

25. To summarise, given the above, in my opinion there is a relevant market for access to or supply of port services in the Port of Newcastle for the export of coal. These services are supplied by PNO and are acquired by coal producers located in the Hunter Valley region and by vessel owners, or vessel agents on their behalf, who transport the coal.

Other relevant markets

26. However, there are other markets which may be affected by the conduct for which authorisation is sought. I assume that most of the coal produced in the Hunter Valley region is thermal coal and that this is used mainly for electricity generation.[14] I assume that metallurgical coal is used in steel-making.[15] I assume that metallurgical coal is not a close substitute for thermal coal. This is because they are not close functional substitutes – they are used in different ways.[16] In addition, I assume that the metallurgical coal is a higher quality coal as it has higher energy content and lower moisture. Given this, I assume that it will be at least 5% more expensive on average than the thermal coal. This means that coal users would be unlikely to respond to a SSNIP by substituting metallurgical coal for thermal coal. Similarly, I would not expect that there would be much, if any, supply-side substitution in response to a SSNIP of 5%. This suggests that there is a market the product dimension of which is the supply and acquisition of thermal coal.

[14] Byrnes Affidavit, paragraph 12 (a); 14.

[15] Byrnes Affidavit, paragraph 12 (b)

[16] Byrnes Affidavit, paragraph 13.

27. The geographic dimension of this market, while including Australia, is primarily international. I assume that Australian thermal coal is sold to countries such as Japan, China, South Korea, and Taiwan.[17] However, in response to a SSNIP in relation to Australian thermal coal, including that from the Hunter Valley region, importing countries could turn to suppliers in other countries such as the United States, Indonesia, Russia, and South Africa which also produce and export thermal coal.[18]

28. In addition to negotiating access to the Port of Newcastle for ships exporting coal (and other minerals), authorisation was sought for collective negotiation of 'common industry issues, such as proposed capital expenditure at the Port and allocation of costs.'[19] Some of these issues may be regarded as being relevant to separate markets from that in which access is supplied, but, at least in terms of infrastructure investment, this will contribute to the supply of port services. If so, by the same reasoning, the market will be confined to these services as supplied at the Port of Newcastle.

[17] ACCC, Final Determination, paragraph 2.4.

[18] Thermal Coal Exporters – see The International Energy Agency, Coal Information Overview. Available at: https://www.iea.org/reports/coal-information-overview.

[19] ACCC, Final Determination, p.2.

Question 2

What economic principles, if any, are relevant in identifying public benefits? When is a benefit "private" rather than "public", and when is a benefit both private and public?

Public benefits – what makes something a public benefit?

29. Business conduct gives rise to a private benefit if it increases the profit of the business either directly or indirectly. A business that engages in conduct, such as improving the attractiveness of its products and charging higher prices for them, or by lowering its costs, will be able to compete more effectively in a market and thereby increase its profits and so obtain a private benefit. However, a business may also obtain a private benefit by exercising market power or by engaging in anti-competitive conduct that increases its market power, thereby enabling it to raise prices, and/or to reduce product quality and/or to adversely reduce other terms of trade and/or to focus less on innovation and investment.

30. Consumers obtain a private benefit from engaging in transactions in a market. A measure of the value that a consumer expects to obtain is the consumer's willingness to pay.[20] The actual benefit obtained from engaging with the market is the difference between the willingness to pay and the market price (the consumer surplus). [21]

31. Conduct that creates private benefit in some circumstances also creates public benefit. This will occur when the conduct has the effect of increasing economic welfare. It will do so if the relevant conduct directly or indirectly has the effect of

[20] This is determined by the factors that determine demand. These include the availability and price of substitutes, preferences/taste, and income.

[21] Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization, Global Edition, 2015 p.94; Jeffrey Church & Roger Ware, Modern Industrial Organization: A Strategic Approach, 2000, p.25. Church & Ware is available at https://edisciplinas.usp.br/pluginfile.php/1663633/mod_resource/content/1/ChurchWare.pdf

increasing the amount of output produced with given resources, and/or when it increases the quality of that production and better satisfies consumer preferences. Conduct that is efficiency-enhancing increases economic welfare and so results in both a private and a public benefit.

32. The conduct of a firm or a group of firms may not increase economic welfare per se, but may increase social welfare. This would include conduct to achieve a particular public policy objective, such as ensuring public health and safety; and conduct aimed at improving environmental outcomes, even though they may impose additional adjustment costs on the supplier. Such conduct can be expected to confer a public benefit but, depending on the circumstances, it may not confer a private benefit, as for example when it is in response to a regulatory requirement and where the conduct would not occur otherwise.

Economic Welfare Standards

33. Economic welfare can be measured in various ways and this may influence whether or not the effect of particular conduct will be considered to give rise to a public benefit. The most commonly considered standards in relation to competition law are the consumer welfare standard and the total welfare standard.[22] The latter is measured as the aggregate of consumer surplus and producer surplus.[23] Producer surplus is the difference between the marginal cost of production (the firm's minimum willingness to supply), and the market price. The difference between the two standards may be reduced to the extent that the consumer welfare standard also takes account of resource saving; while the total welfare standard may be modified in relation to the weight given to a claimed public benefit where that benefit is confined to a narrow group.

[22] For a discussion of these, see OECD, The Role of Efficiency Claims in Antitrust Proceedings, Best Practice Roundtables, 2012, pp. 26-28. Available at: http://www.oecd.org/daf/competition/EfficiencyClaims2012.pdf

[23] Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization, Global Edition, 2015 p.110. Church & Ware, supra Note 21, pp 26-27.

34. In the past, the Tribunal has applied a modified total welfare standard: see Qantas Airways Limited [2004] ACompT 9 at paragraph 185 and Application by Tabcorp Holdings Limited [2017] ACompT 1 at paragraph 62.

Efficiency

35. In economics, efficiency is a measure of how well a market or the firms within it are performing. There are various different aspects to efficiency. Production efficiency and allocative efficiency are static measures of efficiency as distinct from dynamic efficiency.

36. Production efficiency (also referred to as technical efficiency) occurs when a firm produces a given output at the lowest cost per unit produced given the technology employed. In circumstances where production is subject to economies of scale, efficiency gains are available as output increases until the economies of scale are fully exploited. More output is obtained using less resources per unit and, other things remaining constant, this increases economic welfare and would therefore represent both a private benefit (increased profit) and a public benefit (society's limited resources are being better used).

37. A related concept is x-inefficiency which measures cost incurred by a firm in excess of that which would be incurred in a competitive market. An example would be the 'gold plating' of the CEO's office suite or executives taking time off to play golf for leisure during business hours. Here a cost is incurred which could not be incurred in a competitive market where the flow through of the associated cost would raise the firm's price relative to its rivals and cause it to lose sales. The cost differential reflects the firm's ability to ignore, at least to some degree, market pressures, that is, it possesses market power. While there is a private benefit from such conduct, there is no public benefit. Rather, this inefficiency is a public detriment (see Question 5).

38. Allocative efficiency refers to how well resources are allocated between productive activities, in order to best satisfy consumer preferences, given the cost of the resources used in production. Firms will be allocatively efficient when those consumers who are willing to pay a price at least equal to the marginal cost of producing the product obtain supply. Increases in allocative efficiency are a public benefit.

39. A profit maximising firm that possesses substantial market power will not be allocatively efficient (unless the firm is able to perfectly price discriminate). This is because the firm restricts output in order to raise the price above the competitive level. As a consequence, some consumers who previously obtained supply because they valued the product at least equal to the competitive price, will now face a price that exceeds the benefit that they expect to obtain by purchasing the product (willingness to pay). As a consequence, they will turn to other less preferred products. To satisfy the increased demand for these products additional resources will be required. This reallocation of resources is inefficient (measured as the dead weight loss) and reduces economic welfare. The conduct confers a private benefit but not a public benefit.

40. Dynamic efficiency is an assessment of how quickly and completely firms adjust to change, whether on the demand side, such as a change in consumer preferences, or on the supply side, such as the adoption of new technology. This increases economic welfare and represents a public, as well as a private, benefit because it means that the market is better satisfying consumer wants and/or is doing so at a lower cost (using less resources).

41. Dynamic efficiency is closely related to R&D and innovation and economic growth. The effect of technical innovation may be to lower the long run average cost of production, although additional costs associated with this may be incurred in the short run. Increased dynamic efficiency may also result from the introduction of better work practices and systems. New and better products have the effect of

increasing demand which increases consumer surplus, other things remaining constant, and so increases welfare.

42. Conduct that increases efficiency is welfare-enhancing. It will usually confer a private benefit on the firm/s engaged in the conduct and it will be a public benefit.

Market failure

43. Market failure occurs when prices fail to reflect the true economic cost of production – these are understated or overstated depending on the nature of the market failure. It may also occur because the willingness to pay of consumers does not accurately reflect the value of the product for the consumer.

44. There are many sources of market failure. On the supply side they include market power (this may be structural, as in the case of natural monopoly, or strategic as the result of a firm's conduct); information deficiencies, including asymmetry of information (such as access to finance in imperfectly competitive capital markets for new entrants); free riding; externalities; and public goods.

45. On the demand side, market failure may be the result of information asymmetry. This occurs where consumers are not fully informed concerning the qualities of the relevant product or the terms and conditions on which they are supplied. Behavioural economics studies also show that consumers may fail to use, or use fully, the information available to them, again causing a market failure.[24]

46. The consequence of market failure is that supply and/or demand may be excessive or deficient relative to what it would otherwise have been. Market failure means that the market is not operating efficiently and economic welfare is reduced. Where

[24] For example, see Lucia A. Reisch & Min Zhou, Behavioural economics, consumer behaviour and consumer policy: state of the art, published online by Cambridge University Press: 06 October 2017. Available at: https://www.cambridge.org/core/journals/behavioural-public-policy/article/abs/behavioural-economics-consumer-behaviour-and-consumer-policy-state-of-the-art/2141A51B066F5031F4E97006A1DC2BE4

market failure occurs, the party or parties adversely affected by the failure have an incentive to find ways of addressing the market failure – they obtain a private benefit from doing so. However, the increased efficiency that results from addressing the market failure is also a public benefit.

47. It should also be noted that conduct by firms to address a market failure, such as the imposition of vertical restraints, may increase efficiency, which is both a private and a public benefit. However, the vertical restraint may reduce competition (for example, by entering into an exclusive supply contract for a scarce but essential input thus at least raising rivals' costs and possibly foreclosing them) which, although it may be a private benefit, will not be a public benefit. The impact on welfare will depend on the size of the public benefit from addressing the market failure relative to the adverse effect on competition of the vertical restraint.

Question 3

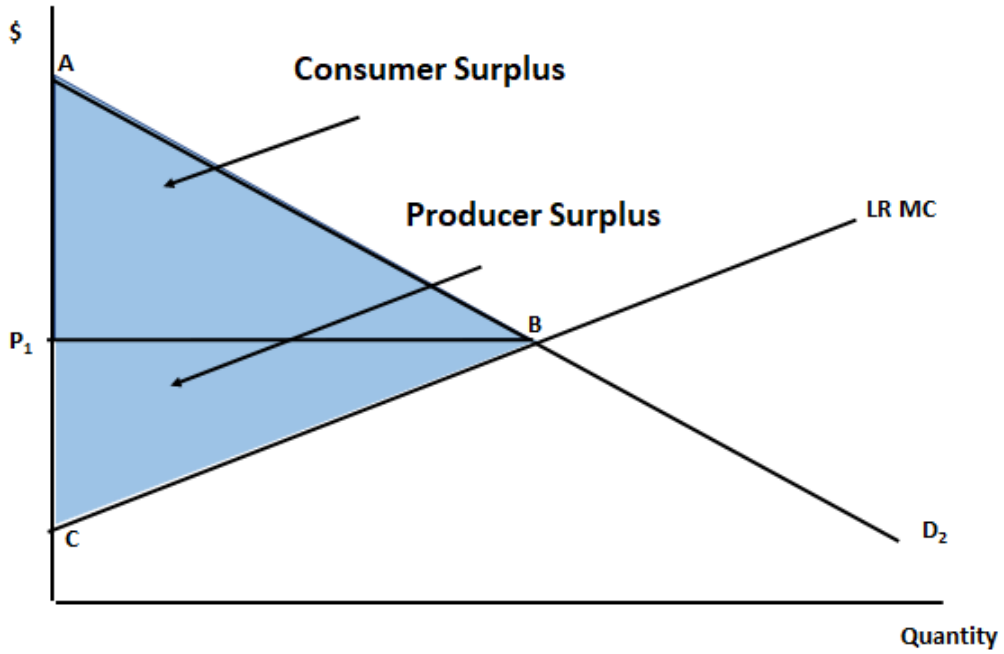
What economic principles apply in relation to collective bargaining conduct? Applying those principles, what are the public benefits and public detriments, if any, that would result or be likely to result from collective bargaining conduct?

48. Collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counterparty).[25]

49. While bargaining is common in business dealings, collective bargaining theory has mainly been developed in relation to labour markets. One area in which concepts concerning collective bargaining have been developed independent of labour markets is in relation to the negotiation of royalties or licences for intellectual property, particularly copyright.

[25] See Stephen P. King, Collective Bargaining in Business: Economic and Legal Implications" [2013] UNSW Law Journal, 36(1).at 107, quoting ACCC. Available at: http://www.austlii.edu.au/au/journals/UNSWLJ/2013/5.html

50. In simple terms, bargaining occurs when both parties expect to gain from trade, otherwise the approach would be a take-it-or-leave-it offer by one of the parties. Buyers will be unwilling to enter into a bargain where the price (or terms of trade) exceed their maximum willingness to pay which reflects the value placed on the product by the buyer. Likewise, a supplier will not be willing to sell at a price that is less than its marginal cost of supply. The former is the upper bound for negotiation, while the latter is the lower bound, and agreement may be reached between these.



51. Negotiation is directed to the share of the surplus that each party obtains by entering into transactions in a market. That share will depend on such factors as:
    i. the alternatives each party has if the negotiations are unsuccessful;
    ii. the relevant information available to each party, that is, whether there are information deficiencies/asymmetries;
    iii. the relative urgency for each party to conclude a deal.

52. In general terms, the benefits of collective negotiation include addressing:

    i. imbalance in bargaining power between the parties;
    ii. asymmetry of information concerning supply costs;
    iii. any lack of bargaining skill/experience of individual parties.

53. The benefit that those negotiating collectively expect to obtain depends on the particular circumstances in which the bargaining occurs. However, they are likely to include:
    i. improvements in the quality of the contractual outcome – eg more appropriate risk allocation;
    ii. reduced costs associated with negotiations.

54. These outcomes are clearly beneficial to the group bargaining jointly, and possibly to the counterparty. As such, they are private benefits. However, if collective negotiation increases efficiency and hence saves resources this will be a public benefit. This may occur if:
    i. a reduction in market power causes a decrease in the dead weight loss;
    ii. transaction costs associated with negotiations are reduced;
    iii. informational deficiencies are addressed which enable better decision-making by the group.

Market power and reduced dead weight loss

55. Collective negotiation may reduce an imbalance in bargaining power that results when one party possesses substantial market power, perhaps because they control an essential input into supply by the other party. If this simply causes a redistribution of the gains from trade between the buyers and the seller this would not be regarded as a public benefit under the total welfare standard, although it would be regarded as a public benefit under the consumer welfare standard.

56. However, redressing the imbalance of bargaining power that results from one party possessing market power will also result in a reduction in the dead weight loss unless the party possessing substantial market power is able to perfectly price discriminate.[26] As the dead weight loss measures the misallocation of resources associated with market power, in my opinion, this increase in efficiency would represent a public benefit under either the consumer welfare standard or the total welfare standard. The size of the public benefit will depend on the size of the dead weight loss and the extent to which it is reduced.

Transaction costs

57. Transaction costs are defined as 'those costs of writing and enforcing contracts that arise in a world of uncertainty with asymmetric information where parties may have conflicting incentives.'[27] As the name implies, they are costs that arise when making a sale that are additional to the cost of production. They include the cost of monitoring, controlling, and managing transactions, including providing a mechanism for settling disputes.

58. Collective negotiation may reduce transaction costs. Carlton notes that '[n]egotiations involving one-on-one bargaining …are often protracted despite their high transactions costs and therefore raise the issue whether the contracts reached are efficient.'[28] Negotiations not only use the time of (generally senior) company employees and take them away from the business, they may also involve the cost of external advisors. So numerous and protracted negotiations, as well as negotiations that fail to reach a satisfactory outcome, are costly for the parties. Thus, the transaction cost of reaching an agreement will depend on many factors including

[26] If this were the case each buyer would be charged its willingness to pay and there would be no dead weight loss.

[27] D.W. Carlton, Transaction costs and competition policy, International Journal of Industrial Organization, volume 73, 2020, p.2. https://doi.org/10.1016/j.ijindorg.2019

[28] Ibid.

available information, the complexity of the terms, as well as the ability to monitor the terms of any agreement.

59. Each party involved in negotiations incurs transaction costs. For members of the group engaged in collective bargaining, it means that those costs can be pooled and shared. However, if collective negotiation results in fewer and/or shorter negotiations compared to bilateral negotiations, transaction costs will be reduced for the counterparty as well. There are economies of scale in collectively negotiating for all parties. This is a private benefit, but as it saves resources, it is also a public benefit.

Other benefits

60. If collective bargaining results in a more efficient contract,[29] this may mean that there is greater certainty/less risk in decision-making in the future. This in turn may allow more and/or more efficient investment. Clearly, there would be a private benefit for those investing, but there is also a public benefit to the extent that there is increased efficiency. Collective negotiation may be important in providing an incentive for investment and hence results in a public benefit, especially where the investment involves a significant sunk cost.

61. Nevertheless, to negotiate collectively, members of the group will need to agree their joint position which will also result in a cost, and that cost is likely to be greater the more heterogeneous the group membership is, and the more their interests diverge. This is a private cost, but because it uses additional resources to determine the public benefit resulting from collective negotiation, it is the net increase in efficiency which is relevant.

Risk of collusion

[29] From an economic perspective, an efficient contract is one that allocates risk to the party best able to bear it. It also refers to a contract that is more likely to achieve its objectives.

62. The process of joint negotiation increases the risk of coordinated conduct by the parties in relation to other aspects of their businesses. RBB Economics, in a paper commissioned by the UK Office of Fair Trading, for example, noted that 'the buying group could just be a façade to hide explicit collusion in the downstream market. For example, the European Commission came to this view in relation to the Spanish Tobacco cartel, where purchasing quotas were, in effect, market share targets in the downstream market'.[30]

63. Thus, collective negotiation may have anti-competitive effects (which reduce efficiency and are detriments to the public). The co-operation required for collective bargaining may dull the incentive to compete, that is, it provides an incentive for collusion. Collective bargaining may also provide or increase the ability to collude more broadly, that is, beyond the areas covered by collective negotiation. This is because collective bargaining involves interactions between competitors which enables the transfer of information between them.

64. The risk of collusion increases the greater the range of issues covered by collective negotiation and the more information that needs to be exchanged between the businesses in order to arrive at a common position in order to collectively bargain, especially where this information includes future prices and fees, and costs. Other factors that affect this risk include:
    i. the greater the proportion of market participants that are party to the collective negotiation;
    ii. any disincentives to act collusively.

    The former makes collusion more likely, while the latter makes it less likely.

65. Disincentives to engage in broader collusive activity include:
    i. loss of commercial advantage from revealing private information;

[30] OFT, The competitive effects of buyer groups, Economic Discussion Paper January 2007, paragraph 1.45. https://www.rbbecon.com/downloads/2012/12/oft863.pdf

ii. the competitiveness of downstream markets.

66. If collective negotiation results in collusion, this will be a private benefit to those colluding. However, collusion reduces efficiency and so is a public detriment.

Other detriments

67. Depending on the market structure, a possible harm from collective negotiation is that the group will succeed in achieving a more favourable outcome at the expense of those competitors who are not part of the group. Whether this is likely depends on whether the more favourable terms secured by the group are confined to the group or whether they benefit the industry as a whole, whether the more favourable terms are transparent enough to be recognised by non-participants in the group, and whether the group negotiating collectively is 'open' or 'closed'. If the group is 'open' it would be expected that if it was able to secure better terms, others would opt into the group. I assume that in relation to the present application, the group is 'open'.

68. Another potential detriment is raised by RBB in its OFT report:
'Sometimes it is argued that increased bargaining strength means that suppliers earn less than before and so are less likely to make investments. However, in general, buyers would be expected to realise this. If the investment by the supplier were important, a buying group would limit its ex post bargaining power (e.g. through writing an ex ante contract). Put differently, buyers may gain from lowering their share of the bargaining pie, if, as a result, the size of the bargaining pie is much larger.'[31]

69. In summary, unequal bargaining power results in not merely a transfer of surplus between parties, but inefficiency, represented by the dead weight loss. Collective bargaining helps to redress that issue. It also results in reduced transaction costs for all parties relative to bilateral negotiation. It may result in more appropriate

[31] OFT, The competitive effects of buyer groups, Economic Discussion Paper January 2007, paragraph 3.37. Available at: https://www.rbbecon.com/downloads/2012/12/oft863.pdf

contractual outcomes, including better risk allocation. To the extent that collective bargaining increases efficiency, it is a public benefit. However, there is a risk that collective bargaining may impact outside of the permitted areas and if that reduces efficiency, this will result in a public detriment.

Question 4

Applying the principles discussed in Questions 2 and 3, what are the public benefits, if any, that would result or be likely to result from the Proposed Collective Bargaining Conduct, and what is their magnitude?

Transaction cost savings

70. In applying for authorisation for collective bargaining the coal producers claimed that the ability to collectively bargain with PNO would result in transaction cost savings. In granting the authorisation, the ACCC accepted that collective negotiation would result in a public benefit. In my opinion, for the reasons provided above, I agree that collective negotiation between the coal producers and PNO would increase efficiency by reducing transaction costs and consequently would be a public benefit.

71. I have been asked to express an opinion as to the extent of this public benefit. This will depend on a number of factors. The first is that there are matters that need to be negotiated. Second is the time typically spent in bilateral negotiations to reach agreement compared to the time taken when there is collective negotiation. Third, it will depend on the number of coal producers that engage in collective negotiation given the voluntary nature of the authorised conduct. Fourth, it depends on whether negotiations are 'one off' or occur on an ongoing basis, the latter potentially resulting in greater savings.

72. [redacted]

[redacted]

73. [redacted]

74. The Affidavit of Mr Byrnes of 15 March 2021 indicates that there has been a significant amount of bilateral negotiation in relation to the Producer Deed with offers and responses between the parties over a period of time. I interpret this material to indicate that PNO has been responsive to the requirements of the coal producers. Irrespective of this, it does suggest that not insignificant time and resources have been spent by numerous parties in these negotiations.

75. In my opinion, this supports a conclusion that the savings in transaction costs associated with collective negotiation will be more than trivial, although I am unable to be more precise than that.

More efficient contractual outcomes

76. In my opinion, PNO possesses substantial market power in relation to the provision of port services at the Port of Newcastle. This results from the reliance of the coal producers on export markets for the sale of their product, the transport and logistical costs of exporting through a port other than the Port of Newcastle (see Question 1), and the barriers to entry facing a potential entrant planning to supply port services.

77. Savings in transaction costs is not the only benefit that may result from collective negotiation. In circumstances where bargaining power is very unequal, as in the case

of a monopoly supplier for example, it is unlikely that the contractual outcome from bilateral negotiations will be efficient:

'Bargaining power will affect the efficiency of contracting. In general, if one party to a negotiation has most of the bargaining power, in the sense that most of the surplus from any negotiation is seized by that party, then this will reduce the incentive for the other party to the negotiation to make mutually beneficial but non-contractible investments.'[32]

78. The ability of the coal producers to collectively negotiate with PNO will help to address the imbalance of bargaining power, which should increase the efficiency of the bargaining process in that it should produce better outcomes relative to those where the bargaining power is bilateral and less equal. This increased efficiency is both a private and a public benefit.

79. Better, more efficient contractual outcomes will also be achieved the better-informed parties are when negotiating:

'Contracting will often involve information asymmetries and limitations on the verifiability of information. Buyers and sellers will have private information that affects the efficient contract, but the incentives for each party to truthfully disclose that information will often be limited.' [33]

80. Collective bargaining may allow the group to coordinate information collection, monitor that collection, aggregate and interpret the information. This may mean that the information provided as part of the negotiation is better and more complete than would be available in bilateral negotiations. Again, this would be both a private and a public benefit. A more complete contract based on better quality information provides a better basis for decision-making by both parties – for example it is likely

[32] Stephen King, supra note 25, p.11.

[33] Dennis Carlton, supra note 27, p.4

to result in more efficient investment decisions by all parties to the negotiation. Even in circumstances where future negotiations remain bilateral, if the coal producers are better informed because they can exchange information then this is likely to result in improved contractual outcomes.

81. The coal producers in their application for authorisation claimed the outcome of the collective negotiations would be greater certainty relative to bilateral negotiation leading to more investment which will benefit the region – for example, by creating or maintaining employment opportunities. In my opinion, if that occurs there would be a private benefit from any such investment, but a public benefit from the employment effects. This may be particularly important to the extent that the future for coal exports is uncertain due to climate change.

82. I assume that coal producers in the Hunter Valley region are price takers on the world market (see paragraph 10 above). This suggests that they would need to absorb all or part of any increase in the cost of port services. This in turn would mean that there are less funds available for investment in the business. Reduced profitability reduces the incentive to invest. Although this is a private cost, ensuring that prices are kept at competitive levels would encourage investment, other things being constant, which would have advantageous effects for the Hunter Valley economy, a public benefit.

83. However, while this should be regarded as a public benefit, the extent of the public benefit depends on whether the issues that could be collectively negotiated impinge on investment decisions and the extent of future investment with or without collective negotiation.

84. Better contractual outcomes would not only benefit the coal producers, they also provide a better basis for investment decisions by PNO, for example in relation to channel widening/dredging or future port development. To the extent that investment in improved port services enables easier access for ships and quicker

loading, this has implications for exporting, which would be regarded as a public benefit.

85. In my opinion, collective negotiation provides a positive incentive for investment as well as greater ability to invest. Again, I am unable to be precise about the magnitude of the public benefit that is likely to result from the ability of coal producers in the Hunter Valley region to collectively negotiate relative to the situation where negotiation is on a bilateral basis. However, in my opinion, the significance of the public benefit is likely to be greater given the uncertain future demand for coal.

86. To summarise, in my opinion, there are public benefits that would result from the ability of the coal producers to engage in collective bargaining. In my opinion, as circumstances change, PNO acting in its own interests may change its stance in relation to collective bargaining. However, even if collective bargaining does not occur because PNO refuses to participate in it, the ability of the coal producers to discuss issues and exchange information as they would do if they were collectively bargaining is likely to mean that they are better informed when bargaining bilaterally which of itself may enable a more efficient outcome in terms of the time taken to negotiate (reduced transaction costs) and the quality of the contractual outcome.

Question 5

PNO contends that the Proposed Collective Bargaining Conduct is a form of cartel conduct that is presumptively harmful (and therefore requires a substantial net public benefit before it is authorised). What is the likely harm from the Proposed Collective Bargaining Conduct?

87. A cartel is typically thought of as an agreement between parties who compete in the supply of a particular product. The cartel members may agree to fix prices, limit output, or allocate tenders. PNO asserts that collective negotiation/bargaining by the coal producers in the Hunter Valley region is a form of cartel.

88. I assume that the coal producers in the Hunter Valley region are likely to be considered competitors in relation to access to the Port of Newcastle.[34] They are seeking to collectively negotiate with PNO on issues including:
    i. pricing mechanisms under the Producer Deed, for example the inclusion of user funded expenditure in PNO's capital base;
    ii. PNO's capital expenditure forecasts at the Port and the impact on prices paid by coal producers either directly or indirectly; and
    iii. PNO's proposed annual price adjustments under the Producer Deed. [35]

89. Cartel conduct is prohibited by the Competition and Consumer Act – it is deemed to be anti-competitive. However, if it results in a net public benefit, that is, if the public detriments from collective negotiation are less than the public benefits to which it gives rise, the conduct may be authorised. If the consequent detriment is large, then it will only be offset by a large public benefit; conversely, if the detriment is small, for there to be a net public benefit, the public benefit would not need to be large.

90. PNO claims that the public detriment that will result from collective negotiation is 'the potential for collective activity among the bargaining group, beyond the authorised conduct, that is, that there is a risk of improper information exchange, with serious implications for competition.'[36] It claims that it would be difficult to detect and monitor any improper information exchanges between members of the bargaining group.[37]

91. Although this may occur, there are several factors that, in my opinion, indicate that the risk is small. One reason for this is that collective bargaining is permitted over a relatively narrow area. The ACCC's Final Determination states that the conduct that is authorised is relatively confined and does not involve the coal producers sharing

[34] ACCC Final Determination, paragraph 1.3

[35] ACCC, Final Determination, paragraph 1.24

[36] ACCC Final Determination, paragraphs 3.4

[37] ACCC, Final Authorisation, paragraphs 4.72

individual coal projection volumes, customer pricing information or marketing strategies.[38] PNO accepted this.[39] Coordination outside of that permitted by the authorisation would be illegal.

92. Co-operation when collectively negotiating may provide businesses with the opportunity to limit competition in relation to the sale of coal, to tacitly collude. I assume that this would take the form of asking higher coal prices. However, not only are the Hunter Valley region coal producers competing for sales with other Australian coal mining companies, they are competing with other coal producers around the world for sales. In other words, as assumed previously, producers in the Hunter Valley region are price takers on the world market. [40] Given this, an attempt to raise prices would be likely to be unprofitable and hence unsustainable.

93. Further, the coal producers are likely to have limited ability to raise their prices in future given the increasingly unfavourable conditions they are likely to face as the use of coal internationally is reduced in response to concerns about climate change. Rather, they are likely to have to compete even more vigorously to secure available sales.

94. I assume that some coal produced in the Hunter Valley region is sold domestically, that is, within the region. I assume it is unlikely that local coal users would source coal from outside of the region in response to an increase in the price of locally supplied coal. Even here, the worsening outlook for coal exports is likely to provide an incentive for each producer to compete vigorously for local sales, exploiting whatever private commercial advantage they may have.

[38] ACCC, Final Determination, paragraphs 4.77

[39] ACCC, Final Determination, paragraph 4.73.

[40] See paragraph 10 of this report.

95. In my opinion, these factors suggest that the risk of collusive activity outside of collectively negotiating in relation to port services is not likely or is not likely to be significant.

96. PNO has claimed also that collective negotiation may disadvantage smaller mining companies and/or companies with different interests from those engaged in collective negotiation.[41] It claimed that collective bargaining will 'substantially alter competitive dynamics' between coal producers in the market for access to port services at the Port of Newcastle, with larger producers placing pressure on smaller producers within the bargaining group. [42] However, collective bargaining is voluntary and these companies would only be expected to engage in it if it is in their interests to do so. Consequently, any detriment is likely to be small.

97. Port Authority of NSW submits that the proposed collective negotiation of the navigation service charge between the coal produces and PNO has the potential for a reduction in those charges, which may have flow on effects to the amount that PNO pays the Port Authority of NSW for services provided at the Port.[43] It claims that 'this has the potential to compromise the safe operation of the Port and its ability to meet its future costs.'[44] This is a fee for service paid by PNO which reflects a requirement under the contract entered into when the port was privatised in 2014. In my opinion, while the effect of any agreement between the Port Authority of NSW and PNO is likely to be a factor in negotiations between PNO and the coal producers, the extent to which the cost of any agreement between PNO and the Port Authority of NSW is passed through to producers is a cost the producers might seek to negotiate and it is a cost that PNO might be prepared to negotiate.

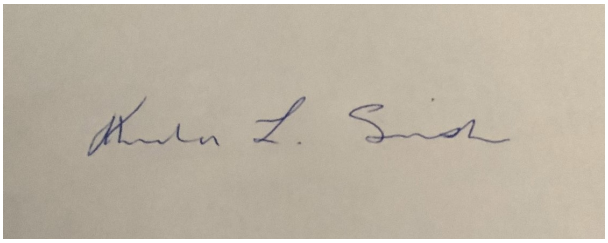
[41] ACCC Final Determination, paragraphs 4.78 – 4.80

[42] Port of Newcastle submission, 7 April 2020, paragraph 21.

[43] Submission of Port Authority of New South Wales to the ACCC, 25 February, 2021, Section 4. See also ACCC, Final Determination, paragraph 3.4.

[44] ACCC, Final Determination, paragraph 4.87

98. In summary, in my opinion there is little, if any, public detriment likely to result from collective negotiation of the matters referred to in paragraph 88 above compared to the outcome from bilateral negotiations.



22 April 2021

Attachment 1

Rhonda L. Smith

October 2020

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Education

D. Com, Economics, University of Melbourne, 2007

MA, Economics, University of Melbourne, 1969

B.Com (Hons), University of Melbourne, 1967

Academic Positions

Senior Fellow, Law, University of Melbourne 2016 –

Senior Lecturer, Economics Department, University of Melbourne, 1981 –

Lecturer, Economics Department, University of Southampton, 1970 – 1972

Senior Tutor, Economics Department, University of Melbourne, 1968 – 1969

Tutor, Economics Department, University of Melbourne, 1967

Visiting lecturer, Law, Australian National University, periodic

Rhonda Smith is a Senior Lecturer in the Economics Department at the University of Melbourne (fractional 0.5) and a Senior Fellow in the Law School (0.3) at the University of Melbourne. She teaches undergraduate and postgraduate courses including Economics of the Law and Foundations: Competition Law & Economics, and Unilateral Conduct (the last two are subjects in the Global Competition Law Masters); she has provided guest lectures in the Law Masers Consumer Law subject and to the Intellectual Property subject. In previous years she has also taught Economics for Public Policy, a Masters level subject.

From November 1995 to November 1998 Dr Smith was a Commissioner with the Australian Competition and Consumer Commission (ACCC). She was appointed an Associate Commissioner of the ACCC in June 1999 but resigned from the ACCC in December 1999 to return to academia.

During 2000 Dr Smith resumed consulting, mainly in relation to competition matters, both to regulatory bodies and to major businesses. She has appeared as an expert witness in a number of major competition law cases.

She has provided technical assistance on behalf of the Asian Development Bank in Papua New Guinea and in the Cook Islands.

She was appointed as the International Telecommunications Arbitrator for PNG in October 2009 to 2014.

She was a member of the Federal Government's Copyright Law Reform Committee from 1995 to 1998. In April 2001 she was appointed a member of the Copyright Tribunal and this appointment remains current.

She was a member of the Advisory Board of the Intellectual Property Research Institute of Australia (IPRIA) and a research fellow with IPRIA.

She was a lay member of the High Court of New Zealand and a member of the Commonwealth Government's Commonwealth Consumer Affairs Advisory Committee. She was also a member of the Advisory Board of the Centre for Regulation and Market Analysis at UniSA.

Dr Smith is an associate editor of the Competition and Consumer Law Journal.

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Attachment 2

Our ref. 20206679

16 April 2021

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Confidential - Subject to legal professional privilege

Dear Dr Smith

Independent Expert Report – ACT 2 of 2020 – Letter of Instructions

1. We confirm your engagement in the above proceedings, which concern an application to the Australian Competition Tribunal (Tribunal) for review of the ACCC's determination to authorise collective bargaining conduct in relation to the terms of access to the Port of Newcastle (Port), to prepare an independent report identifying the economic principles which, in your opinion, will be relevant for the Tribunal to consider in this review.

2. The ACCC's determination dated 27 August 2020 authorised the NSW Mineral Council and other mining companies exporting goods, or requiring future access, through the Port (collectively, the Applicants) to engage in the following conduct, which is described in this letter as the **Proposed Collective Bargaining Conduct**:

   a. collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of coal (and any other minerals) through the Port

   b. discuss amongst themselves matters relating to the above discussions and negotiations and

   c. enter into and give effect to contracts, arrangements or understandings with PNO [Port of Newcastle Operations Pty Ltd] containing common terms which relate to access to the Port and the export of minerals through the Port.

3. The Proposed Collective Bargaining Conduct is voluntary (for the Applicants and PNO), and does not include:

   a. boycott activity by the Applicants or

   b. the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users.

4. Authorisation was granted for a period of 10 years.

5. The application before the Tribunal, brought by PNO, challenges the ACCC's determination.

Materials

6. You have been provided with:

   a. the ACCC's determination dated 27 August 2020

   b. all the material filed by the ACCC with the Tribunal, which comprises the material relied on by the ACCC in its decision-making process, including the application for authorisation lodged on 6 March 2020

   c. PNO's application to the Tribunal for review filed on 17 September 2020

   d. the Statements of Facts, Issues and Contentions filed by the parties, including the ACCC and

   e. the written submission made by the Port Authority of NSW.

7. We may provide you with additional material in the course of your engagement.

Instructions

8. You are instructed to prepare a report in response to the following questions below. In the first instance, we ask that you prepare the report in draft for the ACCC to consider from the perspective of how it can best assist the Tribunal in its decision making process.

1. Which market(s) are relevant to a consideration of the authorisation application?
2. What economic principles, if any, are relevant in identifying public benefits? When is a benefit "private" rather than "public", and when is a benefit both private and public?
3. What economic principles apply in relation to collective bargaining conduct? Applying those principles, what are the public benefits and public detriments, if any, that would result or be likely to result from collective bargaining conduct?
4. Applying the principles discussed in Questions 2 and 3, what are the public benefits, if any, that would result or be likely to result from the Proposed Collective Bargaining Conduct, and what is their magnitude?
5. PNO contends that the Proposed Collective Bargaining Conduct is a form of cartel conduct that is presumptively harmful (and therefore requires a substantial net public benefit before it is authorised). What is the likely harm from the Proposed Collective Bargaining Conduct?

Assumptions for report

9. Please make the following assumptions in preparing your report:

1. Assume that coal produced by coal producers in the Hunter Valley region is mostly exported

2. Assume that coal producers in the Hunter Valley region compete with numerous suppliers in other countries
3. Assume that coal producers in the Hunter Valley region are price takers in an international market for thermal coal
4. Assume that in the context of community debate as to the future of coal mining, the outlook for Australian coal exports is uncertain
5. Assume that PNO derives a very high percentage of its revenue from servicing coal producers in the Hunter Valley region in their coal exports
6. Assume that the Port of Newcastle is the nearest suitable port through which coal producers in the Hunter Valley region can export their coal
7. Assume that coal producers in the Hunter Valley region have access to and use an established logistics system to move coal from their mines to the Port of Newcastle
8. Assume that such a logistics system would not be available to serve an alternative port and would not be developed by coal producers in the Hunter Valley region in response to a 5% SSNIP in the cost of port services
9. Assume that most of the coal produced in the Hunter Valley region is thermal coal and that this is used mainly for electricity generation
10. Assume that metallurgical coal is used in steel-making
11. Assume that metallurgical coal is not a close substitute for thermal coal
12. Assume that Australian thermal coal is sold to countries such as Japan, China, South Korea and Taiwan
13. [**CONFIDENTIAL**] [redacted]
14. Assume that the vessel agents pay the navigation charges when a ship comes into the Port of Newcastle, but that the coal producers pay the wharfage fee
15. Assume that some coal produced in the Hunter Valley region is sold domestically, that is, within the region
16. Assume it is unlikely that local coal users would source coal from outside of the region in response to a small but significant non-transitory increase in the price of locally supplied coal

Practice Note

10. Please read the Expert Evidence Practice Note GPN EXPT of the Federal Court of Australia, a copy of which is **attached** to this letter.

11. Once we have had an opportunity to consider your draft report, we will arrange a conference with you.

12. Please do not hesitate to contact us if you have any queries.

Yours sincerely

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FEDERAL COURT OF AUSTRALIA

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"), including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) **t**he agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Attachment 3

Documents and other materials briefed to Dr Smith

Document Title	Date	Confidential
ACCC Determination		
ACCC Determination of Application for authorisation AA1000473 lodged by NSW Minerals Council and mining companies	27 August 2020	No
Submissions to the ACCC		
NSW Minerals Council Application for Authorisation and submission (including Confidential Annexure 5)	5 March 2020	Part Confidential
Port Waratah Coal Services (**PWCS**) submission on Interim authorisation application	18 March 2020	No
Yancoal Australia Ltd submission on Interim authorisation application	18 March 2020	No
Port of Newcastle Operations Pty Ltd (**PNO**) submission on Interim authorisation application	18 March 2020	Part Confidential
Whitehaven Coal Record of oral submission on Interim authorisation application	18 March 2020	No
NSW Minerals Council response to PNO submission on Interim authorisation application	25 March 2020	No
Hunter Valley Coal Chain Coordinator submission on authorisation application	3 April 2020	No
PWCS submission on authorisation application	3 April 2020	No
Yancoal Australia Ltd submission on authorisation application	3 April 2020	No
PNO submission on authorisation application	7 April 2020	No
Port Authority of NSW submission on authorisation application	16 April 2020	No
NSW Minerals Council response to interested parties submissions on authorisation application	30 April 2020	No
NSW Minerals Council response to ACCC request for information	15 May 2020	No
PWCS submission on draft authorisation determination	10 July 2020	No
PNO submission on draft authorisation determination	10 July 2020	Part Confidential
NSW Minerals Council response to PNO submission on draft authorisation determination	17 August 2020 (received 18 August 2020)	Part Confidential
Documents before the Tribunal		
Application by PNO (confidential version)	17 September 2020	Part Confidential
Tribunal Directions	25 November 2020	No

Tribunal Memorandum	30 November 2020	No
PNO's SOFIC (confidential version)	14 December 2020	Part confidential
NSWMC's SOFIC	28 January 2021	No
ACCC's SOFIC (confidential version)	8 February 2021	Part confidential
ACCC's Issues List	8 February 2021	No
Port Authority of NSW Submission	25 February 2021	No
Port Services Agreement – Confidential Attachment 1 to Port Authority of NSW Submission	17 December 2013	Yes
Harbour Management System Access Agreement – Confidential Attachment 2 to Port Authority of NSW Submission	17 December 2013	Yes
Tribunal Directions	9 March 2021	No
Affidavit of Simon Byrnes (confidential version)	15 March 2021	Yes
Affidavit of Bruce Lloyd	15 March 2021	No
Affidavit of Gabriella Sainsbury (confidential version)	15 March 2021	Yes
Tribunal Directions	12 April 2021	No
Other Documents		
Producer Pro Forma Long Term Pricing Deed	Undated	No
Vessel Agent Pro Forma Long Term Pricing Deed	Undated	No
Qantas Airways Limited [2004] ACompT 9	16 May 2005	No
Application by Tabcorp Holdings Limited [2017] ACompT 1	22 June 2017	No
ACCC Table of Producer-specific fees and charges	24 March 2021	No
ACCC Revised Table of Producer-specific fees and charges	1 April 2021	No