

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Statement of Facts, Issues and Contentions

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



REGISTRAR

Dated: 8/02/2021 4:24 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.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

Re: 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

Applicant: Port of Newcastle Operations Pty Limited [ACN 165 332 990]

**THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S STATEMENT OF
FACTS, ISSUES AND CONTENTIONS**

A. OVERVIEW OF THE PROCEEDING

1. This proceeding is an application for review, under s 101 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**), of a determination by the Australian Competition and Consumer Commission (**ACCC**) under s 88(1) of the CCA, to authorise the NSW Minerals Council (**NSWMC**) and other mining companies exporting goods through the Port of Newcastle (**Port**), to negotiate collectively with Port of Newcastle Operations Pty Limited (**PNO**) in relation to the terms and conditions of access, including price, to the Port for a period of ten years ending 30 September 2030.
2. There are three parties to the proceeding.
3. The NSWMC applied to the ACCC for authorisation on behalf of itself and ten coal producers that export coal through the Port (all collectively defined as the **Authorisation Applicants**).¹
4. PNO is the current applicant for review. It is the target of the proposed collective bargaining conduct for which authorisation was sought, and it participated in the ACCC's public consultation in respect of the Authorisation Applicants' application to the ACCC. PNO is described further below.
5. The ACCC is responsible for the enforcement of the CCA. Under s 88 of the CCA, it has the power to determine whether to grant an authorisation to a person to engage in conduct that would or might contravene a provision of Part IV of the CCA. Once a person applies to

¹ The ten coal producers are: Glencore Coal Assets Australia Pty Limited, Yancoal Australia Limited, Peabody Energy Australia Pty Ltd, Bloomfield Collieries Pty Ltd, Centennial Coal Company Limited, Malabar Coal Limited, Whitehaven Coal Mining Limited, Hunter Valley Energy Coal Pty Ltd, Idemitsu Australia Resources Pty Ltd, and MACH Energy Australia Pty Ltd.

the Tribunal for review of the ACCC's determination, for the purposes of the review, the Tribunal may perform all the functions and exercise all the powers of the ACCC. In a Tribunal review, the ACCC is not a party or protagonist in the proceeding. Its role is to assist the Tribunal in an impartial manner, regardless of any conclusions it may have drawn from its earlier analysis in the matter.² Its role in this review is to assist the Tribunal to reach, in the public interest, the correct or preferable decision.

B. THE CONDUCT SOUGHT TO BE AUTHORISED

6. The Authorisation Applicants sought authorisation from the ACCC, on 6 March 2020, to:
 - 6.1. 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;
 - 6.2. discuss amongst themselves matters relating to the above discussions and negotiations; and
 - 6.3. 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**).³
7. The Authorisation Applicants sought authorisation on the basis that the Proposed Collective Bargaining Conduct may:
 - 7.1. involve a cartel provision within the meaning of Division 1 of Part IV of the CCA; and
 - 7.2. substantially lessen competition within the meaning of s 45 of the CCA.
8. The Proposed Collective Bargaining Conduct:
 - 8.1. is voluntary for all parties, including PNO;⁴
 - 8.2. does **not** include collective boycott activity;⁵ and
 - 8.3. does **not** include the Authorisation Applicants sharing competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users.⁶
9. The Authorisation Applicants sought authorisation to negotiate "all terms of access to the Port that are practically necessary or otherwise desirable for their export task involving the use of the channel and berth facilities at the Port"⁷ and "under the contractual framework

² Application by Flexigroup Limited [2020] ACompT 1 at [20]

³ NSW Minerals Council (**NSWMC**) application for authorisation AA1000473, 6 March 2020, paragraph 3.1.

⁴ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 3.4.

⁵ NSWMC application for authorisation AA1000473, 6 March 2020, paragraphs 3.2.

⁶ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 6.2.

⁷ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 1.4.

put forward by PNO”.⁸ The focus of the application was access charges that apply to coal vessels entering the channels and berthing at the Port – namely, the **Navigation Service Charge** and **Wharfage Charge** set by PNO. The Authorisation Applicants also sought to collectively discuss and negotiate other common industry issues within the Producer Deed (as defined in paragraph 42 below) with PNO, including:

- 9.1. pricing mechanisms under the Producer Deed, e.g., the inclusion of user-funded expenditure in PNO’s capital base;⁹
 - 9.2. PNO’s capital expenditure forecasts at the Port and the impact on prices paid by coal producers, either directly or indirectly;¹⁰
 - 9.3. PNO’s proposed annual price adjustments under the Producer Deed;¹¹ and
 - 9.4. the nature of the expenditure that PNO states it intends to make in developing a new container terminal at the Port, and the associated basis of how costs and charges are proposed to be allocated among Port users.¹²
10. The Authorisation Applicants sought authorisation on behalf of themselves and “future access seekers / Port users” that choose to participate in the proposed collective bargaining group in the future.¹³ The Authorisation Applicants advised the ACCC that the proposed collective bargaining group will primarily comprise coal mining companies, but it could conceivably include other mining company members of the NSWMC. The class of persons proposed to engage in the Proposed Collective Bargaining Conduct is confined to mining companies.¹⁴
11. Under the Proposed Collective Bargaining Conduct, each coal producer can independently determine whether to accept any negotiated terms and conditions offered by PNO following collective negotiations. Each coal producer may undertake independent negotiations with PNO at any time, should they wish to do so.¹⁵
12. The Authorisation Applicants requested authorisation for ten years.¹⁶

C. THE ACCC DETERMINATION

C.1 Interim Authorisation

13. On 2 April 2020 the ACCC granted interim authorisation under s 91(2) of the CCA to enable the Authorisation Applicants to commence collective discussions amongst themselves and

⁸ NSWMC submission, 30 April 2020, p. 9.

⁹ NSWMC submission to the ACCC, 30 April 2020, pp 2, 3, 7.

¹⁰ NSWMC submission to the ACCC, 30 April 2020, p. 7.

¹¹ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 1.10.

¹² NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 1.12.

¹³ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 3.5.

¹⁴ NSWMC submission, 15 May 2020, paragraph 2.5.

¹⁵ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 1.33.

¹⁶ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 3.9.

negotiations with PNO in relation to the terms and conditions of access, including price, to the Port. This did not extend to entering into any collectively negotiated agreements.

14. The Authorisation Applicants advised the ACCC that they wrote to PNO to request an initial meeting to commence negotiations.¹⁷ PNO declined to meet.
15. On 2 April 2020, the ACCC granted interim authorisation until the date on which the ACCC's final determination comes into effect or until the interim authorisation is revoked.

C.2 The ACCC Determination

16. On 27 August 2020, the ACCC issued a final determination in respect of the Proposed Collective Bargaining Conduct until 30 September 2030 (the **ACCC Determination**).
17. The ACCC Determination authorised the Authorisation Applicants and other mining companies requiring access through the Port to:
 - 17.1. 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;
 - 17.2. discuss amongst themselves matters relating to the above discussions and negotiations; and
 - 17.3. 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.¹⁸
18. It did **not** authorise:
 - 18.1. the Authorisation Applicants or other mining companies requiring access through the Port to engage in any collective boycott activity; or
 - 18.2. the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/capacity projections for individual users.¹⁹
19. Due to PNO's application to the Tribunal, the ACCC Determination did not come into effect. As a consequence, the interim authorisation remains in place.

¹⁷ NSWMC submission, 15 May 2020, paragraph 2.16.

¹⁸ See ACCC Determination, paragraphs 1.3 – 1.6, 5.1 – 5.3, 5.7.

¹⁹ See ACCC Determination, paragraphs 1.4 – 1.5, 4.95, 5.10.

D. INDUSTRY BACKGROUND

D.1 The Port

20. The Port is the largest bulk shipping port on Australia's east coast, and Australia's largest terminal for coal exports.²⁰ Newcastle Harbour includes 20 operational berths, 11 of which are allocated to handling a range of cargoes and nine of which are dedicated to the handling of coal.²¹ PNO has the ability to more than double current shipping movements using the existing deep water shipping channel and 200 hectares of vacant Port land.²² The total land holdings of the Port are 792 hectares.²³
21. In 2019, there were 2,296 ship visits to the Port.²⁴ Coal represents 96 per cent (165.25 million mass tonnes) of the all commodities exported from the Port.²⁵ Other commodities exported via the Port include ammonia, metal concentrates, general cargo, aluminium, pitch and tar products, steel and wheat.²⁶
22. A commercial vessel must obtain a right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.
23. Access is provided on an open access basis. To obtain access rights to the Port Channel and berthing services and facilities, a vessel operator must submit a Vessel Berthing Application to PNO and the Port Authority of NSW.²⁷ In its Vessel Standard Terms and Conditions, PNO undertakes to grant the vessel access to the Port Channel, allocate the vessel a berth in the Port and grant the vessel access to and use of facilities and services.²⁸

²⁰ Transport NSW website: <https://www.transport.nsw.gov.au/data-and-research/freight-data/port-of-newcastle>, viewed on 10.12.20.

²¹ Port Authority of NSW website, <https://www.portauthoritynsw.com.au/newcastle-harbour/port-services-facilities/>, viewed on 10.12.20.

²² PNO, *The Port of Newcastle – Economic Impact Report 2016-17*, p. 2 and 3: <https://www.portofnewcastle.com.au/wp-content/uploads/2019/09/ECO-011-Port-of-Newcastle-Economic-Impact-Report-V4--SK-v6.pdf>, viewed on 28.01.21.

²³ NSWMC application for authorisation AAA1000473, 6 March 2020, paragraph 1.14.

²⁴ PNO, *Port of Newcastle 2019 Trade Report*, p. 2: <https://www.portofnewcastle.com.au/wp-content/uploads/2020/05/Port-of-Newcastle-Annual-Trade-Report-2019.pdf>, viewed on 3.02.21.

²⁵ PNO, *Port of Newcastle 2019 Trade Report*, p. 2: <https://www.portofnewcastle.com.au/wp-content/uploads/2020/05/Port-of-Newcastle-Annual-Trade-Report-2019.pdf>, viewed on 3.02.21.

²⁶ PNO, *Port of Newcastle 2019 Trade Report*, p. 3: <https://www.portofnewcastle.com.au/wp-content/uploads/2020/05/Port-of-Newcastle-Annual-Trade-Report-2019.pdf>, viewed on 3.02.21.

²⁷ PNO website: <https://www.portofnewcastle.com.au/what-we-do/port-open-access-arrangements/vesselopenaccess/>, viewed on 10.12.20.

²⁸ PNO, *Vessel Standard Terms and Conditions, Version 1*, paragraph 8.1: <https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/Vessel-Standard-Terms-and-Conditions.pdf>, viewed on 14.12.20.

D.2 PNO

24. PNO became Port operator in May 2014, following privatisation by the NSW Government. It controls the terms and conditions of access at the Port under a 98 year lease arrangement from the NSW Government, as trustee for the Port of Newcastle Unit Trust.
25. As the operator of the Port, and under the terms of its lease, PNO can exercise the powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**). Six types²⁹ of port charges can be fixed and levied, including most relevantly:³⁰
 - 25.1. the Navigation Service Charge (see paragraph 37 below), which is payable in respect of general use by a vessel of the Port and its infrastructure; and
 - 25.2. the Wharfage Charge (see paragraph 38 below), which is payable in respect of the availability of a site at which stevedoring operations may be carried out.
26. In accordance with Part 5 of the PAMA Act:³¹
 - 26.1. PNO has the power to fix and collect the Navigation Service Charge, Wharfage Charges or site occupation charges without Ministerial approval;
 - 26.2. PNO has the power, concurrently with the Minister, to fix and collect port infrastructure charges, although Ministerial approval is required under the lease; and
 - 26.3. PNO does not fix or collect pilotage charges, port cargo access charges and berthing charges to port users.
27. PNO is currently responsible for a number of functions at the Port, including management of port land, wharf and berth services, maintenance of port assets, vessel scheduling and finance.³²

D.3 The Port and the Hunter Valley coal export supply chain

28. The Port is a critical part of the coal export supply chain that involves an extensive rail network from multiple mine sites in the Hunter Valley, Gunnedah Basin, Gloucester Basin, and parts of the Western coalfield.³³
29. There are more than 35 active coal mines operated by 11 coal producers that export through Newcastle, as well as other coal projects in various stages of exploration and development.³⁴

²⁹ Other charges provided for by Part 5 include pilotage charges, port cargo access charges, site occupation charges, berthing charges, and port infrastructure charges.

³⁰ PNO application for review by the Tribunal, 17 September 2020, p. 4.

³¹ PNO application for review by the Tribunal, 17 September 2020, p. 4.

³² PNO website: <https://www.portofnewcastle.com.au/about-our-port/>, viewed on 10.12.20.

³³ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 2.1.

³⁴ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 2.5.

30. Exporting coal from the Port, excluding the coordination of supply chain logistics between the mines and landside coal loading terminals,³⁵ involves bulk carrier vessels entering the Port, transiting the channels in the Port, tying up at terminal berths, being loaded with coal via ship loading systems from stockpiles, and then once again transiting the channels before exiting the Port.
31. Coal from the Port is exported to around 20 countries, primarily in Asia. Japan is the largest customer of coal from Newcastle, receiving 44 per cent of exports. China, Korea and Taiwan currently account for a further 44 per cent.³⁶ In 2018-19, 161 million tonnes (96 per cent of NSW coal) was exported through the Port with the remainder exported through Port Kembla.³⁷
32. The Hunter Valley coal export supply chain is the largest coal export operation in the world. This chain is made up of coal producers (mines), rail haulage providers,³⁸ the Australian Rail Track Corporation (**ARTC**) as the owner of the track, three coal export terminals (owned by Port Waratah Coal Services and Newcastle Coal Infrastructure Group), port managers, and the Hunter Valley Coal Chain Coordinator (**HVCCC**).
33. There are three coal terminals at Newcastle Port,³⁹ which receive coal from the mines, stockpile it and load it onto vessels for export. The Newcastle Coal Infrastructure Group (NCIG)⁴⁰ owned terminal is located on Kooragang Island at the Port, and Port Waratah Coal Services (PWCS)⁴¹ owns the Carrington Coal Terminal,⁴² and PWCS Kooragang Island Coal Terminal.⁴³

³⁵ The Proposed Collective Bargaining Conduct does not relate to coal chain logistics coordination in rail or at the coal loading terminals at the Port themselves.

³⁶ NSWMC e application for authorisation AA1000473, 6 March 2020, paragraph 2.3.

³⁷ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 2.1.

³⁸ There are currently four rail operators providing rail haulage services to coal producers in the Hunter Valley coal chain – Pacific National, Aurizon, Genesee & Wyoming and Southern Shorthaul Railroad.

³⁹ Owned by Newcastle Coal Infrastructure Group (NCIG) and Port Waratah Coal Services (PWCS).

⁴⁰ NCIG is located on Kooragang Island and is the newest of the three terminals, beginning operations in 2010. NCIG has a total handling capacity of 66 million tonnes per annum. NCIG shareholders are: BHP, Yancoal, Whitehaven Coal, Peabody, and Centennial Coal. NCIG website: <https://www.ncig.com.au/business/shareholders>, viewed on 10.12.20.

⁴¹ PWCS is an unlisted public company. Its shareholders comprise a mixture of Hunter Valley coal producers and Japanese coal customers: PWCS website: <https://www.pwcs.com.au/who-we-are/about-us/>, viewed on 14.12.20.

⁴² PWCS began operating what is now Carrington Coal Terminal in 1976. It has a total handling capacity of 25 million tonnes per annum.

⁴³ Kooragang Island began operating in 1984 and has expanded to reach a total handling capacity of 120 million tonnes per annum.

D.4 Investment in expanding the Port

34. PNO has stated in its schedule of service charges (effective from 1 January 2020) that, from 1 January 2021, the published Navigation Service Charge and Wharfage Charge for coal vessels may be increased to reflect additional investment at the Port.⁴⁴
35. In August 2018, PNO announced its intention to develop a container terminal at the Port.⁴⁵

D.5 Current access charges and contracting at the Port

36. PNO controls the terms and conditions of access at the Port. It publishes a schedule of service charges that apply to the commercial use of the Port, in accordance with the PAMA Act and *Ports and Maritime Administration Regulations 2012* – including, a **Navigation Service Charge** and **Wharfage Charge**.⁴⁶ PNO may vary this schedule from time to time, including varying or introducing new fees, subject to it providing ten business days' notice on its website before it takes effect.⁴⁷
37. **Navigation Service Charge** means the charge levied by PNO under s 50 of the PAMA Act upon a vessel's entry to the Port of Newcastle for the general use of the Port and its infrastructure – excluding the use of a pilot, the use of land based port facilities, and the port access for cargo at the interface between the vessel and land-based facilities for the purpose of stevedoring operations. This charge is paid in addition to any Wharfage Charge, Site Occupation Charge and any other fee (for example, Non-Standard Vessel Charges). The charge is payable by the owner of the vessel and is calculated by reference to the gross tonnage of the vessel.⁴⁸
38. **Wharfage Charge** means the charge levied by PNO under s 61 of the PAMA Act for the availability of a site at which stevedoring operations can be carried out. For vessels being loaded at a site, the charge is payable by the owner of the cargo (immediately prior to the cargo being loaded). This charge is calculated by reference to the quantity of cargo loaded or unloaded at the site (unless the PAMA Regulations say otherwise).⁴⁹
39. As an alternative to its published schedule of service charges, at the end of 2019 PNO invited coal producers, vessel agents, vessel operators and FOB coal consignees to enter into bilateral long term pro forma pricing arrangements (or deeds).

⁴⁴ PNO, [Schedule of Service Charges, Version: 13 March 2020](#), p. 6.

⁴⁵ PNO, [New CEO commits Port of Newcastle to developing world-class container terminal](#), 1 August 2018. Relatedly, the ACCC also notes that judgment in proceeding NSD 2289 of 2018 is currently reserved by Her Honour Justice Jagot. The ACCC considers that judgment in that proceeding is unlikely to substantially affect any of the matters for consideration by the Tribunal in this proceeding.

⁴⁶ PNO, [Schedule of Service Charges, Version: 13 March 2020](#), p. 2.

⁴⁷ PNO, [Schedule of Service Charges, Version: 13 March 2020](#), p. 3.

⁴⁸ This definition is compiled from s 50 of the PAMA Act and from Port of Newcastle, *Schedule of Service Charges, version 13 March 2020*, p. 6.

⁴⁹ This definition is compiled from s 50 of the PAMA Act and from Port of Newcastle, *Schedule of Service Charges, version 13 March 2020*, p. 7.

40. The Producer Pro Forma Long Term Pricing Deed (the **Producer Deed**)⁵⁰ is for an initial term of ten years and sets out the following ‘producer specific charges’ for covered vessels transporting producers’ coal at the Port:
- 40.1. **Navigation Service Charge** – currently **A\$0.81** per vessel gross tonne (adjusted annually); and
 - 40.2. **Wharfage Charge** – currently **\$0.08** per revenue tonne of producer coal loaded onto a covered vessel (adjusted annually).
41. Under the current Producer Deed, a variation to the charges covered by the Producer Deed can be made once a year, up to the greater of 4 per cent or CPI (which over the twelve months to the September 2020 quarter rose 0.7 per cent)⁵¹ in any year of the term. A variation can only be made over and above the 4 per cent or CPI increase where it is ‘Material’ (as that term is defined in the Template Producer Deed) and meets certain pricing principles.⁵²
42. Other features of PNO’s Producer Deed include:
- 42.1. Annual price adjustments (clause 7 of the Producer Deed) – at the **beginning** of each contract year, PNO will apply an annual price adjustment of the navigation service and wharfage charges (see paragraph 41 above). It may also vary producer charges following arbitration of a pricing dispute (under the Producer Deed) or in accordance with PNO’s projected five year capital expenditure.
 - 42.2. Notice of variations to proposed producer charges (clause 8 of the Producer Deed) – PNO will provide no less than 45 days’ written notice of variations to producer changes at the Port. Coal producers may object to a price variation by lodging a Price Variation Objection Notice within 14 days. This triggers a dispute resolution process that ultimately leads to arbitration if unresolved by negotiation and mediation.
 - 42.3. Non-discriminatory pricing (clause 5 of the Producer Deed) – PNO commits to not discriminate adversely against any coal producer on price.
 - 42.4. Consultation in relation to efficiency improvements and capital expenditure at the Port (clause 10 of the Producer Deed) – PNO will meet coal producers with executed Producer Deeds at least twice in any contract year to consult on the following matters:
 - 42.4.1. efficiency improvements to vessel services that PNO could make, and
 - 42.4.2. PNO’s delivery of vessel services – including capital expenditure, proposed variations to fees and charges, PNO’s cost of operations, a coal producer’s

⁵⁰ See Producer Deed: [https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020 .pdf](https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020.pdf).

⁵¹ Australian Bureau of Statistics, *Consumer Price Index Australia*, see: <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release>, viewed on 07.12.20.

⁵² PNO submission, 7 April 2020, paragraphs 13, 40.

future needs (including the producer's forecast coal volumes to be shipped from the Port for the next six months) and any other matter agreed between a coal producer and PNO.

43. The Producer Deed and the Vessel Agent Pro Forma Long Term Pricing Deed (**Vessel Agent Deed**)⁵³ contain very similar clauses, and both offer a ten year discounted Navigation Service Charge of \$0.81 per vessel gross tonne. However, the Producer Deed covers the Navigation Service charge and the Wharfage Charge (defined by PNO as 'Producer Specific Charges' under the Producer Deed), while the Vessel Agent Deed only covers the Navigation Service Charge. Both the Producer Deed and the Vessel Agent Deed contain a non-discriminatory pricing commitment from PNO.⁵⁴
44. Practically, it is the terms and conditions of the Producer Deed that the Authorisation Applicants seek to collectively negotiate with PNO.

D.6 Coal producers' economic interest in Port access charges

45. The Authorisation Applicants advised the ACCC that PNO has previously disputed whether coal producers are entitled to negotiate with it in relation to Port service charges due to the nature of contractual arrangements between coal producers and overseas coal customers.⁵⁵ Under these contractual arrangements, coal customers typically pay the navigation service charge, as follows:
 - 45.1. Coal customers typically engage (charter) a vessel operator to transport their coal from the Port.⁵⁶
 - 45.2. Vessel operators typically appoint vessel agents to deal with PNO on their behalf in respect of a vessel's visit to the Port, including the payment of applicable port charges. PNO generally does not deal directly with the vessel operators.⁵⁷
 - 45.3. The vessel agent receives the navigation service charge invoice from PNO, together with details about the vessel's visit and gross tonnage loaded, and then pays the invoice to PNO on behalf of its principal (the vessel operator).⁵⁸
46. The coal producer may also be the charterer of the vessel.⁵⁹
47. Regardless of the nature of these contractual arrangements, Hunter Valley coal producers have an economic interest in the Port service charges. Such charges are part of the total delivered cost of Hunter Valley coal to international destinations. As Hunter Valley coal producers sell coal in competition with producers in other locations, an increase in Port service charges makes Hunter Valley coal more expensive relative to alternatives available

⁵³ See Vessel Agent Deed: [https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020 .pdf](https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020.pdf).

⁵⁴ Clause 5 of the Producer Deed and Vessel Agent Deed.

⁵⁵ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 1.6.

⁵⁶ PNO submission, 7 April 2020, paragraphs 48 – 49.

⁵⁷ PNO submission, 7 April 2020, paragraphs 48 – 49.

⁵⁸ PNO submission, 7 April 2020, paragraphs 48 – 49.

⁵⁹ PNO submission, 7 April 2020, paragraphs 48 – 49.

to international buyers. If Hunter Valley coal producers do not reduce their prices in response to an increase in Port service charges, they risk selling less coal. If Hunter Valley coal producers reduce their prices to offset (either partially or fully) an increase in Port service charges, they will make lower profits on the coal they sell. Either way, Hunter Valley coal producers have an economic interest in the Port service charges.

48. PNO's conduct in offering to engage in bilateral negotiations with coal producers in relation to Producer Specific Charges and other terms within the Producer Deed appears to acknowledge those producers' economic interest in the Port service charges.

E. ISSUES AND ACCC CONTENTIONS

49. The ACCC considers the following issues are central to the Tribunal's assessment:

49.1. **Issue 1:** how does the Tribunal properly exercise its functions in this review?

49.2. **Issue 2:** in assessing public benefits and detriments, what is the relevant market(s) in which to assess the competitive effects of the Proposed Collective Bargaining Conduct?

49.3. **Issue 3:** what are the likely public benefits of the Proposed Collective Bargaining Conduct?

49.4. **Issue 4:** what are the likely public detriments of the Proposed Collective Bargaining Conduct?

49.5. **Issue 5:** how should the benefits and detriments be balanced? Is the net public benefit test in s 90(7)(b) met by the Proposed Collective Bargaining Conduct?

49.6. **Issue 6:** if the test is met, how should the Tribunal exercise its discretion? Should the conduct be authorised? Should any conditions be imposed?

49.7. **Issue 7:** if authorisation is granted, what is the appropriate period of authorisation?

50. The resolution of these seven issues will ultimately determine whether the Tribunal should affirm, set aside, or vary the ACCC Determination.⁶⁰ The ACCC understands that Issues 1 and 7 are not in dispute before the Tribunal.

51. In addition, the following significant issues of principle arise from the SOFICs filed by PNO and the NSWMC:

51.1. What is the significance, if any, of PNO's statement of intention not to participate in collective negotiations with coal producers?⁶¹

⁶⁰ Section 102(1) of the CCA.

⁶¹ PNO SOFIC, 14 December 2020, paragraph 51. See PNO application for review by the Tribunal, 17 September 2020, paragraph 43.

- 51.2. Are improvements in the terms and conditions of Port access, or the reduction of transaction costs in negotiating such terms and conditions, a private benefit or a public benefit?⁶²
- 51.3. As the Proposed Collective Bargaining Conduct involves cartel conduct, which is said by PNO to be presumptively harmful, should the Tribunal decline to exercise its discretion to authorise the Proposed Collective Bargaining Conduct unless it is likely to result in a substantial net public benefit?⁶³
52. The ACCC considers that PNO's contentions in relation to the first and third of these issues (as outlined in paragraphs 51.1 and 51.3 respectively) are incorrect. The ACCC also considers that it would be open to the Tribunal to reject PNO's contention in relation to the second issue (as outlined at paragraph 51.2 above). These issues are addressed in more detail below. Subject to inquiries and directions from the Tribunal as to how it would be best assisted by the ACCC, and in light of the SOFICs filed by PNO and NSWMC, the ACCC anticipates its primary focus to be on these three issues.

Issue 1: The Tribunal's function

53. The ACCC does not understand there to be any dispute between the parties to this review as to the Tribunal's function. The relevant principles are as follows.
54. Section 101(2) provides that this review by the Tribunal under s 101(1) is a re-hearing of the matter. The Tribunal must undertake a complete rehearing of the application for authorisation based on the material before it.⁶⁴ It is not the Tribunal's role merely to resolve issues in dispute between the parties.⁶⁵ The Tribunal must engage in a re-hearing in the fullest sense and reach its own conclusions on the material before it,⁶⁶ rather than examining factual or other conclusions reached by the ACCC. The Tribunal's review is not a review of whether what the ACCC had determined was right or wrong on the material before it.⁶⁷ It is the ACCC Determination, not the published reasons, which is the subject of review before the Tribunal.⁶⁸
55. In performing this re-hearing function, the Tribunal must apply s 90(7) of the CCA. Section 90(7)(b) provides that authorisation must not be granted unless the Tribunal is satisfied in all the circumstances that:
- (i) the conduct would result, or be likely to result, in a benefit to the public;
and

⁶² PNO SOFIC, 14 December 2020, paragraph 58(d).

⁶³ PNO SOFIC, 14 December 2020, paragraph 63(a).

⁶⁴ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [135], [138]; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [135].

⁶⁵ *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41,453.

⁶⁶ CCA s 101(2); *Re Media Council of Australia (No 2)* (1987) 88 FLR 1; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR ¶41-357 at 42,654; *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,524 [138].

⁶⁷ *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295-296; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [135].

⁶⁸ *Re Applications by Australasian Performing Right Association Ltd* [1999] ACompT 3 at [27].

- (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

56. In applying the statutory test for authorisation, the Tribunal compares the likely future with the conduct for which authorisation is sought, with the likely future without such conduct.⁶⁹ This is not the same as comparing a future in which the proposed conduct is authorised against a future in which it is not authorised.⁷⁰
57. The Tribunal is to identify the benefits and detriments, or the *likely* benefits and detriments, of the proposed conduct on the basis of the materials before it in this matter, and determine whether the test in s 90(7)(b) is met.
58. The power to grant authorisation is discretionary.⁷¹ In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the CCA.⁷² Proper identification of likely benefits and detriments is also important as it may influence the Tribunal's consideration of its discretion and the content of any conditions it may wish to consider appropriate to specify.

Issue two: Relevant market

59. A market is an area or space of close competition between firms or the field of rivalry between them.⁷³ Markets are defined to focus analysis by situating conduct in an area of competitive activity by reference to the four dimensions of product, geography, functional level and time.⁷⁴
60. Neither PNO nor the NSWMC has expressly called into question the ACCC's description of the area of competition most relevant to the application for authorisation, although it may be that PNO intended to do so by referring in its SOFIC to a global market for the supply of thermal coal.⁷⁵
61. In the ACCC Determination, the ACCC stated that the most relevant area of competition affected by the Proposed Collective Bargaining Conduct is competition for access to port services at the Port which are owned and operated by PNO. The ACCC said this includes

⁶⁹ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117]; *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41-453; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [137].

⁷⁰ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

⁷¹ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106]; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [138]

⁷² *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522 [126].

⁷³ *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 513, referred to with approval in *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2002) 215 CLR 374 at [133] (Gleeson CJ and Callinan J), [248] (McHugh J); *Flight Centre* at [66] (Kiefel and Gageler JJ).

⁷⁴ *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] FCA 826; (2006) ATPR 42-123 at 45,243, [429] (Allsop J, as his Honour then was); *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 187 (Mason CJ and Wilson J); *Australian Competition and Consumer Commission v P. T. Garuda Indonesia Ltd* (2016) 224 FCR 42 190 at [110] (Dowsett and Edelman JJ).

⁷⁵ PNO SOFIC, 14 December 2020, paragraphs 22 – 26.

channel shipping services and wharfage, but does not include landside coal loading infrastructure, which is owned by other parties, or marine pilotage services.⁷⁶

62. The ACCC's view remains that this is the most relevant area of competition.
63. The product dimension of this market includes the following services:
 - 63.1. the use of (dredged and marked) shipping channels to enter and exit the Port;
 - 63.2. vessel scheduling; and
 - 63.3. wharf and berth services, PNO allocating a berth to a vessel and access to and use of the various associated facilities and services.
64. PNO is the sole supplier of these services.
65. The ACCC considers it is open for the Tribunal to conclude, and it appears to not be in dispute, that this market does **not** include:
 - 65.1. the delivery of coal at the coal loading terminals at the Port from mines;
 - 65.2. the stockpiling of coal at the coal loading terminals; and
 - 65.3. the loading of coal onto vessels, or marine pilotage services,
66. These services are not demand-side or supply-side substitutes for the port services listed above. Nor do they form part of the same functional market as the port services.
67. It is also open for the Tribunal to conclude, and it appears not to be in dispute, that the geographic scope of this market is limited to the Port, given its proximity to the relevant coalfields and coal producers' reliance on rail transportation of coal from mine to port. The next nearest port with coal loading facilities is Port Kembla. It is uneconomic to transport coal from the Hunter Valley region to Port Kembla because of the significant additional distance combined with restrictions on coal trains passing through the Sydney metropolitan rail network.
68. The ACCC previously concluded that the following areas of competition are, to a lesser extent, also affected by the Proposed Collective Bargaining Conduct:
 - 68.1. the acquisition and disposal of exploration and/or mining authorities in the Hunter Valley region (the Tenements Market); and
 - 68.2. the supply of specialist mining services such as geological and drilling services, and construction, operation and maintenance services in NSW.

⁷⁶ ACCC Determination, paragraph 4.7.

69. It is open for the Tribunal to accept the conclusions at 68.1 and 68.2, and it appears that these conclusions are not in dispute.

Issues 3, 4 and 5: Public benefits and detriments

Applicable principles

70. In assessing the application for authorisation, the Tribunal applies the net public benefit test under s 90(7)(b). The Tribunal will consider the likely public benefits and detriments flowing from the conduct for which authorisation is sought.
71. The CCA does not define “public benefit”. The Tribunal has previously described it as “anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress”.⁷⁷ For a benefit (or detriment) to be considered it needs to be sufficiently capable of exposition (rather than ephemeral or illusory).⁷⁸ Such benefits need not be quantifiable in monetary terms.
72. Similarly, the CCA does not define “public detriment”. The Tribunal has previously described public detriments as “any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency”.⁷⁹
73. The term “public” refers to the Australian public.⁸⁰ Identification of benefits or detriments to the public as benefits or detriments to the community generally does not mean that private benefits or detriments are irrelevant. The Tribunal has recognised that “encouragement or enabling of an individual to pursue legitimate ends or to attain legitimate rewards may well be beneficial to the community generally.”⁸¹ Further, even if savings are not passed on to end consumers in the form of lower prices, it remains open for the Tribunal to consider them to be public benefits,⁸² and such an approach is available to the Tribunal in this review.
74. For a benefit or detriment to be taken into account, the Tribunal must be satisfied that the benefit or detriment is “likely” in the sense that there is a real chance, and not a mere possibility, of it eventuating. A speculative or a theoretical possibility will not suffice.⁸³

⁷⁷ *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 508; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

⁷⁸ *Qantas Airways Ltd* [2005] ACompT 9 at [156]

⁷⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁸⁰ *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385.

⁸¹ See *In the Matter of the Application by Rural Traders Co-operative (W.A.) Ltd., Elder Smith Goldsbrough Mort Ltd., Wolf Boetcher and Ors., Farmers' Union of W.A. (Inc.) and Western Livestock Ltd* (1979) ATPR 40-110.

⁸² ACCC Guidelines for Authorisation of Conduct (non-merger), 5 March 2019, p. 48, at [8.8]: <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>

⁸³ *Qantas Airways Ltd* [2004] ACompT 9 at [156], quoted in *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [109].

Issue 3: Public benefits

Likely public benefit 1: Transaction cost savings⁸⁴

75. Each party to a negotiation and subsequent contract will incur transaction costs. Collective bargaining enables members of a bargaining group to share some or all of the transaction costs of preparing to negotiate and to avoid unnecessary duplication of costs to renegotiate, monitor and enforce the agreement. There are likely also to be cost savings for the target in undertaking a single negotiation over terms and conditions compared to a series of bilateral negotiations.
76. Transaction cost savings represent a (productive) efficiency improvement and are a public benefit in and of themselves. They can also facilitate allocative and dynamic efficiency improvements that result in further public benefits (also discussed below). For example, cost savings for a company may flow through to its shareholders or to its capacity to employ more people. For that reason, it is not correct to characterise such benefits as merely private benefits.⁸⁵
77. , The ACCC considers that it is open for the Tribunal to conclude that:
- 77.1. The Authorisation Applicants are likely to share the costs associated with preparing for and engaging in negotiations with PNO, including through identifying and discussing common contractual issues and sharing the costs of engaging expert advice and/or administrative services.
- 77.2. PNO is likely to face lower upfront costs in negotiating with the collective group of producers compared to engaging in a series of individual negotiations with each producer. These cost savings result from reducing the number and length of negotiations, and include lower legal, research, technical advisory and administrative costs.
- 77.3. PNO is likely to face lower ongoing negotiating costs because it has committed to twice yearly consultation with individual producers to discuss PNO's capital expenditure, any proposed variation to its fees and charges and PNO's costs of operations.

Likely public benefit 2: More efficient investment as a result of coal producers having greater and more informed input into the Producer Deed and reduced information asymmetry⁸⁶

78. Information asymmetry occurs when one party to a negotiation has access to relevant information that the other party lacks, including price and quality of the good or service. The party lacking information is not fully informed; is unable to make rational decisions on price, quantity and quality, and may accept less efficient terms than it would if more information

⁸⁴ See also NSWMC SOFIC, 28 January 2021, paragraph 99.

⁸⁵ PNO SOFIC, 14 December 2020, paragraph 58(d).

⁸⁶ See also NSWMC SOFIC, 28 January 2021, paragraphs 67 - 96.

were available to it. In these circumstances, the outcomes of negotiation may not capture many of the available efficiencies.

79. Collective bargaining can enable members of the bargaining group to become more informed and engaged in negotiations, improving their ability to convince the target of the merits of their position and hence have greater input into contracts. This can lead to terms of supply that are more comprehensive and that better reflect the circumstances of the group and the target business, resulting in more efficient outcomes.
80. Transaction cost savings (as described above) can result in more (allocative or dynamic) efficient outcomes because parties are willing to invest more in preparation for and participation in negotiations if the cost of doing so is lower.
81. The ACCC considers that it is open for the Tribunal to conclude that:
 - 81.1. Collective bargaining with PNO provides the Authorisation Applicants with confidence to accept an outcome that has been negotiated jointly. Individual Authorisation Applicants are likely to be reluctant to negotiate bilaterally with PNO over the terms of the Producer Deed due to a concern that other producers may obtain better terms and conditions than them. PNO's non-discriminatory pricing commitment is insufficient to address this concern because PNO can still discriminate between producers on other terms and conditions.
 - 81.2. Individual coal producers have less incentive to expend resources developing and proposing alternatives to terms and conditions in PNO's Producer Deed because the costs of doing so are likely to outweigh any expected savings. Further, the additional costs for PNO in having different contract terms with various producers are likely to exceed any benefits to it such that it acts as a disincentive for it to negotiate different terms and conditions with individual producers.
 - 81.3. Collective bargaining can make it viable for the Authorisation Applicants to invest jointly in developing and proposing alternative terms and conditions; including hiring expert advice or advocates.
 - 81.4. Collective bargaining can make it viable for the coal producers to identify changes to standard terms and conditions set out in the Producer Deed that benefit both themselves and PNO, or are at least neutral for PNO.
 - 81.5. Where coal producers have more efficient terms and conditions, they will make more efficient investment decisions in the exploration for and production of coal in the Hunter Valley.
 - 81.6. PNO has a full understanding of its reasonably expected costs in providing the relevant services over a ten-year period, whereas individual producers have less incentive than they would if acting collectively to expend resources (including hiring expert advisers) to try to develop a reasonable understanding to better inform bilateral negotiations.
 - 81.7. The Authorisation Applicants negotiating collectively, are likely to have greater and more informed input into the terms and conditions of the Producer Deed, resulting in

more efficient terms and conditions. There are also likely to be terms and conditions of the Producer Deed that could be changed to the mutual benefit of PNO and the Authorisation applicants (or at least that are neutral to PNO) but that PNO would not consider changing as part of a bilateral negotiation with one producer because it would be unsure if all producers would agree to the change and the cost of negotiating that separately with each producer would be prohibitively high.

Likely public benefit 3: Increased competitiveness of Hunter Valley export coal industry⁸⁷

82. The CCA recognises that increasing the international competitiveness of Australian industries is a public benefit.
83. There has been ongoing price uncertainty for navigation service charges at the Port of Newcastle for several years, with a wide range of outcomes proposed by PNO or determined in regulatory processes (summarised in **Annexure A** hereto).
84. Certain international customers have expressed a desire to have ongoing uncertainty over the level of the navigation service charge at the Port of Newcastle resolved in order to provide greater certainty over the delivered price of coal.⁸⁸
85. The Authorisation Applicants contend that the pricing mechanism set out under the Producer Deed does not provide them with pricing certainty. The Deed provides PNO with mechanisms by which it may adjust the price for use of the Port based on factors that are not detailed and based on capital expenditure that is solely within the determination of PNO. The Authorisation Applicants also consider that the Producer Deed provides very unclear mechanisms for users to ascertain the data needed to understand such changes or to dispute those charges. The Authorisation Applicants have sought to discuss those provisions as an industry, being the most efficient manner to discuss these concepts.⁸⁹
86. The ACCC considers that it is open for the Tribunal to conclude that:
 - 86.1. While coal customers, through contracts with vessel owners or agents, typically pay the navigation service charge, those charges also contribute to the total delivered cost of Hunter Valley coal. As such, coal producers' revenues and profits will be affected by changes in the level of this charge, because they will either reduce the volume of coal they supply or need to reduce their prices to keep the delivered price of their coal competitive with alternative suppliers.
 - 86.2. Any potential reduction in the navigation service charge would likely be a small proportion of the total delivered price of Hunter Valley coal. However, competition generally occurs at the margins. Accordingly, even a small reduction in the total delivered price can result in Hunter Valley coal producers being more competitive in international markets.

⁸⁷ See also NSWMC SOFIC, 28 January 2021, paragraph 98(a).

⁸⁸ Whitehaven Coal submissions to the ACCC, 18 March 2020.

⁸⁹ NSWMC application for authorisation AA1000473, 6 March 2020, paragraph 2.25.

86.3. There are a number of issues (in addition to the level of navigation service charges) that are more efficiently dealt with between PNO and all producers, rather than in a series of bilateral negotiations. Examples include: the extent and timing of any expansions of capacity at the Port, and the impacts (potentially including increased costs) of any new Port development on existing users, such as a new container terminal.

86.4. Resolving these issues through collective negotiation rather than a series of bilateral negotiations, where the same issues must be dealt with repeatedly, is likely to result in a more timely resolution, thereby providing savings for all parties involved, including PNO.

86.5. Collective bargaining can result in greater price certainty and more timely resolution of these other issues that fall within PNO's responsibilities because any outcomes will be agreeable to all parties. This could facilitate more efficient investment decisions for Hunter Valley coal producers and increase their international competitiveness.

87. [Redacted]

88. [Redacted]

88.1.1. [Redacted]

88.1.2. [Redacted]

88.1.3. [Redacted]

89. [Redacted]

PNO's refusal to negotiate

⁹⁰ PNO SOFIC, 14 December 2020, paragraph 58(a).

90. PNO contends that any authorisation will have no practical effect given that PNO would not engage in collective negotiations with the Authorisation Applicants, but rather will offer to undertake bilateral negotiations.⁹¹
91. PNO's contention is not relevant to the statutory test that the Tribunal must apply.
- 91.1. In applying the statutory test for authorisation, the Tribunal compares the likely future with the conduct for which authorisation is sought, with the likely future without such conduct.⁹² In this case, the conduct is the Proposed Collective Bargaining Conduct, as defined in the Authorisation Application.⁹³
- 91.2. Comparing the likely future with and without the Proposed Collective Bargaining Conduct is not the same as comparing a future in which the Proposed Collective Bargaining Conduct is authorised against a future in which it is not authorised.⁹⁴ The statutory test does not ask the Tribunal to determine whether the Proposed Collective Bargaining Conduct, if authorised, would occur in the future.
92. Further, PNO's contention disregards the dynamic nature of markets and the duties of directors to assess, from time to time, the facts relevant to any decision, and to act in the best interests of the company, at the time a decision arises, in light of those available facts.⁹⁵

Issue 4: Public detriments

Potential Public Detriment 1: Potential for Reduction in competition between Hunter Valley coal producers.

93. Information sharing in collective bargaining arrangements may be of concern if it increases the potential for the parties to co-ordinate their conduct beyond that for which authorisation is granted, for example, if it facilitates collusion or aligned behaviours in related markets such as the downstream supply of products or services to consumers.
94. Public detriment may result from collective bargaining arrangements if competition is reduced between members of the group as a result of acting collectively, or where the ability of businesses outside of the bargaining group to compete against the group is affected.
95. The ACCC notes that:
- 95.1. There is currently limited competition between the Authorisation Applicants in acquiring services from PNO given the nature of the pro-forma Producer Deed offered to them by PNO, and given the small incentives for Authorisation Applicants to engage in bilateral negotiations with PNO.

⁹¹ PNO submission to the ACCC, 7 April 2020, paragraph 5(c).

⁹² *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117]; *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41-453.

⁹³ NSW Minerals Council application for authorisation AA1000473, 6 March 2020, paragraph 3.1.

⁹⁴ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

⁹⁵ *Corporations Act 2001 (Cth)* s 181.

- 95.2. The proposed arrangements are voluntary, with coal producers free to enter collectively negotiated agreements with PNO or to seek to enter into bilateral discussions with PNO in relation to terms and conditions of long term access under the Producer Deed.
- 95.3. The authorisation extends to any mining companies that seek to access or use the Port and that choose to participate in the proposed collective bargaining group in the future. Future access seekers are not therefore excluded.
- 95.4. Approximately 90 per cent of Hunter Valley coal is exported, with the remainder sold domestically. Considering the substantial competition faced by the Authorisation Applicants from many other coal producers globally, there is very little, if any, scope for the Authorisation Applicants to influence world coal pricing.
- 95.5. The Proposed Collective Bargaining Conduct does not extend to collective negotiations or information sharing relating to the domestic supply of Hunter Valley coal.
96. The ACCC considers it is open for the Tribunal to conclude that:
- 96.1. The Proposed Collective Bargaining Conduct is unlikely to materially harm competition between coal producers in any relevant market, please see discussion on relevant markets at paragraphs 59 – 69 above.
- 96.2. Due to the confined purposes of the limited sharing of commercially sensitive material, the Proposed Collective Bargaining Conduct does not significantly increase the likelihood of collusion occurring in relation to matters for which authorisation is not being sought, or increase the likelihood of the members of the bargaining group sharing commercially sensitive information regarding downstream markets.

Potential Public Detriment 2: Potential to lose unique interests of bargaining group members

97. PNO contends that pursuant to the Proposed Collective Bargaining Conduct individual producers will not be able to negotiate terms and conditions tailored to their own individual needs, and collective negotiations, to the extent they occur, will more likely reflect the needs of the larger producers.⁹⁶
98. The NSWMC contends that the Authorisation Applicants have largely common interests in transparency and efficiency, and for the terms and conditions of access to be understood and approached in a consistent manner across the industry.⁹⁷
99. The Proposed Collective Bargaining Conduct is voluntary. Coal producers will be free to negotiate terms and conditions of Port access separately if they believe it is in their interests to do so or if their individual interests have not been met fully through collective negotiations. This includes 'smaller' coal producers in the Hunter Valley.

⁹⁶ PNO SOFIC, 14 December 2020, paragraph 61.

⁹⁷ NSWMC SOFIC, 28 January 2021, paragraphs 107 - 108.

Issue 5: Balance of public benefit and public detriment

100. The Tribunal should weigh the likely public benefits and public detriments and determine whether the net public benefit test is satisfied in respect of the Proposed Collective Bargaining Conduct.⁹⁸
101. The ACCC considers it is open for the Tribunal to conclude that the Proposed Collective Bargaining Conduct would be likely, in all the circumstances, to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public resulting from the Proposed Collective Bargaining Conduct such that the test in s 90(7)(b) is met.
102. In particular, it is open for the Tribunal to conclude that:
- 102.1. Public benefits are likely from the Proposed Collective Bargaining Conduct, such as: greater and more informed input into the terms and conditions of access under the Producer Deed, and increased transparency around capital expenditure plans and cost allocation at the Port. Further, public benefits are likely to include greater certainty for the delivered price of Hunter Valley coal, more timely resolution of common industry issues, and facilitating more efficient investment decisions at the Port and across the Hunter Valley coal industry.
- 102.2. The Proposed Collective Bargaining Conduct will likely enhance the international competitiveness of the Hunter Valley coal industry, with investment and employment benefits in Australia, and result in transaction costs savings for the collective bargaining participants.
- 102.3. Any public detriments from the Proposed Collective Bargaining Conduct are likely to be limited due to the voluntary nature of participation in the Proposed Collective Bargaining Conduct (so that producers are free to choose not to participate if they believe their interests would not be adequately represented or advanced by the collective bargaining group and negotiate individual deeds with PNO), and the exclusion of any collective boycott activity or the sharing of sensitive information outside of the terms and conditions of the PNO Producer Deed.

Issue 6: The Tribunal's discretion

103. PNO contends that even if the authorisation test is met, the Tribunal should exercise its discretion and not authorise the Proposed Collective Bargaining Conduct because:⁹⁹
- 103.1. it involves cartel conduct which is presumptively harmful, and therefore should not be authorised unless it is likely to result in a substantial net public benefit;
- 103.2. any benefit would be of a private nature; and
- 103.3. any net benefit that would likely result from the Proposed Collective Bargaining Conduct would not be substantial.

⁹⁸ See paragraph 55 above.

⁹⁹ PNO SOFIC, 14 December 2020, paragraph 63.

104. At a general level, the ACCC considers that it is open to the Tribunal to be satisfied that the authorisation test in s 90(7)(b) is met such that it could exercise its discretion and authorise the Proposed Collective Bargaining Conduct in this review. But more specifically, the ACCC disputes each of the contentions made by PNO listed at paragraph 103 above.

Does the proposed collective bargaining involve presumptively harmful cartel conduct?

105. PNO contends that the Proposed Collective Bargaining Conduct involves cartel conduct that is presumptively harmful to competition so as to require a showing of substantial net public benefits in order to obtain authorisation.

106. The ACCC rejects the contention that there is a requirement to show a substantial net public benefit in order to obtain authorisation.

107. The ACCC considers that, while cartel conduct is presumptively harmful, such conduct can be authorised under the CCA precisely because that conduct can be shown to be of net benefit to the public. To this end, s 90(7)(b) of CCA requires the ACCC, and the Tribunal in this review, to be satisfied in all the circumstances that the public benefit outweighs the public detriment likely to result from the proposed conduct. It is appropriate, and directed by the statute, that the Tribunal consider the specific circumstances in each case to assess the public benefit and detriment *likely to result from* the proposed conduct. That requirement does not incorporate any presumption of detriment nor transform the statutory test to require a “substantial” net public benefit as a threshold to be met before cartel conduct can be authorised. The statutory test applies in an orthodox way, consistent with the statutory language.

108. The ACCC considers that it is open for the Tribunal to conclude that, while the Proposed Collective Bargaining Conduct involves cartel conduct, such conduct involves a very low likelihood of detriment and/or detriment that is unlikely to be significant in light of the scope of the Proposed Collective Bargaining Conduct and the considerations expressed at paragraph 95 above, such that the authorisation test is met and the Tribunal may in the circumstances exercise its discretion to authorise the Proposed Collective Bargaining Conduct.

Private benefits

109. This SOFIC has addressed this issue above: see at paragraph 73.

Substantiality of the net public benefit

110. PNO appears to contend that any net public benefit would not be substantial and therefore the Tribunal should not exercise its discretion and deny authorisation (paragraph 103). This SOFIC has addressed this issue above: see from paragraph 105-108.

Issue 7: Length of authorisation

111. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period.

112. The Authorisation Applicants sought and the ACCC granted authorisation for ten years. PNO and other interested parties did not raise any concerns with the time period sought.
113. Neither PNO nor the NSWMC has taken any issue with the period of authorisation sought. The Tribunal could properly form the view that an authorisation term of ten years is appropriate. In particular, the Producer Deed is proposed for ten years¹⁰⁰ and this period would enable the Authorisation Applicants to collectively negotiate any proposed changes during its operation.

Ruth C A Higgins SC

Christopher Tran

Counsel for the ACCC

¹⁰⁰ See Producer Deed: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf.

Annexure A

Summary of recent regulatory and court decisions which have impacted PNO's access charges and pricing methodology

Over the last several years there have been significant, and ongoing regulatory issues at the Port:

2015 – Glencore sought declaration of the shipping channel at the Port by the National Competition Council (NCC). The NCC didn't recommend declaration of the channel services.

2016 – On appeal by Glencore, the Tribunal determines that the shipping channel at the Port of Newcastle is declared (Tribunal Determination No. 1).

November 2016 – Glencore notifies the ACCC of an access dispute with PNO about the increase in price for coal vessels entering the Port, and requests the ACCC to arbitrate.

July 2018 – following amendment of the declaration criteria under Part IIIA of the CCA in 2017, PNO seeks recommendation from NCC to revoke declaration of the shipping channel service at the Port.

September 2018 – the ACCC's Access Determination concludes that PNO should charge ships entering the port to carry Glencore's coal \$0.61 per gross tonne (GT). In this process, the ACCC had to establish the value of assets used to provide the 'declared' shipping channel service. The ACCC determined it was appropriate to exclude previous user-funded channel dredging from the costs that PNO could recover.

PNO subsequently appealed the ACCC's Access Determination to the Tribunal.

July 2019 - NCC recommends that the declaration of the Port under Part IIIA of the CCA be revoked.

September 2019 – the Treasurer confirmed that following the expiration of the 60 day period to consider the NCC's recommendation, the declaration at the Port is deemed to be revoked.

October 2019 – the Tribunal issues a determination increasing access charges (from \$0.61 per gross tonne) to \$1.01 per gross tonne (Tribunal Determination No. 2). In its determination the Tribunal included previous industry-funded expenditure for channel dredging in PNO's regulated asset base. This allowed PNO to recover the user-funded amounts in its access charge.

The Tribunal's Determination No. 2 is limited to the terms and conditions of access where Glencore owns or, either directly or by agent, charters a vessel that enters the Port and loads Glencore coal. It did not apply to:

- the terms and conditions of access to apply in respect of vessels carrying coal that are not owned, or have not been chartered, by Glencore
- the terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and

- any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.

November 2019 – Glencore and the ACCC applied to the Federal Court for a review of the Tribunal Determination No. 2. The parties sought review of the Tribunal's treatment of user funding at the Port. While the declaration of the Port has been revoked, the Tribunal Determination No. 2 remains in force until 2031. On 24 August 2020 the Federal Court ordered that the Tribunal Determination No. 2 be set aside and the matter be remitted back to the Tribunal for determination.

July 2020 – the NSWMC lodged an application with the NCC for declaration of certain 'services' in relation to the Port of Newcastle. 'Services' are defined under the application for declaration as:

the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (Service). The Service is currently provided by PNO.

the Service relates to all coal being exported from the Port either on a Free on Board (FOB) or Cost including Freight (CIF) basis...

...The facilities used to provide the Service are the shipping channels and vessel berth areas...

October 2020 – NCC releases draft recommendation not to declare the Service at the Port.

18 December 2020 – NCC sent its final recommendation in respect of the NSWMC's application for the declaration of certain services at the Port to the Treasurer. The Treasurer has 60 days after receipt of the NCC's recommendation to publish his decision and reasons.