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Lodgment and Details

Document Lodged:	Outline of 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

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S OUTLINE OF SUBMISSIONS

PART I INTRODUCTION

1. The applicant, Port of Newcastle Operations Pty Ltd (**PNO**), has sought review of a determination by the Australian Competition and Consumer Commission (**ACCC**) under s 88(1) to authorise the NSW Minerals Council (**NSWMC**) and other mining companies exporting goods through the Port of Newcastle (**Port**) to collectively negotiate with it in relation to the terms and conditions of access, including price, to the Port for a period of 10 years ending 30 September 2030.

2. The ACCC's role in this review is to assist the Tribunal in an impartial manner to reach, in the public interest, the correct or preferable decision. Given the presence of NSWMC as a contradictor, it is unnecessary for the ACCC to test all the evidence before the Tribunal or to present opposing points of view on every issue.

3. There are, however, important matters of principle which this review raises and in which the ACCC has a legitimate interest, including because the ACCC has the ongoing administration of the authorisation regime.[1] Those matters of principle are as follows:

   3.1. productive efficiency and public benefit: Part II;

   3.2. the role of evidence and principle in the Tribunal's function: Part III;

   3.3. the relevance of constraints upon PNO: Part IV;

   3.4. the meaning of "likely": Part V.

[1] ACCC, *Guidelines for Authorisation of Conduct (Non-Merger)* (March 2019) https://www.accc.gov.au/system/files/Guidelines%20for%20Authorisation%20of%20conduct%20%28non-merger%29_0.pdf.

4. The ACCC otherwise continues to rely upon its statement of facts, issues and contentions (**ACCC SOFIC**). The ACCC SOFIC addresses: the background on the parties, at [3]-[5]; the conduct sought to be authorised, at [6]-[12]; the ACCC's determination, at [13]-[19]; the Port, PNO and the Hunter Valley coal export supply chain, at [20]-[48]; and an overview of the Tribunal's function, at [53]-[58].

5. For the assistance of the Tribunal, **Annexure A** to these submissions is a table that summarises the more granular issues between the parties to the review, and the competing positions advanced before the Tribunal.

6. **Annexure B** to these submissions identifies some factual topics potentially relevant in this review, and provides the Tribunal with some pinpoint references in the materials that may assist the Tribunal to consider those topics.

PART II PRODUCTIVE EFFICIENCY AND PUBLIC BENEFITS

7. The ACCC does not disagree with **PNO Submissions, [6]-[9]** and **NSWMC Submissions, [27]-[29]**. In light of the issues joined between the parties, the ACCC considers the following matters warrant particular attention in the Tribunal's assessment of public benefits.

8. In *Application by Flexigroup Ltd [No 2]*, the Tribunal stated that: "[a] benefit to the public includes 'anything of value to the community generally, any contribution to the aims pursued by 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'".[2]

9. In *Qantas Airways Ltd*, the Tribunal recognised that: "[i]n assessing the nature and extent of public detriment and benefit, it is necessary to consider the significance of any issues of allocative, dynamic and productive efficiency".[3] The Tribunal explained that: "Productive or technical efficiency relates to the most efficient use of the resources and technology currently available to a firm, in any given time period".[4]

10. In her expert report, at [36], Dr Smith explains:

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

11. PNO contends that "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

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2 [2020] ACompT 2 at [139]

3 [2004] ACompT 9 at [157].

4 [2004] ACompT 9 at [160].

supplies services at the Port, and/or any dependent market": **PNO Submissions, [34]**. In so contending, PNO cites (*inter alia*) Mr Houston's expert report at [35], which says this:

> In my opinion, the potential for public benefits from the authorised conduct requires that collective bargaining gives rise to both:
>
> a. a change in economic conduct, i.e., the form and outcome of negotiations with PNO are different as compared with what they would have been absent the collective bargaining conduct; *and*
>
> b. an increase in either the quantity or quality of output for the access service, or in one or more markets upstream or downstream to the access service, that would not have arisen in the absence of the collective bargaining conduct.

12. This framework is incomplete. It takes insufficient account of the public benefits derived from achieving productive efficiencies.

13. Collective bargaining may increase productive efficiency by reducing the transaction costs of bargaining. In doing so, collective bargaining frees up resources that can be used elsewhere in the economy. So long as there is a valued alternative use of those resources, the cost savings constitute an economic and public benefit.

14. Such cost savings may not, however, affect the quality or quantity of access services. Where they do not do so, they fall outside Mr Houston's framework, and thus would not constitute public benefits on PNO's contention. That should not be accepted as a matter of economic principle. The ACCC does not disagree with the NSWMC's response to Mr Houston's framework, namely that "the legal standard of public benefits is wider than the economic specification of welfare cited by economists": see **NSWMC Submissions, [50]-[51]**. But the ACCC's disagreement with the framework and PNO's contentions built upon it is more fundamental. That disagreement is at the level of economic principle.

15. Another, perhaps related, contention by PNO should also be rejected. PNO contends (**PNO Submissions, [3]**) that transaction costs savings are a mere "private transfer of surplus between PNO and producers". That is not correct. Transaction cost savings for producers do not come at the expense of PNO. Indeed, PNO is likely to benefit from transaction cost savings itself if it moved from a series of bilateral negotiations to a single collective negotiation.

PART III EVIDENCE, PRINCIPLE AND THE TRIBUNAL'S FUNCTION

16. It may be that PNO's contentions, built around Mr Houston's framework, could or should be understood as having a place for productive efficiency, so long as there is "evidence" of some valued alternative use. That would render intelligible PNO's contention, repeated on no fewer than seven occasions, that there is "no evidence" to substantiate certain propositions: **PNO Submissions, [3], [16], [26], [29], [35]**. Yet, this understanding of PNO's contentions, and these complaints, tend to gloss over matters of important principle about the nature of the evaluative task in s 90(7)(b). The NSWMC joins issue with PNO (**NSWMC Submissions, [55]**), but without exposing for the Tribunal's consideration the methodological difficulties with PNO's approach.

A. The section 90(7)(b) inquiry

17. Just as in s 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the issues that arise in s 90(7)(b) could fairly be described as "economic facts": the Tribunal must reach conclusions about the real world, but appropriately and usefully "observed and described through the tools and language of the social science of economics".[5]

18. Pausing here; this signals something important for the Tribunal in considering its approach to its statutory task. Economic theory and principle is itself a body of evidence that can inform the Tribunal's decision-making in forming the state of satisfaction which s 90(7)(b) calls for. How markets and actors can be expected to operate as explicated by economic theory and principle is a legitimate body of learning upon which the Tribunal can rely. The CCA, in s 90(7)(b), as much as s 50, is written upon the foundation of economics. As expert bodies, the ACCC at first instance, and then this Tribunal on review, are entitled to draw on knowledge of, and expertise in, the application of economic principles, which knowledge and expertise they have accumulated in carrying out their functions.[6]

19. Section 90(7)(b) is like s 50 of the CCA in another way. Each involves "a forward-looking test".[7] This is another important point in evaluating PNO's complaints about a lack of evidence. Section 90(7)(b) "involves a prediction about the future",[8] which "does not mean that we prophesy the future".[9]

20. What is the fact-finding process in which the Tribunal is here engaged? "Facts" about future conduct are not the same as facts about the past or the present and cannot be "proved" in precisely the same ways or to the same degree of confidence.

21. Proof of "future possibilities" is very similar to proof of "past hypothetical situations", which is made clear by the High Court's treatment of them together in *Malec v J.C. Hutton Pty Ltd*[10] and *Sellars v Adelaide Petroleum NL*.[11] As to the consideration of hypotheticals, and thus as to the proof of future possibilities, it has been recognised that "the inquiry necessarily proceeds by drawing inferences from known facts"[12] and based on "reasonable conjecture within the parameters set by the historical facts".[13]

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5 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 at 109 [215] (Middleton and O'Bryan JJ).

6 *Application by Chime Communications Pty Ltd [No 2]* (2009) 257 ALR 765 at 770-771 [8]-[11], 782-784 [58]-[71], 785-786 [76]-[77] (Finkelstein J, Davey and Round). See also *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 604 [7], 605 [12] (Gleeson CJ), 630 [116] (McHugh J), 661 [263] (Hayne J), 669-670 [300] (Callinan J).

7 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 at 109 [216] (Middleton and O'Bryan JJ).

8 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 at 109 [216] (Middleton and O'Bryan JJ).

9 *Re QIW Ltd* (1995) 132 ALR 225 at 276.

10 (1990) 169 CLR 638 at 643 (Deane, Gaudron and McHugh JJ).

11 (1994) 179 CLR 332 at 350 (Mason CJ, Dawson, Toohey and Gaudron JJ).

12 *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 753 [35] (Gageler J).

13 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 454 [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

22. In *Australian Competition and Consumer Commission v Pacific National Pty Ltd*, the joint judgment expressed the point as follows:[14]

> In the usual case, predictions about the nature and extent of competition in the future with and without the acquisition will be rooted firmly in past and present market conditions, which are susceptible of proof in the ordinary way. Most markets have a history from which an assessment of substitution possibilities, concentration, barriers to entry and other commercial behaviours and conditions can be undertaken and reliable predictions about the future can be made. Further, some future facts are more certain than others.

23. The above principles have been articulated in the context of judicial proceedings, whereas the Tribunal is an administrative decision-maker.[15] It follows that there is more, not less, scope for the Tribunal to engage in drawing inferences and reasonable conjecture informed by economic theory and principle.

B. PNO's position in light of the above principles

24. Against that background, PNO's complaints have about them the air of empty argument.

25. For example, PNO contends (**PNO Submissions, [41]**) that:

> 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. Neither Dr Smith nor Mr Morton grapples with this requirement. 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.

26. This submission is built around the scaffolding of Mr Houston's report, at [209], which says:

> Dr Smith and Mr Morton do not provide any evidence to suggest that transaction cost savings would result in an increase in demand for port access services by producers, or an analysis suggesting that 'saved resources' would be effectively redeployed in other parts of the economy. It follows that there is insufficient basis on which to conclude that any transaction cost savings would ultimately give rise to any public benefits.

27. PNO, accordingly, appears to doubt that "saved resources" from collective bargaining will be redeployed to some alternative valuable use, absent evidence as to how those saved resources will in fact be used. That is contrary to economic principle and contrary to a traditional fact-finding approach to future possibilities.

28. From the perspective of economic principle, transaction costs, opportunity costs and scarcity are topics on which there is a rich and established literature.[16] Assuming no more

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14 (2020) 277 FCR 49 at 110 [218] (Middleton and O'Bryan JJ).

15 See also CCA s 103(1).

16 The literature on these subjects is vast. Classic examples include the following: R H Coase, "The Nature of the Firm" (1937) 16(4) *Economica* 386–405; R H Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics* 1–44; O E Williamson, "The Economics of Organization: The Transaction Cost Approach" (1981) 87(3) *The American Journal of Sociology* 548–577; P Samuelson and W Nordhaus,

than economic agents behaving rationally, one can reasonably conjecture that saved resources would be valuably redeployed elsewhere, unless there is some cogent reason to conclude there was *no* alternative, available, valuable use.

29. To understand the role of the Tribunal in this respect, it is helpful to take Mr Houston's example of legal services at [49(b)] of his report. If collective bargaining results in fewer lawyers being needed to conduct negotiations, it is reasonable to conjecture that these lawyers would be usefully redeployed by taking on new briefs or (perhaps more rationally still) devoting more time to existing briefs. Evidence is not required as to the specific counterfactual tasks in which these lawyers would be engaged, because the Tribunal as an administrative decision-maker (and indeed, a court as a judicial decision-maker) could safely reason that they would be valuably redeployed elsewhere.

C. Evidence and public vs private benefits

30. Relatedly, PNO can be understood to contend that, absent evidence as to how savings will be used, the Tribunal should prefer to characterise those savings as a private rather than public benefit. PNO thus posits any cost saving being "retained as a surplus for the mining companies involved": **PNO Submissions, [41]**. It is commercially unrealistic to conjecture that those savings will sit idle, unused entirely.

31. The submission attempts to use a supposed need for "evidence", understood narrowly, to reagitate a narrow conception of public benefits that the Tribunal rejected in *Qantas Airways Ltd* in the following terms:[17]

> We consider that the phrase "benefit to the public" is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement. This broad approach to public benefit promotes the achievement of both static and dynamic efficiencies.
>
> Given the above reasoning, we have formed the view that the "public versus private" dichotomy used by the parties in relation to cost savings is of fairly limited assistance when examining the benefits relied upon for the purposes of s 90. Rather, the enquiry should be directed towards the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of "anything of value to the community generally"? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?
>
> It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account for the purposes of s 90 of the Act, where they result in pass through which reduces prices to final

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Economics (first published in 1948, with multiple editions published since); T R Malthus, *An Essay on the Principle of Population* (1798); Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (1932). The ACCC does not suggest that these or any other works are necessarily relevant to the Tribunal's task in this review, and the ACCC does not suggest that the Tribunal need read any of these for the review. Rather, the ACCC emphasises the deep resources that economic theory and principles provide.

17 [2004] ACompT 9 at [187]-[189] (Goldberg J, Latta and Round).

> consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment. However, the weight that should be accorded to such cost savings may vary depending upon who takes advantage of them and the time period over which the benefits are received.

32. The last paragraph is instructive. Where there is specific evidence about what will be done with cost savings, it would be surprising if the Tribunal did not take that use into account in forming its overall evaluative assessment under s 90(7)(b). Having such evidence (depending on what that evidence showed) may affect the weight the Tribunal gives to the cost saving as a public benefit in its reasoning process. But that is not to say that it can or should give the matter *no weight* when no evidence of a pass through is before it. And the assessment of weight will always be guided by the kind of cost saving in question, and the ease with which sensible evidence of the effects of those costs savings might be gathered.

D. Evidence and public detriments

33. In at least one respect, PNO and Mr Houston are willing to engage in conjecture without evidence. That area is in identifying public detriments that weigh against the grant of authorisation. Of course, reasonable conjecture is permissible on both the public benefits side and the public detriments side. Their analysis of public detriments provides another useful example for how the fact-finding process ought to work in performing the evaluative function in s 90(7)(b).

(1) Risk of collusion

34. PNO contends that "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": **PNO Submissions, [42]**. It contends that "the problem is that the authorised conduct makes it easier for coal producers to engage in precisely this (and other) types of unauthorised conduct": **PNO Submissions, [43]**. It criticises Dr Smith (with whom Mr Morton agrees) for characterising the risk as small: **PNO Submissions, [44]**.

35. It is reasonable to conjecture that providing competitors with an opportunity to discuss common positions on one matter may precipitate a small risk of collusion on other matters. The thesis is no more complicated than: giving people an opportunity to talk will breed familiarity with each other and provide them with an opportunity to talk about other things.

36. It is reasonable to identify this as a risk without a requirement of further evidence. But it is likewise reasonable to characterise the risk as small; not because of what might be the subject of future speculative collusion (cf **PNO Submissions, [44]**), but because of the inherent unlikelihood of *the authorisation* aggravating that risk. It is unrealistic to proceed as if these competitors are not already familiar with each other and would not have any other opportunity to confer and collude if that were their intent. And it is a little fanciful to think that they would use the umbrella of an ACCC authorisation, sought by the NSWMC as applicant, and the increased scrutiny that might attract, to collude when otherwise they would not have done so during myriad other opportunities to engage with each other around town or at industry events.

37. Finally, in assessing the likelihood of this risk materialising, it is necessary to take into account that there are laws against cartel conduct, and significant penalties for engaging in it, which can rationally be taken to deter such conduct.[18]

(2) Risk of marginalising producers

38. PNO also contends that "in the process of collective negotiation, the interests and preferences of some producers are likely to be overlooked or marginalised": **PNO Submissions, [45]**. That is possible, in that collective bargaining involves putting forward positions agreeable to the collective, without needing further "evidence" to support the possibility.

39. PNO's response to the ACCC's point that any risk of marginalisation is mitigated by the fact that the authorised conduct is voluntary (permitting producers to not participate if they desire not to do so) is unpersuasive: **PNO Submissions, [47]**. PNO contends that this is inconsistent with there being cost savings. Not so: there are cost savings while producers collectively bargain and to the point where they are satisfied that the collective position suits their individual interests. Those savings are not lost or non-existent because a producer may seek, at some later point, to bargain bilaterally on some or all issues.

E. Evidence and PNO's refusal to collectively bargain

40. Finally, one of PNO's claims is that there are no likely public benefits, because it will simply refuse to engage in collective bargaining. "[A]uthorisation is likely to be pointless", it says: **PNO Submissions, [26]**. PNO mischaracterises the ACCC's position as inviting the Tribunal to "*assume* that collective negotiations will take place": **PNO Submissions, [26]**. That is not so.

41. *First*, the Tribunal should analyse the future with the authorised conduct alive to what PNO has said to be its present intention not to participate in collective bargaining. Even if PNO declines to participate, authorising producers to share information and positions can facilitate their own separate bilateral negotiations with PNO:[19] see also **NSWMC Submissions, [44]**.

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[18] This point can be distinguished from that rejected by Beach J in *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)* [2019] FCA 669 at [836]. His Honour there considered an argument that, if Pacific National were to own the Acacia Ridge Terminal (**ART**), then, on the ACCC's hypothesis in that case, Pacific National would have market power in the supply of terminal services at the ART. Pacific National had contended that using that power to discriminate against access seekers would risk contravening s 46, which could expose PN to very large penalties under s 76, which penalties would have a substantial deterrence effect (at [833]). In that context, Beach J observed: "*True it is that s 46 and the potential for substantial penalties may operate as a potential discipline on behaviour. But it would be appreciated that a s 46 case, even with its recent amendments, is difficult and expensive to get up, let alone in a timely timeframe. Moreover, in any event it may not be an answer to some of the behaviour under discussion. I do not see this potential deterrent effect as sufficiently ameliorating or removing the relevant ability to discriminate*." A salient point of difference is that the relief available for contraventions of s 46 principally comprises civil pecuniary penalties, as opposed to the criminal sanctions and possible custodial sentences available under the cartel provisions. Further, Beach J's rejection involved questions of degree — such penalties may operate as discipline, but not a sufficient discipline — in a context of unilateral conduct. The contention here is simpler and different: the occasion for coordination already exists, and is not likely to be aggravated by collective bargaining, where the ACCC is observing the conduct; which conduct is in any event discouraged by possible criminal sanctions.

[19] Smith Report at [14], [59].

42. *Secondly*, the Tribunal should consider the future and take into account the possibility that PNO may in the future change its position, for reasons that Dr Smith explained in her report at [16]. In short, Dr Smith said that it is in coal producers' interests to reduce transaction costs, and it is in PNO's interests to have no unnecessary impediments or disincentives for the export of coal through the Port of Newcastle. There is, to this extent, a mutual interest that may in the future conduce to PNO changing its stance: see also **NSWMC Submissions, [43]**. PNO itself seeks to employ this kind of reasoning as part of its submissions: Part IV below.

43. There is an additional reason why it is possible that PNO may, in the future, change its position. Its directors have duties 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.[20] Those directors can be taken to be astute to the need to not inappropriately fetter their discretions to decide whether or not to engage in collective bargaining, during the period of any authorisation, having regard to the circumstances that pertain from time to time.[21]

44. Thus, and of course, the Tribunal is not asked blindly to assume that collective bargaining will occur. What will occur is that the conditions of competition will change such that collective bargaining can occur. The Tribunal can safely infer that the NSWMC, as the authorisation applicant, will attempt to engage in such bargaining, which is likely to lead to public benefits even if PNO does not participate. And the Tribunal can infer that it is possible that PNO's expressed position that it will not participate may change over the course of the authorisation, in which case further benefits are likely to be realised.

45. In light of the above, the position is more nuanced than **NSWMC Submissions, [19]-[25]** presents, subject to what the NSWMC means by contending that: "the Tribunal must assume that the collective bargaining conduct in respect of which authorisation is sought in this case will occur". It is accurate to observe, as the NSWMC does, that s 90(7)(b) focuses attention on "the conduct" which is sought to be authorised; this may provide additional reason to infer that the authorisation applicant will in fact engage in that conduct. It does not follow that the Tribunal should ignore PNO's present stance that it will not engage with the authorisation applicants. But as explained, nor should the Tribunal accept that that will be the case for the entire duration of the authorisation. And PNO's present stance does not mean that there are not likely to be public benefits derived from permitting the authorisation applicants to try to engage with PNO on a collective basis.

46. The position is also far more nuanced than PNO contends it to be. Its submission that "PNO's likely refusal makes authorisation nugatory" cannot be accepted: **PNO Submissions, [26]**. In terms, the submission acknowledges, by use of the word "likely", that its present intention not to participate in collective bargaining may change. But more fundamentally, there is a risk that the authorisation process in respect of collective bargaining conduct will be frustrated entirely if, as PNO implicitly contends, authorisation is at the mercy of what the proposed target says it will do or not do: see also **NSWMC Submissions, [23]**. That result should not be countenanced as a matter of principle.

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20 *Corporations Act 2001* (Cth) ss 180-181.

21 *Thorby v Goldberg* (1964) 112 CLR 597 at 605-606; *Re NRMA Ltd* (2000) 33 ACSR 595 at 623 [109] (Santow J).

PART IV CONSTRAINTS ON PNO

47. PNO advances five reasons why it is already constrained in the prices and terms of access it can impose: **PNO Submissions, [15]-[24]**. It contends that it "is already both constrained and incentivised to ensure that coal producers in the Hunter Valley earn proper economic returns" such that "any improvements in price achieved through collective bargaining would be unlikely to boost efficiency": **PNO Submissions, [24]**.

48. The ACCC does not presently intend to engage directly with those five reasons. The specificity of those issues suggests that those are issues appropriately determined in a contest between PNO and NSWMC. The NSWMC does join issue with PNO: **NSWMC Submissions, [32]-[42]**. The ACCC will offer assistance on those subjects during the hearing as appropriate.

49. Rather, the ACCC advances two more general points concerning PNO's position.

50. *First*, the constraints to which PNO points could only rationally result in there being **no** likely public benefits from the authorised conduct if PNO is already charging competitive or efficient prices and imposing competitive and efficient terms. On that hypothesis, there is nothing more for collective (or any) bargaining to do. Efficiency has already been achieved.

51. The difficulty for PNO is that the Tribunal should not be satisfied that this is the case. Indeed, PNO's position as a monopolist suggests strongly that prices are inherently unlikely to reflect some optimally competitive or efficient figure.

52. Firms with monopoly power maximise their profits by charging prices in excess of their cost of production. Doing so may result in some lost sales, but doing so will also increase the profit margin on retained sales. If that increase is larger than the lost profit on lost sales, it will be profitable for a firm to price above cost. Setting prices to "maximise returns over the expected life of its lease" is thus not the same thing as setting prices to achieve the "maximum long term level of coal export" as Mr Houston tends to assume at [100] of his report: and see **PNO Submissions, [18]**.

53. *Secondly*, the Tribunal should be sceptical about the extent to which a monopolist not subject to price regulation is constrained and slow to accept that it is so heavily constrained that authorising producers to collectively bargain could have no realistic chance of producing a public benefit.

PART V THE MEANING OF "LIKELY"

54. The final issue of principle raised by PNO is the meaning of "likely" in s 90(7)(b). That section provides:

> The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:
>
> …
>
> (b) the Commission is satisfied in all the circumstances that:

(i) the conduct[22] 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; or […]

55. PNO contends that the words "be likely to result" refer to "a benefit or detriment that is more probable than not" despite, as PNO appropriately acknowledges, the Tribunal having previously held that this refers to a "real chance": **PNO Submissions, [10]**.

56. PNO's contention should be rejected. The Tribunal should, in this review, approach the statutory reference to "likely" results to mean that there is a "real chance" of public benefits and public detriments. In applying a "real chance" interpretation, the Tribunal will follow a long line of authority in the authorisation context that has adopted this interpretation and rejected a "more probable than not" interpretation.

57. As far back as 1977, the Tribunal in *Re Howard Smith Industries* said, in the context of authorisation of a merger, that the reference to likely "does not mean that the likely effects must be more probable than not, but rather there must be a tendency or real possibility of a particular result".[23]

58. In 2004, on three separate occasions, the Tribunal reaffirmed the "real chance" interpretation instead of a "more probable than not" meaning in the specific context of s 90.[24] It has done so consistently ever since.[25]

59. In the circumstances, the "re-enactment presumption"[26] that "where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'"[27] is engaged. Section 90 has been amended on several occasions without the Parliament seeking to disturb the settled meaning given to "likely" in the authorisation context.[28]

60. As Kiefel and Keane JJ observed in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, "[r]egularity and consistency are important attributes of the rule of law … there comes a point when a view of statutory construction which may reasonably have been contestable on the first occasion on which it was agitated must be

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22 It is inaccurate to refer, as PNO does (**PNO Submissions, [10]**), to public benefits eventuating from the "authorisation" as such.

23 (1977) 28 FLR 385 at 405.

24 *Re Qantas Airways Ltd* [2004] ACompT 9 at [153]-[156] (Goldberg J, Latta and Round); *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ATPR ¶42-120 at 45,062 [83] (Heerey J, Beerworth and Walsh); *Re Application by Jools, President of the New South Wales Taxi Drivers Association* (2006) 233 ALR 115 at 126 [48] (Finkelstein J, Starrs and Shrogen).

25 *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,518 [109] (French J, Latta and Walsh); *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Ltd* [2014] ACompT 1 at [164] (Mansfield J, Latta and Round). See also in the context of ss 95AT and 95AZ: *Application by Sea Swift Pty Ltd* [2016] ACompT 9 at [46] (Farrell J, Davey and Round).

26 *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502 [15].

27 *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106. See also *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 at [10]-[11] (Kiefel CJ, Keane and Gleeson JJ), [51], [56] (Gageler, Gordon and Steward JJ).

28 *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) Sched 1 Items 15-18.

acknowledged to have been settled".[29] Considerations of comity lend themselves to the same approach and conclusion.[30]

61. What this all means is that, if there is to be a departure from the settled meaning given to "likely" in the authorisation context, then it is for the Parliament to enact that departure, something it has not done in the decades that it could have done so. The Tribunal should not make such a departure from the interpretation upon which the ACCC and Australian businesses will have relied for many years.

62. In reasoning in this fashion, the Tribunal will be following the same mode of reasoning, leading to the same conclusion, as the Full Federal Court in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* as to the meaning of "likely" in s 50.[31]

63. It is unnecessary to engage further with the substance of PNO's contention on this issue: **PNO Submissions, [10]**. The NSWMC essays some additional responses to PNO's contention, with which the ACCC does not disagree: see **NSWMC Submissions, [13]-[14], [17]**. But the reasons set out above, which reflect **NSWMC Submissions, [8]-[12], [15]-[16]**, are sufficient to dispose of PNO's argument.

Ruth C A Higgins SC

Christopher Tran

24 September 2021

Counsel for the ACCC

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29 (2013) 251 CLR 322 at 383 [198].

30 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [21] (Allsop CJ).

31 (2020) 277 FCR 49 at 115-116 [243]-[244] (Middleton and O'Bryan JJ).

ANNEXURE A – SUMMARY OF ISSUES AND POSITIONS

Issue	PNO	NSWMC	ACCC
Nature of the Tribunal's function	Subs, [7]-[9] SOFIC, [53]-[57]	SOFIC, [16]-[26]	SOFIC, [53]-[58]
What is the meaning of "likely"	More probable than not. See Subs, [10]	Real chance. See Subs, [7]-[18]	Real chance. See Subs, [53]-[62]
Whether a "public benefit" must involve an increase in output	Yes. See Subs, [34], [36], [41]	No. See Subs, [50]	No. See Subs, [10]-[14]
Is "evidence" needed and what counts as evidence?	Evidence is needed (and seemingly excludes economic theory and principle). See Subs [3], [16], [26], [29], [35]	No. See Subs, [47]-[49], [55]	Not in the way and to the extent for which PNO contends. See Subs, [24]-[29]
What is/are the relevant market/s?	SOFIC, [22]-[26]	SOFIC, [64]-[66], [72]	SOFIC, [59]-[69]
Is the conduct unlikely to result in public benefits because of existing constraints?	Yes, unlikely. See Subs, [2], [15]-[33] SOFIC, [58(a)]	SOFIC at [2]-[5], [49]-[54], [67]-[96] Subs, [32]-[47]	SOFIC, [78]-[81]
Will collective bargaining promote investment conditions, efficiency and competition?	Not proved. See Subs, [35]-[36]. SOFIC, [59]	Yes. See Subs, [52] SOFIC, [97]-[98]	SOFIC, [82]-[89]
What is the extent of lower transaction costs?	Collective bargaining will also generate transaction costs. See Subs, [37]-[40] SOFIC, [58(c)]	SOFIC, [99] Subs, [53]-[58]	SOFIC, [75]-[77]
Public vs private benefits	Submissions at [2], [3], [16], [24], [36], [41] SOFIC at [58(d)], [63(b)]	SOFIC, [72]	Subs, [30]-[32] SOFIC, [73]

PNO refusal to negotiate	Subs, [26]-[28] SOFIC at [51]	SOFIC, [111]-[112] Subs, [19]-[25], [43]	SOFIC, [90]-[92]
What is the extent of the risk of collusive conduct?	A real risk. See Subs, [43]-[44]	Subs, [61]-[62]	Subs, [34]-[37]
What is the extent of the risk that interests of individual producers will be overlooked or marginalised? And is the voluntary nature of the collective bargaining a sufficient answer?	A real risk. See Subs, [42], [45]-[49]	Subs, [63]-[65]	
Is a substantial net public benefit required?	SOFIC, [60], [63]		SOFIC, [105]-[108]
Exercise of the Tribunal's discretion	SOFIC, [63]	SOFIC, [109]-[112]	SOFIC, [103]-[110]
Length of authorisation	Not put in issue	SOFIC, [60]	SOFIC, [111]-[113]

ANNEXURE B

1. PNO will not engage in collective bargaining

1. Letter from Clifford Chance to ACCC dated 15 May 2020 at [1.2] [**HB 2318**], [2.16] [**HB 2323**]

2. Affidavit of Simon Byrnes affirmed 15 March 2021 at [78] [**HB 138-139**]

2. Promotion of investment, employment, certainty and competition

3. Record of oral submission by Whitehaven Coal on 18 March 2020 [**HB 2266**]

4. Letter from Yancoal Australia Limited dated 18 March 2020 at [3(c)] [**HB 2267**]

5. Letter from Port Waratah Coal Services dated 18 March 2020 [**HB 2269**]

6. Letter from Hunter Valley Coal Chain Coordinator dated 3 April 2020 [**HB 2281-2282**]

7. Letter from Yancoal Australia Limited dated 3 April 2020 [**HB 2283-2285**]

8. Letter from Port Waratah Coal Services dated 3 April 2020 [**HB 2286-2288**]

9. Letter from Port Authority of New South Wales dated 16 April 2020 [**HB 2299-2300**]

10. Letter from Port Waratah Coal Services dated 10 July 2020 [**HB 2328**]

3. Transaction cost savings

11. Letter from Yancoal Australia Limited dated 3 April 2020 at [3.2] [**HB 2285**]

12. Letter from Port Waratah Coal Services dated 3 April 2020 [**HB 2287**]

4. Safety

13. Letter from Port Authority of New South Wales dated 16 April 2020 [**HB 2299-2300**]

14. Letter from Port Waratah Coal Services dated 10 July 2020 [**HB 2329**]

5. Charges at the Port

15. Affidavit of Simon Byrnes affirmed 15 March 2021 at [8]-[11] [**HB 117-118**]

16. Affidavit of Gabriella Sainsbury affirmed 15 March 2021 at [6]-[12] [**HB 306-307**]

17. Affidavit of Simon Byrnes affirmed 30 July 2021 at [7]-[22] [**HB 848-850**]

18. Affidavit of Michael Ryan Philip Dodd affirmed 6 May 2021 at [5]-[6] [**HB 1042-1043**]

19. Affidavit of Brett Farley Lewis sworn 30 April 2021 at [7]-[8] [**HB 1054**]

20. Affidavit of Keiron Rochester affirmed 30 June 2021 at [5]-[6] [**HB 1070**]

6. Types of coal

21. Affidavit of Simon Byrnes affirmed 15 March 2021 at [12]-[14] [**HB 118-119**]

7. Future of coal

22. Affidavit of Simon Byrnes affirmed 15 March 2021 at [24] [**HB 122**], [29]-[32] [**HB 125-127**]

23. Affidavit of Simon Byrnes affirmed 25 June 2021 at [7]-[14] [**HB 690-692**].

    23.1. See also at **HB 702, 712, 713, 717, 722**

24. Affidavit of Dave Poddar affirmed 25 June 2021 at [17]-[21] [**HB 1089**]

    24.1. See also at **HB 1243, 1244**

25. Expert Report of Euan Morton dated 25 June 2021 at [25] [**HB 1535-1536**]

8. Bilateral negotiations between PNO and producers

26. Affidavit of Simon Byrnes affirmed 15 March 2021 at [33]-[76] [**HB 127-138**]

27. Affidavit of Simon Byrnes affirmed 25 June 2021 at [15]-[32] [**HB 692-694**]

28. Affidavit of Simon Byrnes affirmed 30 July 2021 at [44]-[45] [**HB 855-856**]

29. Affidavit of Michael Ryan Philip Dodd affirmed 6 May 2021 at [7]-[12] [**HB 1043-1044**]

30. Affidavit of Brett Farley Lewis sworn 30 April 2021 at [9]-[18] [**HB 1054-1056**]

31. Affidavit of Keiron Rochester affirmed 30 June 2021 at [7]-[14] [**HB 1071-1072**]

9. Subsequent discussions since interim authorisation

32. Affidavit of Simon Byrnes affirmed 15 March 2021 at [81] [**HB 139**], [83] [**HB 140**]

10. Bilateral access deeds with ships' agents

33. Affidavit of Gabriella Sainsbury affirmed 15 March 2021 at [13]-[19] [**HB 307-309**]

11. Constraints

34. Affidavit of Bruce Llewellyn Lloyd affirmed 15 March 2021 at [3]-[21] [**HB 377-382**]

35. Affidavit of Simon Byrnes affirmed 30 July 2021 at [23]-[28] [**HB 850-852**]

12. Container terminal development

36. Affidavit of Simon Byrnes affirmed 30 July 2021 at [29]-[33] [**HB 852-853**]

37. Affidavit of Dave Poddar affirmed 25 June 2021 at [4]-[16] [**HB 1086-1088**]

38. Affidavit of Dave Poddar affirmed 29 July 2021 at [5]-[7] [**HB 2014-2015**]