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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Submissions
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
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Important information

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COMMONWEALTH OF AUSTRALIA

***Competition and Consumer Act 2010* (Cth)**

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No:	ACT 2 of 2020
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

SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD

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Introduction

1. Pursuant to s 101(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), Port of Newcastle Operations Pty Ltd (**PNO**) seeks review of the Australian Competition and Consumer Commission (**ACCC**)'s decision to authorise New South Wales Minerals Council (**NSWMC**) and ten of its coal producer members in the Hunter Valley to negotiate collectively with PNO about the terms of access to the Port of Newcastle (the **Port**). The Tribunal should set aside the ACCC's determination, on the basis that it could not be satisfied that the conduct would be likely to result in a benefit to the public, or alternatively, not one that would outweigh any detriment likely to result.

2. The alleged benefit in the present case is that collective bargaining would constrain PNO's bargaining power and deliver what are described as "more efficient terms of access", including a "more favourable environment for future investment in coal production and Port infrastructure".[1] However, this ignores that PNO already has an incentive to encourage investment in coal production and Port infrastructure, including so as to ensure that coal producers receive a reasonable return on investment, and is already constrained by the long-term deeds PNO has entered with vessel agents representing all coal vessels. Further, when the applicants refer to "more efficient terms" they are principally referring to improved pricing, in particular the navigation service charge. However, this charge represents only a small fraction of the cost of coal exported through the Port. Even if collective bargaining did result in a discount (beyond that already agreed to in the vessel agent deeds), this would be unlikely to produce a public benefit (whether in the form of improved efficiency, competition or otherwise) and would instead simply represent a private transfer of economic surplus from PNO to producers, and a small one at that.

3. The other alleged benefit of collective bargaining is that it would lead to a reduction in transaction costs. However, there is no evidence, or reason to think, that this benefit will arise, as opposed to merely redistributing or even increasing transaction costs. Further, there is no evidence to conclude that any saving that did result would represent a benefit to the public, as opposed to a private transfer of surplus between PNO and producers. On the other hand, by favouring the wishes of larger producers, and increasing the risk of collusion, authorisation is likely to produce public detriments.

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1 NSWMC SOFIC at [67], [77]

The background to the present hearing

4. On 6 March 2020, NSWMC sought authorisation from the ACCC on behalf of itself and ten of its coal producer members (the **authorisation applicants**)[2] 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 the above discussion and negotiations; and (iii) enter into, and give effect to, contracts, arrangements or understanding with PNO containing common terms which relate to access to the Port and the export of minerals through the Port (the **collective bargaining conduct**).

5. On 2 April 2020, the ACCC granted interim authorisation pursuant to s 91(2)(d) to enable the authorisation applicants to commence collective discussion amongst themselves and negotiations with PNO in relation to the terms and conditions of access, including price, to the Port (but not enter into collectively negotiated agreements). On 15 May 2020, the authorisation applicants sought authorisation for other mining companies to participate in the proposed collective bargaining conduct. On 27 August 2020, the ACCC granted authorisation in respect of the proposed collective bargaining conduct for ten years, until 30 September 2030. The authorised conduct is voluntary for all parties, including PNO, and does not include boycott activity by the collective bargaining group or the sharing of commercially sensitive information among the group. As a result of PNO's application for review, the ACCC's authorisation has not come into effect: s 91(1A)(b).[3]

The nature of the present hearing

6. The Tribunal's review is a re-hearing of the ACCC's decision to grant authorisation pursuant to s 90(7) of the CCA: s 101(2). The Tribunal may make a determination affirming, setting aside or varying the ACCC's determination, and for the purposes of the review, may perform all the functions and exercise all of the ACCC's powers: s 102(1). In conducting the review, the Tribunal may have regard to any information furnished, documents produced, or evidence given to the ACCC in connection with the making of the determination: s 102(7). As the Tribunal observed in *Application by Flexigroup Ltd (No 2)* [2020] ACompT 2

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2 The coal producers are: Glencore Coal Assets Australia Pty Ltd; Yancoal Australia Ltd; Peabody Energy Australia Pty Ltd; Bloomfield Collieries Pty Ltd; Centennial Coal Company Ltd; Malabar Coal Ltd; Whitehaven Coal Mining Ltd; Idemitsu Australia Resources Pty Ltd; and MACH Energy Australia Pty Ltd. Hunter Valley Energy Coal Pty Ltd, owned by BHP Billiton, was one of the coal producers that sought authorisation but is no longer seeking to negotiate collectively with PNO: NSWMC SOFIC, fn 1.

3 Interim authorisation was granted on 2 April 2020 and remains in place until the Tribunal makes its determination: s 91(1A)(b).

(***Flexigroup***), [107], a review under s 101 is a *de novo* review, i.e., a fresh hearing and determination of the ACCC's determination. In *Application by Medicines Australia Inc* (2007) ATPR ¶42-164 (***Medicines Australia***) at [135], the Tribunal observed that it "must make its own findings of fact and reach its own decision as to whether authorisation should be granted or not, and if so, any condition to which it is to be subject". The Tribunal's task is not to ascertain whether the ACCC was right or wrong, or could have better formulated its determination, but rather, to assess the application on its merits, by reference to the material before the ACCC and any material the parties wish to put to the Tribunal: *Medicines Australia*, [138]. Further, in conducting its review, the Tribunal is not confined to issues raised by parties to the review and must itself determine if the statutory test is met: *Flexigroup*, [136].

7. The statutory pre-condition for authorisation is found in s 90(7). That provision applies to the Tribunal's determination, by operation of s 101(3). Given the authorisation applicants seek authorisation in respect of the possible application of the cartel provisions,[4] the applicable test is s 90(7)(b): s 90(8)(a). Pursuant to that provision, 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 (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

8. This test requires consideration of the benefits and detriments likely to result from the conduct, and involves a comparison of the future with, and without, the conduct for which authorisation is sought: *Flexigroup*, [137]. As the Tribunal observed in *Medicines Australia* (at [120]) this is not the same as comparing the future with, and without, authorisation.

9. The concept of a benefit to the public encompasses "anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress": *Medicines Australia* at [107], quoting *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169, at 182-183. The relevant "public" is the Australian public. The concept of a detriment is similarly broad and extends to "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": *Medicines Australia* at [108],

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[4] ACCC determination at [5.8].

quoting *Re 7-Eleven Stores Pty Ltd* (1994) 16 ATPR 41-357 at 42,683. As the Tribunal observed in *Medicines Australia,* although "detriment" covers a wider field than anti-competitive effects, in many cases the important detriments will have that character.

10. Section 90(7)(b) refers to benefits and detriments that "would result, or be likely to result". This test involves the application of two legal standards: the first standard ("would result") refers to a benefit or detriment that will eventuate if authorisation is granted; the second ("be likely to result") refers to a benefit or detriment that is more probable than not. Although the Tribunal has previously held that the second standard refers to a "real chance",[5] this interpretation should not be adopted here, for at least the following reasons:

    (a) it does not accord with the ordinary meaning of the expression (as confirmed by the Full Court in *ACCC v Pacific National Pty Limited* (2020) 277 FCR 49 (***Pacific National***), [222]);

    (b) the "real chance" meaning of "likely" comes from decisions interpreting the meaning of the word in the context of other provisions in the CCA, which use similar language, but are concerned with a different legal question (namely, the likelihood of harm resulting from a substantial lessening of competition);

    (c) as observed by the Full Court in *Pacific National* at [223], the reasoning in those cases for rejecting the ordinary meaning of likely, in favour of the "real chance" meaning (namely, that the ordinary meaning would create redundancy between "would" and "likely"), involves a conflation between the matter to be proved ("would result") and the standard of proof (in a civil matter, the balance of probabilities);

    (d) contextual and purposive considerations support the adoption of the ordinary meaning of "likely" in the present statutory context. It is inconsistent with the object of enhancing the welfare of Australians through the promotion of competition (s 2) to authorise anti-competitive conduct on demonstration of nothing more than a "real chance" that the conduct will result in a benefit to the public. Additionally, in cases where the conduct sought to be authorised would result, or be likely to result, in

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5 See *Re Howard Smith Industries* (1977) 28 FLR 385 (***Howard Smith Industries***), 405; *Re Qantas Airways Limited* [2004] ACompT 9 (***Qantas Airways***), [153] – [156]; *Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7, [26]; *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120, [83]; *Medicines Australia Inc*, [109]. See also, in the context of s 95AZH (now repealed), *Application by Sea Swift Pty Limited* [2016] ACompT 9, [46] – [47] and *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, [164].

countervailing detriment, s 90(7)(b) requires a satisfaction that the benefit "would outweigh" the detriment. This balancing test suggests an intention that the Tribunal would be weighing something more concrete than a "real chance" of a benefit against a "real chance" of a detriment. The concept of a "real chance" is elusive enough; the task of identifying and weighing competing "real chances" becomes almost impossible; and

(e) the consideration which was decisive in the Full Court's decision in *Pacific National* to retain the "real chance" meaning of "likely", despite finding strong textual arguments to the contrary, was that this interpretation had been adopted for 40 years, dating back to the Full Court's decision in *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees Union* (1979) 42 FLR 331: *Pacific National*, [243]. The present statutory context, however, is different – the meaning of "likely" as it appears in s 90 does not appear to have been the subject of previous consideration by the Federal Court. Although, as mentioned above, the Tribunal has previously adopted the "real chance" meaning of "likely", with the exception of the Tribunal's decision in *Howard Smith Industries* (at 405), this does not seem to have been the subject of challenge. And *Howard Smith Industries* concerned a different statutory formulation, which did not involve the weighing of benefits and detriments. In the present case, neither the language nor the context is the same as that of the earlier Federal Court decisions, and indeed the distinction is made plain by s 90(7) itself, which separates out the likely effect on competition in (a) from benefits and detriments in (b).

11. Although PNO contends that this is the correct interpretation of "would result, or be likely to result" in s 90(7)(b), it does not make a difference to the result in the present case. The Federal Court has emphasised that "a real chance" is concerned with "commercial likelihoods" and does not encompass a mere possibility: *Pacific National*, [245]. Similarly, the Tribunal has observed, "There must be a commercial likelihood that the applicants will … act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment.", and the benefit (or detriment) must be a consequence of the conduct in a "tangible and commercially practical way": *Qantas Airways*, [156]. Even applying the lower "real chance" standard, the Tribunal could not be satisfied that there is a real chance of the conduct resulting in a benefit to the public. Similarly, even if the Tribunal was satisfied that such a real chance did exist, it could not be satisfied that it would outweigh the real chance of a corresponding detriment to the public.

The Port of Newcastle, NSWMC and Hunter Valley Coal Producers

12. The Port is the largest coal exporting port in the world. PNO became the operator of the Port in 2014, following its privatisation by the NSW Government. PNO controls the terms and conditions of access at the Port, pursuant to the terms of a 98-year lease with the NSW Government. Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMA Act**) permits PNO to fix and levy three types of port charges without approval from the Minister: (i) a navigation service charge (s 50), which is payable by shippers in respect of general use by a vessel of the Port; (ii) a wharfage charge (s 61), which is payable by coal producers in respect of the availability of a site at which stevedoring operations may be carried out, and is paid by the owner of the cargo at the time it is loaded or unloaded; and (iii) a site occupation charge (s 60), which is payable by occupiers of land-side facilities such as stevedores at terminals.

13. In December 2019, PNO published on its website new "open access" rates for both the navigation service and wharfage charges for vessels using the Port. PNO offered a navigation service charge of $1.0424 per gross tonne and a wharfage charge of $0.0802 per revenue tonne. From early 2020, PNO began negotiations with vessel agents, on behalf of vessel operators, in relation to discounted pricing arrangements pursuant to s 67 of the PMA Act. In March 2020, PNO entered deeds with vessel agents, the terms of which have governed the access, including price, for every coal carrying vessel calling at the Port (with effect from 1 January 2020). Pursuant to these deeds, coal vessels pay an initial navigation service charge of $0.8121 per gross tonne (as at 1 January 2020), subject to an annual price adjustment and other adjustment terms. PNO also offered to enter deeds with coal producers, that offered the same discounted navigation service charge as the vessel agent deed and a wharfage charge of $0.0802 that would apply to any vessel carrying from coal from that producer's mine. The authorisation applicants seek authorisation in order to engage in collective negotiations in relation to the producer deed. PNO conducted bilateral negotiations with producers from the end of 2019 through to the end of March 2020, but those negotiations ceased once interim authorisation was granted.

14. NSWMC describes itself as the leading mining industry association in NSW. Its members include exporters of coal (and other commodities) from the Hunter Valley region. The other applicants for authorisation are coal producers of varying sizes. For example, Glencore reported that revenues from its thermal coal operations in Australia were US$4.031 billion for the year end 31 December 2020, with 66.7 million tonnes produced in Australia during

that period,[6] while Whitehaven Coal Mining Ltd reported that its revenue from its thermal coal operations were AUD$1.402 billion for the year ended 30 June 2020.[7] The overwhelming majority of seaborne thermal coal supply in Australia is exported through the Port.[8] NSWMC has not filed any evidence about how it operates, and there is little in the way of publicly available information. The information that is available shows that its board of directors comprise a combination of full-time employees of NSWMC, together with directors from members, including coal producers.[9] NSWMC is funded by membership fees paid by its members according to production volume.[10]

The conduct is unlikely to result in a benefit to the public

Conduct unlikely to change bargaining power or improve terms of access

15. The authorisation applicants contend that the need for authorisation arises from the Port's position as a natural "bottleneck" facility, which allows PNO to enjoy the commercial negotiating position of a monopoly service provider.[11] According to the authorisation applicants, collective bargaining offers a means of curbing PNO's "unfettered monopoly power".[12] Although the authorisation applicants say they wish to "negotiate all terms of access",[13] their application focuses on PNO's charges, specifically, the navigation service charge. The authorisation applicants complain that this charge is too high, and inefficient (because it includes a return on user-funded works). They also complain that coal producers are susceptible to future price increases, and that PNO will use charges on coal vessels to fund its plans to establish a container terminal at the Port.[14] The authorisation applicants contend that the collective bargaining conduct would provide coal producers with a means to improve the terms on which PNO provides access to the Port, which in turn would variously boost productivity in the coal export market, improve the conditions for investment in the Hunter Valley region and improve competition in dependent markets.[15]

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6 30 July Byrnes affidavit, [40(c)], annexure SB-13.

7 30 July Byrnes affidavit, [40(e)], annexure SB-15.

8 25 June Byrnes affidavit, annexure SB-1 (page 30).

9 30 July Byrnes affidavit, [41].

10 30 July Byrnes affidavit, [43], annexures SB-18 and SB-19.

11 NSWMC SOFIC, [2].

12 NSWMC SOFIC, [4(a)].

13 NSWMC submission to the ACCC dated 6 March 2020, [1.4].

14 NSWMC SOFIC, [4(c)].

15 NSWMC SOFIC, [5].

16. Each step in this argument is problematic: *first*, it ignores the constraints and incentives which inform PNO's conduct; *secondly*, there is no evidence as to how the collective bargaining conduct would be likely to result in better outcomes that would be likely to result in the future without the authorised conduct; and *thirdly*, even if collective bargaining were likely to produce better terms for coal producers, there is no evidence that these improvements would be likely to result in a public benefit, as opposed to a private transfer of economic surplus between PNO and coal producers. Each of these problems is considered in turn.

17. First, the fact that PNO operates a bottleneck facility does not mean that it has unfettered market power. As the Tribunal recently concluded, a variety of commercial, regulatory and economic factors are likely to constrain PNO's market power across the medium term: *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 (***NSWMC declaration proceedings***), [184] – [199].

18. For a start, as described above, PNO operates a lease over the Port that runs until 2112. During the term of this lease, PNO has an incentive to operate the Port in a manner that has regard to its ability to maximise its expected profits over the term of the lease. Coal vessels currently provide the majority of the Port's revenue. In 2020, 96% of total trade through the Port in calendar year 2020 related to coal, from which PNO derived more than 70% of its revenue.[16] While PNO is exploring ways in which it might reduce its reliance on coal volumes, including the construction of a container terminal (discussed further below), coal exports are likely to remain the major source of PNO's revenue for the foreseeable future. This makes PNO highly dependent on coal mining activities and gives coal producers significant countervailing power. The true relationship between PNO and coal producers is one of mutual dependence.[17]

19. Secondly, the Port is not capacity constrained, and unlikely to become so in the foreseeable future. The Port can accommodate the safe movement of 10,000 vessels p.a., and is currently operating at less than 50% of its capacity.[18] In those circumstances, PNO does not have an incentive to set prices in a way that reduces coal production and exports. On the contrary,

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16 30 July Byrnes affidavit, [26].

17 Houston report, [111].

18 30 July Byrnes affidavit, [25] and [26].

PNO has an interest in fostering competition between coal producers, and encouraging investment by coal producers, so as to maximise long term coal exports.[19]

20. Thirdly, coal exported through the Port competes against coal from several other countries in a competitive, international market. As the Tribunal has recently found, PNO's position as operator of an input in the Hunter Valley coal supply chain, in which the coal export market is effectively competitive and coal producers are price takers, significantly constrains PNO's pricing behaviour: *NSWMC declaration proceedings*, [193]. Even if PNO could increase its profits in the short term by raising prices, such a strategy would be counter-productive over the medium term, as it would be likely to cause some coal mining and export activities to become uneconomic, which would be harmful to PNO's longer term profits. PNO's economic incentives are closely tied to those of coal producers.

21. Both the ACCC and the authorisation applicants highlight the pressures on coal producers. Dr Smith, for example, refers to the "increasingly unfavourable conditions" coal producers are likely to face in response to concerns about climate change,[20] while the authorisation applicants refer to the "significant cost pressures on the Hunter Valley coal industry, as coal customers turn to alternatives and Hunter Valley producers compete in finding new markets as alternative to exports to China".[21] These pressures similarly constrain PNO's ability to increase prices.

22. Fourthly, for the next ten years, PNO is also constrained in its ability to increase prices by the deeds it has entered with vessel agents. As discussed, pursuant to those deeds, PNO charges a discounted navigation service charge. The fact that PNO has signed binding deeds with all the vessel agents that currently ship coal through the Port provides certainty for the period for which authorisation is sought, and on one view (shared by at least one of the coal producers[22]), removes any need for coal producers to enter deeds with PNO.

23. Fifthly, PNO is also constrained by the threat of declaration. In the *NSWMC declaration proceedings*, the Tribunal emphasised (at [152], [198] and [216]) that its refusal of NSWMC's application did not prevent a future application, and observed (at [198]) that "[i]f at that time the market environment and PNO's behaviour has altered, a different conclusion

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19 Houston report, [100].

20 Smith report, [93].

21 NSWMC SOFIC, [32].

22 Affidavit of Mike Dodd, Yancoal Australia Ltd, affirmed 6 May 2021, [12].

on declaration may be reached".

24. Cumulatively these factors significantly constrain PNO's conduct. The authorisation applicants' case for authorisation is predicated on the assumption that by constraining PNO's bargaining power, coal producers would be able to achieve a price for Port access that promotes productivity among producers. However, as the above analysis demonstrates, PNO is already both constrained and incentivised to ensure that coal producers in the Hunter Valley earn proper economic returns. In these circumstances, any improvements in price achieved through collective bargaining would be unlikely to boost efficiency, and would instead represent at most a private transfer from PNO to producers which would allow producers to achieve higher than normal economic returns.

25. The authorisation applicants point to several matters said to evidence PNO's unfettered market power and the sorts of problems that the proposed collective bargaining conduct may address. However, none withstand scrutiny:

    (a) the authorisation applicants refer to price increases by PNO since privatisation. The authorisation applicants' expert, Mr Morton, considers these increases.[23] However, as the Tribunal observed in the *NSWMC declaration proceedings* (at [210]), it cannot be assumed that the rates that applied when the Port was state-owned were set at economically efficient levels.[24] The Tribunal, in the context of its re-arbitration of the access dispute between PNO and Glencore, has previously found that they were not.[25] Further, as Mr Houston observes, the price increases implemented by PNO are much smaller than those Mr Morton predicted would be profitable.[26] This raises the question: if, as the authorisation applicants contend, PNO is not constrained, why has it not imposed larger increases?

    (b) Mr Morton expresses the opinion that the bilateral deeds allow PNO to price discriminate between different coal users.[27] Mr Morton observes that a monopolist who can price discriminate is able to extract the maximum possible economic surplus from each, while minimising the negative impact on demand. However, this concern is baseless: PNO does not discriminate on price or non-price terms between coal

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23 Morton report, [27] – [33].

24 Houston report, [96].

25 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, [329] – [336].

26 Houston report, [81] – [86].

27 Morton report, [21] – [23].

vessel operators, or coal producers.[28] All coal vessels pay the same navigation service charge, and all coal producers pay the same wharfage charge. Further, in response to requests from coal producers, PNO has included a non-discrimination clause in the pro-forma coal producer deed;[29]

(c) the authorisation applicants cite PNO's refusal to engage in collective bargaining as evidence of its unfettered market power.[30] However, PNO does not wish to participate in collective bargaining because it regards it as an unproductive form of negotiation. The fact that coal producers cannot force PNO to participate in collective bargaining does not demonstrate that PNO is free from constraint – it establishes only that coal producers are unable to dictate terms to PNO;

(d) the authorisation applicants also complain about various terms of the producer deeds. A substantial part of Mr Morton's report is dedicated to this topic.[31] The deeds were considered in detail in the *NSWMC declaration proceedings*, in which the Tribunal concluded (at [240]) that the deeds "provide a reasonable degree of pricing certainty to coal producers", and that "[w]hile the deeds allow PNO to propose adjustments to the rate of the navigation service charge, any such adjustment is subject to arbitration applying pricing principles which are similar to those governing arbitrations under Division 3 of Part IIIA".

26. The second problem with the authorisation applicants' case is that there is no evidence as to how collective bargaining would be likely to deliver better outcomes. For a start, given PNO's refusal to negotiate collectively, authorisation is likely to be pointless. The authorisation applicants (and the ACCC) contend that the Tribunal should ignore PNO's refusal, and instead *assume* that collective negotiations will take place. The ACCC contends that this approach conforms with the Tribunal's observation in *Medicines Australia* that the Tribunal should compare the future with and without the conduct, rather than the future with and without authorisation.[32] However, the authorisation applicants and the ACCC confuse the authorisation applicants' conduct, in relation to which authorisation is sought, with PNO's likely response to that conduct. The Tribunal should assume that the authorisation applicants will seek to engage in collective bargaining, but not that PNO will necessarily

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28 30 July Byrnes affidavit, [19].

29 15 March Byrnes affidavit, [55], Confidential Annexures SB-12 to SB-15.

30 Smith report, [13].

31 Morton report, [34] – [76].

32 See NSWMC SOFIC, [112]; ACCC SOFIC [90] to [91].

take up this opportunity. Instead, in assessing the benefit of the conduct, it is relevant to consider, among other factors, PNO's response to that conduct. In this case, PNO's likely refusal makes authorisation nugatory. This is demonstrated by the ACCC's decision to grant interim authorisation: notwithstanding the urgency that was said to justify interim authorisation, no further negotiations (collective or bilateral) ensued.

27. The ACCC's alternative response to PNO's refusal is that PNO may be forced to reconsider its position.[33] However, this prediction only highlights the various factors which already constrain PNO, as Mr Houston explains in his report.[34] Further, there is no explanation of why or how those factors will force a change in stance by PNO.

28. In their submissions to the ACCC, the authorisation applicants contended that NSWMC's application for declaration of the shipping channel service at the Port would allow coal producers to notify the ACCC of an access dispute if PNO refused to negotiate collectively.[35] It is not clear that PNO's refusal to participate in collective negotiations could trigger an access dispute under s 44S, but in any event, the question does not arise, as the Tribunal has affirmed the Treasurer's decision not to declare the service.

29. But even if the Tribunal assumed that PNO would or may participate in collective bargaining, there is no evidence to indicate that collective negotiations would be likely to produce better outcomes for coal producers. In relation to the Port's charges, as explained above, there are two relevant charges: the navigation service charge and the wharfage charge. The wharfage charge is small and has never been the source of any dispute.[36] The navigation service charge is the focus of the ongoing arbitration between Glencore and ACCC, was the focus of NSWMC's application for (re-)declaration at the Port, and is the focus of this application for authorisation.

30. However, contrary to the concerns expressed by the authorisation applicants about price uncertainty, PNO is already constrained in its ability to increase the navigation service charge, most immediately by the vessel agent deeds which provide that any increases must be consistent with the pricing principles set out in Sch 3 to the deeds.[37] Further, between December 2019 and April 2020, PNO engaged in active bilateral negotiations with

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33 Smith report, [16].

34 Houston report, [23] – [27].

35 NSWMC SOFIC, [4(d)]; Applicants' submission to the ACCC dated 15 May 2020, [2.8].

36 25 Junes Byrnes affidavit, [16] - [19].

37 15 March Sainsbury affidavit, Annexure GS2.

producers, as a result of which PNO made several concessions and changes to the draft deed.[38] In the future without the authorised conduct, any coal producer who wished to obtain its own enforceable price and other terms, could enter a producer deed.

31. The authorisation applicants have not explained how they would be able to negotiate a better price than the price under the vessel agent deeds, or the price that a coal producer might obtain through bilateral negotiations. Mr Morton devotes most of his report to describing PNO's incentives and pricing behaviour without the authorised conduct. He only addresses how authorisation would make a difference in the final paragraph of his report, and then in the most tentative terms. Mr Morton says he is "unable to predict the extent to which collective bargaining by mining companies will actually achieve more efficient outcomes", but that collective bargaining "represents the best opportunities for parties to negotiate a more balanced contract …".[39]

32. As mentioned above, the authorisation applicants also contend that the collective bargaining conduct would enable coal producers to guard against the risk that PNO would fund its container terminal plans from coal vessels. This purported benefit assumes that PNO is likely to proceed with its plans to construct a container terminal in the near to medium term. PNO's five year forecast capital expenditure plan shows that PNO does not intend to make any capital expenditure in relation to berth capacity or a container terminal in the coming five years.[40] The reason for this is explained in PNO's evidence.[41] Under its agreement with NSW Ports, the State is obliged to compensate NSW Ports for containers diverted from Port Botany or Port Kembla to a container terminal at Port of Newcastle above a specified threshold. PNO, under its agreement with the State, has a corresponding obligation to reimburse the State of NSW for any compensation paid to NSW Ports. The ACCC's action to set aside these provisions on the grounds that they contravened the CCA was recently rejected by the Federal Court.[42]

33. A further complaint made about the deeds is that they only impose on PNO an obligation to share, and consult about, its capital expenditure plans, and do not confer a right on Port users

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38 15 March Byrnes affidavit, [66] and [67], Confidential Annexure SB-22 and SB-23.

39 Morton report, [79].

40 30 July Byrnes affidavit, [32].

41 30 July Byrnes affidavit, [29] – [33].

42 *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720.

to "materially influence" future investment decisions by PNO.[43] But this would be an extraordinary right for a service provider to grant its customers, and the authorisation applicants do not explain why PNO would agree to such a demand. Further, even if the Tribunal were to make the (wholly) unrealistic assumption that PNO would agree, the authorisation applicants fail to explain why this would represent a public benefit.

Any changes in terms of access unlikely to lead to improvements in efficiency or competition

34. For the reasons explained above, the collective bargaining conduct is unlikely to result in better outcomes for coal producers than would result in the future without the conduct. But even if it did, those outcomes are unlikely to result in a public benefit. As Mr Houston explains, a change in economic conduct does not constitute a public benefit unless that change leads to an increase in output, whether in the market in which PNO supplies services at the Port, and/or any dependent market.[44]

35. In its determination, the ACCC accepted the contention of the authorisation applicants that the collective bargaining conduct will promote more certain investment conditions in the Hunter Valley, and lead to improvements in efficiency and competition in the coal export market, and other dependent markets. But there was no evidence before the ACCC to substantiate this assertion, and none has been filed in this proceeding. On the contrary, the evidence points against such benefits. In the first instance, navigation service charges are paid by vessel operators, on behalf of coal customers, rather than producers. (The exception is where coal is sold under CIF arrangements, and the producer is responsible for shipping.[45]) The effect of the producer deed would be that vessel operators would pay the rate set out in the deed in respect of vessels covered by the deed. Therefore, the immediate benefit of any improvement in terms would accrue to foreign coal customers, rather than the coal producers. The authorisation applicants assert that coal producers ultimately bear the cost of shipping, and therefore would enjoy the benefit of any discount, but this has not been established. Contrary to the submission of the authorisation applicants, it cannot be simply inferred from the fact that PNO has offered to enter agreements with producers.[46] This is equally explicable on other bases including an attempt to avoid further litigation with Glencore and other coal producers about PNO's charges.

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43 NSWMC SOFIC, [86].

44 Houston report, [35] – [36], [39] – [50], [73] – [74], [137].

45 See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194, [129] – [135].

46 NSWMC submission to the ACCC dated 6 March 2020, [1.6].

36. More importantly, Port charges represent only a small proportion of the overall cost of the production and sale of coal for export from the Hunter Valley.[47] Coal producers are subject to much bigger fluctuations – for example in coal export prices, and labour costs. Against this background, it is inherently unlikely that Port charges would figure in decisions by coal producers about how much coal to produce, or decisions by investors about whether to invest in coal tenements. It is even less likely that any difference in charges between the price under the vessel agent deeds and the ACCC's determination price, could have an impact on production or investment in the coal export market, or any related market. In economic terms, a difference in price is unlikely to lead to an increase in coal exports, or an increase in the quantity or quality of output in any upstream or downstream market. Rather, any discounts obtained by producers would represent at most a private transfer of economic surplus from PNO to producers.

Lower transaction costs

37. The other benefit identified by the authorisation applicants is that collective bargaining will reduce transaction costs for both coal producers and PNO.[48] Each producer that negotiates with PNO bilaterally incurs certain costs such as the time of management in those negotiations and the cost of advisers.[49] According to the authorisation applicants, rather than each producer incurring those costs, collective bargaining "means that those costs can be pooled and shared".[50]

38. This analysis is both incomplete and theoretical. It is incomplete in the sense that it ignores new transaction costs which would not need to be incurred in the absence of collective bargaining, and theoretical in the sense that the authorisation applicants have made no attempt to quantify or estimate the savings or their significance. Each of those deficiencies make it impossible for the Tribunal to conclude that the saving of such transaction costs would be significant or would amount to a public benefit (rather than a simple transfer in economic rent).

39. An article by Prof Stephen King (cited by both Dr Smith and Mr Houston) provides a more complete framework for analysing transaction costs: "[W]hile collective bargaining may allow for a sharing of negotiation costs between the members of the bargaining group, it

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47 15 March Byrnes affidavit, [25] – [28]; see *NSWMC declaration proceedings*, [257].

48 NSWMC SOFIC, [99].

49 Houston report, [165].

50 Smith report, [59].

also creates the need for coordination within the bargaining group. This coordination can be costly and may lead to contracts that address the needs of the average member of the bargaining group rather than the needs of individual members."[51] In other words, even though an individual coal producer may not spend as much time or incur as many costs negotiating directly with PNO, the producer would be likely to incur more time and cost negotiating with other coal producers. Further, as Dr Smith recognises,[52] the greater the heterogeneity of the group, the more additional time likely to be spent negotiating among group members. Both the authorisation applicants and the ACCC fail to identify why any savings in transaction costs (of negotiating with PNO) would be likely to outweigh the increases in transaction costs (of negotiating with other miners). As Mr Houston concludes, "[T]here is no clear basis on which to conclude that the net effect on transaction costs will be either higher or lower under the authorised conduct."[53]

40. There are various reasons why collective bargaining conduct gives rise to material transaction costs: (i) the interests of producers are different (as described further below); (ii) it is arguably more efficient for PNO, rather than NSWMC, to collate the concerns and preferences of coal producers, as PNO is also in a position to decide which concerns and preferences it is prepared to accommodate (as happened during the negotiations prior to interim authorisation); (iii) PNO's commitment to a non-discriminatory pricing clause avoids the need for producers to agree a common negotiating position; the clause means that they will all obtain the benefits of any concessions made by PNO in this regard;[54] (iv) PNO's unwillingness to participate in collective negotiations means that any costs incurred in negotiating among coal producers are likely to represent wholly wasted costs; (v) Dr Smith raises the possibility that the future with the conduct may involve a combination of collective and bilateral negotiations.[55] The evidence suggests that coal producers do not intend to participate in bilateral negotiations while collective bargaining is permitted, but if they did, this would further erode any potential savings in transactions costs.

41. Finally, even assuming a reduction in transaction costs, the authorisation applicants have not demonstrated that this would amount to a public benefit. The immediate effect of a

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51 King, S, 'Collective Bargaining in Business: Economic and Legal Implications' (2013) *UNSW Law Journal* 36(1) 107, 110; see Houston report, [167]; Smith report, fn 25 and 32.

52 Smith report, [61]; Houston report, [189]. Mr Morton does not analyse this topic in any detail – see Morton report, [79].

53 Houston report, [194].

54 15 March Byrnes affidavit, [57].

55 Smith report, [96].

reduction in transaction costs is an increase in economic surplus to each mining company.[56] It is only if those costs savings are used either to increase output or are redeployed to other more productive uses in the economy that the saving can be described as a public benefit.[57] Neither Dr Smith nor Mr Morton grapples with this requirement.[58] It is likely (as Mr Houston identifies) that any cost saving would be retained as a surplus for the mining companies involved, in light of the fact that such savings, even if quantified, are likely to be minute in the context of the total value of coal production from the Hunter Valley.[59]

Any benefit does not outweigh the detriment likely to result from the conduct

42. The authorisation of collective bargaining would give rise to two specific types of detriment. *First*, authorisation amounts to the sanctioning of communications between competitors about matters in respect of which they would ordinarily compete. The increased risk of collusive conduct arising in that circumstance is a matter of detriment recognised by each of the experts.[60] *Secondly*, the nature of collective bargaining means that the members of the bargaining group would need to come to a common position for their dealings with the Port. That means that there is a natural tendency for the collective position to reflect the position of those members of the group with the loudest voice or deepest pockets, at the expense of the preferences of other, less influential members. This risk is described by Mr Houston,[61] but is not addressed by Dr Smith or Mr Morton. These two matters are addressed below.

Risk of collusive conduct

43. Authorisation authorises conduct which would otherwise breach provisions of the CCA, including in this case, the cartel provisions. The authorised conduct also gives rise to a risk of unauthorised collusive conduct. The ACCC emphasises that authorisation would not permit discussions in respect of commercially sensitive information such as coal projection volumes, customer pricing information or marketing strategies.[62] However, the problem is that the authorised conduct makes it easier for coal producers to engage in precisely this (and other) types of unauthorised conduct. As expressed by Mr Houston, "[s]uch risks arise

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56 Houston report, [196].

57 Houston report, [197].

58 Houston report, [205]-[209].

59 Houston report, [213]-[214]

60 Smith report, [62]-[66]; Morton report, [14]; Houston report, [232]-[255].

61 Houston report, [256]-[272].

62 ACCC Final Determination, [4.77].

by means of the opportunities for coordination between producers that are likely to present in the course of authorised collective discussions."[63]

44. Dr Smith (with whom Mr Morton agrees) recognises the risk of collusive conduct but says that the risk is small in the present case. Dr Smith says any attempt by coal miners to increase coal prices by restricting output is likely to fail, given the competitive nature of the coal export market.[64] But this assumes, incorrectly, that any collusive conduct would be confined to withholding supply from export. In the process of production of coal for export, mining producers compete in respect of a whole host of goods and services.[65] Collusion could occur in respect of any these goods and services. That risk is increased by the fact that the authorisation applicants comprise nearly all of the mine operators in the Newcastle catchment area.[66]

The different interests of members

45. A further detriment likely to result from the collective bargaining conduct is that in the process of collective negotiation, the interests and preferences of some producers are likely to be overlooked or marginalised. Coal producers have different concerns, or at least, prioritise concerns differently. These differences may arise from matters such as differences between producers' size, mine life or operational complexity.[67] The level of the navigation service charge is a good example. The evidence shows that some producers, such as Glencore, are vehemently opposed to the pricing offered by PNO under the producer deeds, while other producers are less concerned.[68]

46. The risk in a collective negotiation framework is that no agreement will be reached unless everyone's concerns can be addressed, or at least not until the concerns of the largest, most influential, members of the negotiating group have been satisfactorily addressed. This may mean that some individual producers will not sign producer deeds even though their own concerns have been satisfactorily addressed. This has the potential for inefficiency.

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63 Houston report, [231].

64 Smith report, [92].

65 Houston report, [253]-[255].

66 The applicants for authorisation comprise nine of the 11 coal producers in the Hunter Valley: see NSWMC SOFIC, fn 1, and [29].

67 Houston report, [263] and [264].

68 15 March Byrnes affidavit, [40]-[41].

47. The ACCC and authorisation applicants contend that the voluntary nature of the collective bargaining conduct protects against this risk, and that if a smaller producer is unhappy with the collective bargaining process, it can still choose to re-engage with PNO on a bilateral basis.[69] But this contention is inconsistent with the premise underlying the alleged transaction cost savings, which are said to arise from the fact that bilateral negotiations will no longer be needed.[70] Put another way, the alleged transaction costs savings are said to arise from a uniform and undifferentiated collective negotiating position, which would preclude any efficiency enhancing bilateral negotiations between PNO and producers wishing to advance their own personal interests and preferences. In any event, the evidence suggests that producers are unlikely to pursue bilateral negotiations while collective bargaining remains authorised.[71]

48. The authorisation applicants also suggest that the producers all share common interests.[72] However, the evidence points against that conclusion. The bilateral negotiations which took place in 2019-2020 illustrate the differences between the coal producers:

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

69 ACCC SOFIC, [99]; Smith report, [96]; NSWMC SOFIC, [102.3].

70 Houston report, [270].

71 Houston report, [261].

72 NSWMC SOFIC, [108].

73 15 March Byrnes affidavit, [40].

74 15 March Byrnes affidavit, [42]-[44].

75 15 March Byrnes affidavit, [45]-[48].

76 15 March Byrnes affidavit, [55]-[56]; Rochester affidavit, [12(e)]; Dodd affidavit, [10(e)].

(e) [redacted]

49. A number of these concerns have since been addressed by PNO through amendments to the draft producer deed,[80] but they illustrate the way in which the concerns of producers vary. Under a bilateral negotiation model, there is a prospect that PNO will be able to reach agreement with individual producers whose own particular concerns have been addressed, whereas this prospect is much slimmer under a collective negotiation model. As Mr Houston concludes, authorised collective bargaining is likely to restrain individual preferences of coal producers when negotiating with PNO, with the potential for less efficient contractual outcomes as a result.[81] This is a further matter of public detriment which must be brought to account by the Tribunal.

Conclusion

50. The authorisation applicants' application is predicated on the assumption that without authorisation PNO can simply ignore the wishes of coal producers. Nothing could be further from the truth. PNO runs a Port which is heavily dependent on coal volumes, under-utilised, and which operates under the threat of declaration. Collective bargaining is not needed to make PNO responsive to the interests of coal producers. Further, the authorisation applicants have failed to demonstrate how the collective bargaining conduct would be likely to generate any public benefit. At most, it will increase the profits of coal producers in the Hunter Valley, at the expense of PNO. That is not a proper basis to authorise conduct which is inherently anti-competitive, creates a risk of illegal collusion, and is likely to deter bilateral agreements between PNO and individual coal producers.

DATED: 27 August 2021

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77 15 March Byrnes affidavit, [59].

78 15 March Byrnes affidavit, [61].

79 15 March Byrnes affidavit, [74]-[75]; Dodd affidavit, [10(c)].

80 15 March Byrnes affidavit, [66]-[67].

81 Houston report, [271b].