

## NOTICE OF LODGMENT

### AUSTRALIAN COMPETITION TRIBUNAL

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#### Lodgment and Details

Document Lodged: Form I – Application to Tribunal for Review

File Number: ACT 2 of 2020

File Title: Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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REGISTRAR

Dated: 17/09/2020 5:52 PM

#### Important information

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



## FORM I

(subregulation 20(1))

### APPLICATION TO TRIBUNAL FOR REVIEW

*Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council (NSWMC) on behalf of itself, certain coal producers that export coal through the Port of Newcastle (Port), and mining companies requiring future access through the Port (together, the Applicants), and the determination made by the ACCC on 27 August 2020*

1. Port of Newcastle Operations Pty Limited ACN 165 332 990 (**PNO**) hereby applies to the Australian Competition Tribunal (**Tribunal**) pursuant to section 101 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated the 27th day of August 2020 (Commission file no. AA1000473) (**Determination**).
2.
  - (a) PNO was not the applicant for the authorisation to which the Determination relates.
  - (b) PNO's interest in the Determination is as follows:
    - (i) PNO is the target of the conduct the subject of the Determination (**Proposed Collective Bargaining Conduct**). The Proposed Collective Bargaining Conduct relates to the terms and conditions of access to the Port provided by PNO, including price for the export of coal and any other minerals through the Port;
    - (ii) as the Port operator authorised to fix and levy charges under the *Ports and Maritime Administration Act 1995* (NSW), PNO is directly affected by the Proposed Collective Bargaining Conduct authorised by the Determination; and
    - (iii) PNO has actively participated throughout the consultation conducted by the ACCC since 6 March 2020, including by providing three written submissions dated 18 March 2020, 7 April 2020 and 10 July 2020.
3. PNO is dissatisfied with the Determination in the following respects:
  - (a) The Proposed Collective Bargaining Conduct should not be authorised when it would not be likely to result in any tangible or significant public benefit at all, including because:
    - (i) the price terms and conditions of Port access are insignificant to the competitiveness of coal exported from the Hunter Valley;
    - (ii) the Proposed Collective Bargaining Conduct would not increase certainty for any price terms and conditions of Port access **[CONFIDENTIAL TO PNO]** [REDACTED];
    - (iii) it has not been identified, nor established, how there would be any meaningful reduction in transaction costs relative to bilateral negotiations between PNO and coal producers; and/or
    - (iv) it has not been identified, nor established, how the Proposed Collective Bargaining Conduct would facilitate more efficient terms and conditions of Port access in agreements between PNO and coal producers.
  - (b) The Proposed Collective Bargaining Conduct should not be authorised when any benefits in which it might result would be of a private, not public, nature.



## Public Version

- (c) Further or alternatively, the Proposed Collective Bargaining Conduct should not be authorised when it would not be likely to result in any tangible or significant public benefit in circumstances where it involves cartel conduct that:
- (i) is presumptively harmful to competition;
  - (ii) could facilitate the exchange of competitively sensitive information between coal producers that otherwise would not occur; and/or
  - (iii) could adversely affect competition and/or efficient investment in a range of markets in which coal producers participate in the Hunter Valley coal supply chain, including rivalry between coal handling terminals in which some but not all coal producers have an ownership interest.
- (d) Further, the Proposed Collective Bargaining Conduct would be likely to result in significant public detriment by inhibiting efficiency enhancing competition between coal producers with respect to acquiring access services from PNO, including because:
- (i) it would have the practical effect of replacing efficiency enhancing bilateral negotiations between PNO and individual coal producers with collective negotiation; and/or
  - (ii) the terms and conditions of Port access negotiated between PNO and coal producers would be reduced to a lowest common denominator when that might not be an efficiency maximising outcome.
- (e) The Proposed Collective Bargaining Conduct should not be authorised as a matter of discretion in the following circumstances:
- (i) it involves cartel conduct that is presumptively harmful to competition and that should not be authorised without it being likely to result in substantial net public benefit;
  - (ii) any net benefit that it would be likely to result (which is denied) would be of a private nature; and
  - (iii) any net public benefit that it would be likely to result (which is denied) would be insignificant.
- (f) The Determination fails properly to take into account, in accordance with s 90(6A) of the CCA, all of the submissions and information that the ACCC received from PNO in circumstances where the ACCC could not be satisfied that the Proposed Collective Bargaining Conduct would be likely to result in a public benefit that would outweigh any likely detriment to the public if this material had been properly taken into account.
- (i) For example, the Determination makes only cursory reference to critical information that PNO provided to the ACCC on a confidential basis, and failed properly to take this information into account (Determination, 3.9).
- (g) The following findings made by the ACCC in the Determination were not supported by the information and submissions before the ACCC, and further or alternatively are not supported in all the relevant circumstances:
- (i) the ACCC's conclusion regarding the likely future without the Proposed Collective Bargaining Conduct, and in particular, that in the absence of entering into a long term deed with PNO, vessels carrying coal for the Applicants will be subject to PNO's published access charges (Determination, 4.16);
  - (ii) that the Proposed Collective Bargaining Conduct is likely to result in public benefit through addressing, in part, an asymmetry of information between each of the Applicants and PNO (Determination, 4.40-4.41);



**Public Version**

- (iii) that the Proposed Collective Bargaining Conduct is likely to result in some benefits from increased pricing certainty and more timely resolution of industry-wide issues, which facilitates more efficient investment decisions for Australian coal producers, as well as increased certainty for the delivered coal price for international coal customers (Determination, 4.48);
- (iv) that the Proposed Collective Bargaining Conduct is likely to result in transaction cost savings to all parties to the collective negotiations (Determination, 4.57);
- (v) that the Proposed Collective Bargaining Conduct does not significantly increase the likelihood of collusion occurring in relation to matters for which authorisation is not being sought, or increase the likelihood of the members of the bargaining group sharing commercially sensitive information (Determination, 4.77); and
- (vi) that the Proposed Collective Bargaining Conduct would not proceed on the basis that all members of the bargaining group have the same interest and remove Port users' unique individual interests, such that the Proposed Collective Bargaining Conduct is likely to result in minimal public detriment (Determination, 4.83-4.85).

4. The determination that PNO is seeking from the Tribunal is as follows:

- (a) that the Determination be set aside;
- (b) that the interim authorisation determination of the ACCC dated the 2nd day of April 2020 be set aside and the interim authorisation be revoked; and
- (c) that application for authorisation AA1000473 be dismissed.

5. Particulars of the facts and contentions upon which PNO intends to rely in support of the application for review, and a statement of the issues as PNO sees them, are attached.

6. PNO's address for service for the purpose of regulation 21 of the *Competition and Consumer Regulations 2010* is:

**Port of Newcastle Operations Pty Limited**  
c/o Bruce Lloyd  
Clayton Utz  
[blloyd@claytonutz.com](mailto:blloyd@claytonutz.com)  
DX 370  
Level 15  
1 Bligh Street  
Sydney NSW 2000

7. Documents may be served on PNO at [blloyd@claytonutz.com](mailto:blloyd@claytonutz.com).

Dated this 17th day of September 2020.

Signed on behalf of the applicant

.....  
Bruce Llewelyn Lloyd  
Partner, Clayton Utz  
Solicitor for the Applicant

# ATTACHMENT - BACKGROUND, FACTS, CONTENTIONS AND ISSUES FOR THE TRIBUNAL TO CONSIDER

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## 1. The Applicant

Port of Newcastle Operations Pty Limited (**PNO**) operates the Port of Newcastle (**Port**) under a 98-year sublease which commenced on 30 May 2014. Prior to 30 May 2014, the Port was owned by the State of New South Wales.

The Port is the largest port on the East Coast of Australia, and the world's largest coal export port. The Port services the Hunter Valley coal fields. More than 90% of the Port's revenue is derived from coal export operations.

The NSW Government retains regulatory oversight of the Port as well as responsibility for a range of maritime safety and security functions, including emergency response, the Harbour Master, Port Safety Operating Licence and pilotage functions.

As the operator of the Port, and under the terms of its lease, PNO has the power and authority to exercise the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**). These include the power to fix and levy certain port charges in respect of the use of the Port.

Under Part 5 of the PAMA Act, six types of port charges can be fixed and levied by "relevant port authorities". Two are relevant for the purposes of the Application:

- (a) the navigation service charge, which is payable in respect of general use by a vessel of the Port and its infrastructure (**NSC**); and
- (b) the wharfage charge, which is payable in respect of the availability of a site at which stevedoring operations may be carried out (**Wharfage Charge**).

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

In Part 5 of the PAMA Act, "relevant port authority" is defined to mean the port operator or the appropriate public agency for the port, the Minister, the Port Corporation or the pilotage service provider as the case may be for each type of port charge. The effect of this definition is that:

- (a) PNO has power to fix and collect navigation service charges, wharfage charges or site occupation charges without Ministerial approval;
- (b) PNO also has power, concurrently with the Minister, to fix and collect port infrastructure charges, although Ministerial approval is required under the lease; and
- (c) pilotage charges, port cargo access charges and berthing charges are fixed and charged to users of the Port, but are not fixed or collected by PNO.

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## 2. Application for authorisation

8. PNO was the target of the application for authorisation (non-merger) dated 6 March 2020 pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) made by the New South Wales Minerals Council (**NSWMC**) to the Australian Competition and Consumer Commission (**ACCC**) on behalf of itself and the following coal producers that export coal through the Port:

- (a) Glencore Coal Assets Australia Pty Limited;
- (b) Yancoal Australia Limited;
- (c) Peabody Energy Australia Pty Limited;

- (d) Bloomfield Collieries Pty Limited;
  - (e) Centennial Coal Company Limited;
  - (f) Malabar Coal Limited;
  - (g) Whitehaven Coal Mining Limited;
  - (h) Hunter Valley Energy Coal Pty Limited;
  - (i) Idemitsu Australia Resources Pty Limited; and
  - (j) MACH Energy Australia Pty Limited,
- (together, the **Applicants**).

9. PNO actively participated in the ACCC's public consultation in respect of the Application. It provided three written submissions in the periods both before and after the ACCC's interim authorisation and draft determination: on 18 March 2020, 7 April 2020 and 10 July 2020.

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### 3. Proposed Collective Bargaining Conduct

10. The Applicants sought authorisation to collectively negotiate and discuss the terms of access to the Port, including price, with PNO. Specifically, the Applicants sought authorisation to:
- (a) collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of coal (and any other minerals) through the Port;
  - (b) discuss amongst themselves matters relating to the above discussions and negotiations; and
  - (c) enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port,
- (the **Proposed Collective Bargaining Conduct**).
11. The Applicants sought authorisation on behalf of themselves and "future access seekers / port users" that choose to participate in the proposed collective bargaining group in the future. On 15 May 2020, the Applicants clarified that the proposed collective bargaining group will primarily comprise coal mining companies. However, future participants could conceivably involve other mining company members of NSWMC.
12. The Applicants submit they are seeking authorisation to collectively negotiate with PNO primarily because of increases in access charges that have occurred since the Port was privatised in 2014 and asserted pricing "uncertainty" at the Port.
13. On 2 April 2020, the ACCC granted interim authorisation under s 91(2) of the CCA to enable the Applicants to commence collective discussions amongst themselves and negotiations with PNO in relation to the terms and conditions of access, including price, to the Port.
14. On 27 August 2020, the ACCC issued its Determination in respect of the application for authorisation. The Determination granted authorisation for the Applicants to engage in the Proposed Collective Bargaining Conduct in relation to the terms and conditions of access, including price, to the Port. The ACCC granted authorisation for a period of ten years, until 30 September 2030.
15. The Determination did not extend to permit the Applicants to engage in any collective boycott activity, and does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/capacity projections for individual users.



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## 4. Impact of the Determination on PNO

16. PNO is the target of the Proposed Collective Bargaining Conduct.<sup>1</sup> The Applicants include coal producers that export coal through the Port and access certain services at the Port. As the Port operator authorised to fix and levy the terms and conditions of access (including prices) at the Port, the Proposed Collective Bargaining Conduct directly affects the business and commercial affairs of PNO.
17. The class of persons to whom the Determination applies is broadly defined as "mining companies".<sup>2</sup> The Determination could therefore apply to future participants in addition to the Applicants listed in the Determination.
18. The Proposed Collective Bargaining Conduct the subject of the Determination is broad and imprecise. It authorises discussions and negotiations among the Applicants, and between the Applicants collectively and PNO, as to the "terms and conditions of access" to the Port and "the export of minerals through the Port". The Determination does not appropriately identify with precision the detriment and benefits by reference to the conduct owing to the breadth of the proposed conduct.
19. PNO is concerned about the competitive harm and public detriments that the Proposed Collective Bargaining Conduct as authorised by the ACCC will have on competitive dynamics in the market for access to port services at the Port.
20. Participation in the Proposed Collective Bargaining Conduct is voluntary, both for the Applicants and PNO. The Determination states that, because participation in the Proposed Collective Bargaining Conduct is voluntary, it is likely to result in "minimal, if any, public detriment".<sup>3</sup> However, the fact that participation is voluntary does not mean that public detriments will not arise. PNO submits that the Proposed Collective Bargaining Conduct has the potential to detrimentally and substantially alter competitive dynamics in the market for access to port services at the Port. This concern arises in particular from the pressure that will be placed on smaller producers to remain within the negotiating bloc in practice.
21. PNO has a sufficient interest in the Determination to bring this Application.

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## 5. Key contentions

22. PNO contends that the Proposed Collective Bargaining Conduct should not be authorised, principally because:
  - (a) the Tribunal cannot be satisfied that this conduct would be likely to result in any tangible or significant benefit to the public at all;
  - (b) the conduct involves cartel conduct, which is presumptively harmful to competition, and could facilitate information exchange between coal producers that could adversely affect competition and/or efficient investment in a range of markets in which coal producers participate in the Hunter Valley coal supply chain; and
  - (c) the conduct involves significant public detriment because it would inhibit efficiency enhancing competition between coal producers with respect to acquiring access services from PNO.

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<sup>1</sup> Determination, [1.15].

<sup>2</sup> Determination, [1.6].

<sup>3</sup> Determination, [4.62].

## 5.1 No tangible or significant public benefits

23. PNO contends that the Proposed Collective Bargaining Conduct would not be likely to result in any tangible or significant public benefits at all, let alone any of the public benefits set out in the Determination.

### ***Competitiveness of the Australian export coal industry unlikely to be enhanced***

24. Contrary to the ACCC's finding in the Determination that the Proposed Collective Bargaining Conduct would be likely to enhance the international competitiveness of the Hunter Valley coal industry (Determination, [4.48]), this is not so. Further, even if the conduct were likely to result in "some benefits which facilitates more efficient investment decisions for Australian coal producers, as well as increased certainty for the delivered coal price for international coal customers"<sup>4</sup> (which is denied), this still would not significantly improve the competitiveness of Australian export coal.
25. *First*, as was found by the National Competition Council (**NCC**) in its 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', dated 22 July 2019, coal from the Hunter Valley is predominantly exported, with Glencore estimating in 2015 that 70% of exports go to Japan, Korea and Taiwan, with a further 20% exported to China. What this means is that the coal producers participate in a competitive global coal market and compete against coal produced and sold through other ports in Australia and overseas.
26. *Secondly*, as was also found by the NCC, "it is also highly unlikely that changes in the price of the Service within the range considered in paragraph 7.160 above [i.e. \$0.41 per GT to \$1.36 per GT] in any given period are likely to alter export prices for coal". That is, if PNO's port usage charges are within this range, they are unlikely to have any impact on export prices charged by coal producers. That is a relevant range of charges for the purposes of the present application.
27. The relevant Port charges the subject of the Proposed Collective Bargaining Conduct constitute a very small percentage of the total cost of coal. Thus, there is no basis for concluding that any impact that collective bargaining may have on Port charges, or the certainty of those charges, would be likely to result in any materially improved competitiveness for coal producers in coal export markets. Even if those charges were to change significantly, they would remain a very small proportion of the price of coal.

### ***No increased certainty and efficient investment is likely to arise from the Proposed Collective Bargaining Conduct***

28. Contrary to the ACCC's finding that the Proposed Collective Bargaining Conduct would increase pricing certainty and facilitate more efficient investment decisions for coal producers (Determination, [4.48]), PNO contends that collective bargaining would not have this effect.
29. *First*, the Proposed Collective Bargaining Conduct would not materially increase pricing certainty on Port usage charges, because **[CONFIDENTIAL TO PNO]** [REDACTED]. In particular:
- (a) Section 67 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**) allows the port operator to enter into agreements with any person liable to pay charges under the PAMA Act. The persons liable to pay the NSC under section 50 of the PAMA Act are vessel owners.
  - (b) **[CONFIDENTIAL TO PNO]** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>4</sup> Determination, [4.48].



[REDACTED]

(c) [CONFIDENTIAL TO PNO] [REDACTED]

(d) [CONFIDENTIAL TO PNO] [REDACTED]

(e) [CONFIDENTIAL TO PNO] [REDACTED]

(f) [CONFIDENTIAL TO PNO] [REDACTED]

30. To the extent that collective bargaining may result in a long term agreement concerning other Port usage charges, it is difficult to see how any additional certainty in this regard could be material, in circumstances where the already set NSC constitutes the bulk of these charges, and these charges are insignificant to the export coal price in any event.

31. What this also demonstrates is that ACCC failed to properly take into account certain confidential information that PNO provided during the authorisation process. In particular:

- (a) The ACCC states in the Determination that "[i]n the absence of entering into a long term Producer Deed with PNO, the vessels carrying coal for the Applicants will be subject to PNO's published access charges" (Determination, [4.16]).
- (b) However, this is factually incorrect and inconsistent with the confidential information set out above that PNO provided to the ACCC.
- (c) Further, this confidential information is given scant treatment in the Determination beyond a passing reference to "*information provided by PNO on a confidential basis*".<sup>6</sup>

32. Had the ACCC properly taken into account this information, it could not have misunderstood the counterfactual in the way that it did.

33. *Secondly*, PNO has been actively negotiating with a number of Port users, including the Applicants, in relation to the terms of long-term pricing arrangements subject to agreeing the terms of a Port User Pro Forma Long Term Pricing Deed (**Deed**) and the parties' respective positions have been clearly articulated. It is difficult to see how simply putting these positions collectively will achieve any 'increased certainty and efficient investment'.

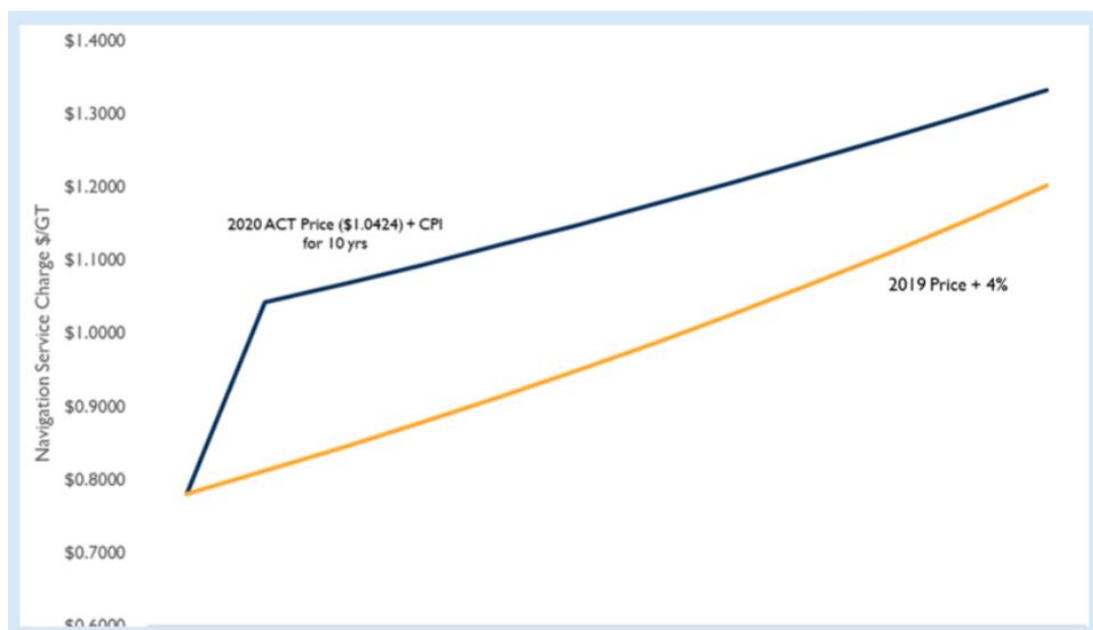
34. PNO has already offered Port users discounted long-term pricing arrangements, subject to agreeing the terms of the Deed. That is, in the absence of any authorisation, PNO has already voluntarily opted-into contractual regulation of its prices under the Deed it has offered. The relevant provisions of the Deed state that the charge can only be varied under the Deed where the increased charge is consistent with pricing principles drawn from the Competition Principles

<sup>5</sup> [CONFIDENTIAL TO PNO] [REDACTED]

<sup>6</sup> Determination, [3.9].

Agreement. The current offers have been published transparently on the PNO website, and offer long-term certainty if Port users wish to take up the voluntary offer.

35. Even if the Port users do not wish to enter into the Deed, PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port, through its open access arrangements for users published on its website. The terms and conditions of access are openly available, as are the fees and charges, as set out in PNO's Schedule of Service Charges, which will apply to a vessel's visit to the Port.
36. The graph below shows the per gross tonne charges from 2019 to 2030 and is indicative only of the forward 10 year price variance between the standard coal vessel pricing and the bilateral price Deed coal vessel pricing (assuming CPI is 2.37-2.50%).



37. PNO is bound by the Deed not to discriminate adversely against any producer/vessel operator on the NSC.
38. The ACCC concluded that the Proposed Collective Bargaining Conduct will promote "[i]ncreased certainty about terms and conditions of access at the Port" which is "likely to lead to more efficient investment decisions within the Hunter Valley coal industry, which is a public benefit".<sup>7</sup> Contrary to the ACCC's conclusions that authorisation will promote increased pricing certainty, as explained above PNO has already provided producers with clear mechanisms to understand how pricing increases will occur over the course of the term, and has applied a contractual form of the Competition Principles Agreement pricing principles, under which PNO will have to justify if it wishes to increase these charges above the greater of 4% or CPI, in any year of the term. PNO is also contractually bound to provide Producers with a forward looking forecast of its proposed capital expenditure. These provisions provide very significant transparency and accountability benefits to producers - and without the need for authorisation.
39. *Thirdly*, the Determination also states that the Proposed Collective Bargaining Conduct is likely to result in public benefit through addressing, in part, an asymmetry of information between each of the Applicants and PNO.<sup>8</sup> However, it is not clear how such a purported reduction in asymmetry of information would arise. For example, the Applicants submit that PNO holds all of the data on past expenditures at the Port, and that individual coal producers seeking to have bilateral negotiations with PNO in relation to its long term template Deed would not have access to that

<sup>7</sup> Determination, [4.41]; see also [4.48], [4.58].

<sup>8</sup> Determination, [4.24].

data.<sup>9</sup> Even on the assumption that this assertion is correct, which it is not, the Determination does not articulate how the Proposed Collective Bargaining Conduct would reduce this asymmetry of information.

40. *Fourthly*, in any event, coal producers face much greater uncertainty from other sources, principally in relation to fluctuations in the price of coal, than they do in relation to the future cost of services at the Port. In that context, it is difficult to see how any additional certainty concerning Port usage charges could make any material difference.

***No proof of any meaningful reduction in transaction costs***

41. The ACCC finds in the Determination that compared to the 'future without the conduct', where members of the bargaining group would negotiate individually with PNO, the Proposed Collective Bargaining Conduct is likely to result in transaction cost savings (to all the parties to the collective negotiations).<sup>10</sup>
42. However, the Applicants have not identified, let alone established, how there would be any meaningful reduction in transaction costs relative to bilateral negotiations between PNO and coal producers.
43. PNO contends that such transaction cost savings are highly unlikely to materialise. From a practical perspective, any authorisation will have no practical effect given that PNO will not be engaging in collective negotiations with the Applicants, but rather will continue to offer to undertake bilateral negotiations.<sup>11</sup>
44. Further, even on the assumption that PNO were prepared to engage in collective negotiations, PNO contends that any transaction cost savings will not arise given that collective negotiations will make reaching any negotiated outcome significantly less likely. Even if a reasonable compromise could be reached which satisfied the interests of PNO, smaller exporters and other port users, it is extremely unlikely that this compromise would proceed because negotiation would proceed on the basis of the bloc's single, collective interest. Notwithstanding that participation in the collective negotiation is voluntary, PNO expects that large exporters would use their dominant position to hold out reaching any compromise until their interests were met. This is inherently contrary to the structure of negotiation that is desirable for infrastructure services and is likely to increase costs for both PNO and the Applicants, rather than result in transaction cost savings.

***No proof of how it would facilitate more efficient terms and conditions***

45. The ACCC finds in the Determination that compared with the 'future without the conduct', the Proposed Collective Bargaining Conduct is likely to result in a public benefit in the nature of more efficient terms and conditions, and more timely resolution of common industry issues (Determination, [4.41]).
46. However, it has not been identified, let alone established, how the Proposed Collective Bargaining Conduct would facilitate more efficient terms and conditions of Port access in agreements between PNO and coal producers, or more timely resolution of common industry issues.

***Any benefits resulting from the conduct would be 'private' benefits***

47. In circumstances where the Proposed Collective Bargaining Conduct would not be likely to result in any meaningful improvement in the competitiveness of Australia export coal, it has not been established that any of the benefits put forward by the Applicants, or found by the ACCC, are "public", in contrast to "private", benefits.

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<sup>9</sup> Determination, [4.32].

<sup>10</sup> Determination, [4.24].

<sup>11</sup> Determination, [4.13]-[4.16].

## 5.2 Proposed Collective Bargaining Conduct will result in public detriments and competitive harm

48. PNO contends that the Proposed Collective Bargaining Conduct is likely to result in public detriments, as set out below.

### ***The proposed conduct is cartel conduct that is presumptively harmful***

49. The Applicant coal producers are competitors in a number of markets, including in acquiring of services from PNO. The Proposed Collective Bargaining Conduct would involve cartel conduct, because it would moderate their rivalry by allowing them to collectively discuss and agree on the terms and conditions of access, including price, they might negotiate with PNO.

50. Cartel conduct is presumptively harmful to competition. This is why the CCA prohibits cartel conduct absolutely without resort to any form of competition test such as a purpose or effect of substantially lessening competition. Further, the mere fact that all competing coal companies will potentially be engaged in the Proposed Collective Bargaining Conduct, which will provide them with occasion to regularly meet and discuss the flow of coal through the Port, itself increases the risk of collusion in markets in which they compete.

51. Accordingly, the Proposed Collective Bargaining Conduct should not be authorised unless it would be likely to result in some substantial public benefit that would provide satisfaction that this presumptive harm to competition is outweighed.

### ***The conduct could lead to the sharing of certain sensitive information and it increases the potential for collective activity beyond the authorised conduct***

52. PNO contends that the Proposed Collective Bargaining Conduct would be likely to facilitate exchange of competitively sensitive information between coal producers, and collective activity beyond the collective bargaining arrangements.

53. This proposition is supported by the Determination itself, which states that "... *public detriment may arise as a result of collective bargaining arrangements in circumstances where competition is reduced between members of the group as a result of acting collectively ... and/or by increasing the potential for collective activity beyond the collective bargaining arrangements which are sought to be authorised*" (emphasis added).<sup>12</sup>

54. In particular:

- (a) The coal producers would be likely to share a range of information with each other for the purposes of the Proposed Collective Bargaining Conduct that otherwise would not be shared. The sharing of this information could affect their incentives or decision-making in relation to other markets in which they participate in the Hunter Valley coal supply chain.
- (b) Further, although the Applicants did not seek authorisation (and are not authorised under the Determination) to share customer information, marketing strategies or volume/capacity projections, and such conduct would not be covered under the authorisation, they have formed a Port of Newcastle Working Group comprising representatives from the Applicant mining companies and the NSWMC, and which will convene on an "*ongoing basis*".<sup>13</sup> The opportunity to meet in this forum creates a significant risk of a sharing of a range of information.
- (c) The fact that it would be extremely difficult to detect and monitor any improper information exchange through the Working Group discussions also increases the level of risk that this might occur.

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<sup>12</sup> Determination, [4.61].

<sup>13</sup> Determination, [1.28].

55. These concerns were shared by the Port Authority of New South Wales in its submission to the ACCC dated 16 April 2020:

*the Applicants are not only coal exporters, but also suppliers to domestic industries such as electricity generation assets. Sharing of competitively sensitive information about future production and export volumes may, for example, give the group insight into each other's intentions for domestic coal supply.*

***The conduct could adversely competition in related markets in the coal supply chain***

56. The Proposed Collective Bargaining Conduct, along with the opportunity for exchange of competitively sensitive information that it creates, could adversely affect competition and/or efficient investment in a range of markets in which coal producers participate in the Hunter Valley coal supply chain.

57. For example, some but not all coal producers have an ownership interest in one or other of the coal handling terminals at the Port. All coal producers need to acquire services from those coal handling terminals in order to export their coal. What that means is that there is rivalry between coal producers in acquiring services from the coal handling terminals. However, it is rational to expect that information would be exchanged during the course of the Proposed Collective Bargaining Conduct that may be relevant to decisions that individual coal producers make in relation to coal handling services. If so, the exchange of such information that otherwise would not be exchanged could moderate competition that otherwise would exist in relation to acquiring those services.

***The fact that participation in collective bargaining will be voluntary, both for the Applicants and PNO does not mean that public detriments will not arise***

58. PNO contends that the Proposed Collective Bargaining Conduct has the potential to detrimentally and substantially alter competitive dynamics in the market for access to port services at the Port.

59. As a practical matter, the Proposed Collective Bargaining Conduct is likely to result in the coal producers attempting to negotiate as a bloc with PNO, and preclude smaller producers in particular from engaging in separate negotiations. The fact that the collective bargaining would be voluntary, and that smaller producers may well be technically free to negotiate through bilateral discussions with PNO, does not gainsay that this would be the practical effect.

60. **[CONFIDENTIAL TO PNO]** [REDACTED]

61. There are a number of ways in which this consequence, namely that individual coal producers no longer engage in bilateral negotiations with PNO, could be detrimental to efficiency enhancing competition between coal producers in acquiring services from PNO. For example:

- (a) Coal producers have a spectrum of unique and varied incentives and interests, and for some of them, the non-price terms are as important as price terms. It will be that one particular coal producer would be prepared to be more flexible on Port charges (because it exports its coal FOB in contrast to CIF), in exchange for non-price terms that could make the passage of its coal through the port more efficient. Such efficiency enhancing outcomes, which result from bilateral negotiations, would be precluded.
- (b) In practical terms, smaller producers will be placed under pressure not to break from the negotiating bloc, and are likely to find it difficult to conduct such bilateral discussions with PNO in these circumstances. This will mean that discrete issues, unique to individual Applicants and PNO, will be unable to be appropriately dealt with on a commercial, bilateral basis. The effect of the Proposed Collective Bargaining

Conduct is that the interests of smaller producers and other port users will be marginalised.

- (c) Large producers are likely to use their dominant position to hold out reaching any compromise until their interests are met. Even if a reasonable compromise could be reached which satisfied the interests of PNO, smaller producers and other port users, it is extremely unlikely that this compromise would proceed because negotiation would proceed on the basis of the bloc's single, collective interest (which would inevitably favour the interests of the largest exporters).
- (d) What the Proposed Collective Bargaining Conduct would do is reduce the access terms and conditions negotiated between PNO and coal producers to the lowest common denominator (or even worse, the requirements of the large producers), when this might not be the efficiency maximising outcome. It is more likely that efficiency maximising outcomes would be reached if coal producers, in a practical sense, continued to have bilateral negotiations with PNO.

### 5.3 The "Need" for authorisation is not substantiated

62. The ACCC notes in the Determination that the Applicants submit the need for authorisation arises because PNO:<sup>14</sup>

*...is an infrastructure monopoly service provider that enjoys the commercial benefits of that position in circumstances where the Port was privatised at the end of a multi user export supply chain, and in the absence of any regulatory constraints...it is noted that after revocation of the declaration [at the Port of Newcastle], PNO increased its prices significantly once again and in particular, based on the inclusion of user contributions that PNO did not...expend.*

63. The increases to Port charges levied by PNO since the privatisation of the Port need to be considered in the context of the significant under-recovery by the State in the period prior to privatisation - exceeding \$8 billion since 1990 alone. As the Tribunal has already accepted:<sup>15</sup>

*In the period after the 1990 restructure until 2014, NSC at Newcastle were largely unchanged with charges in 2014 only 7 percent higher than in 1990 in nominal terms. In the same period, the CPI rose by over 80 percent, so prices fell substantially in real terms ...*

...

*Prices remained unchanged from 1990 until 1996. In June 1996 the Premier announced a 10 percent reduction over two years commencing 1 July 1996. This was to assist trade and improve competitiveness to support the coal industry and employment in the Hunter. There was no commercial or financial basis for this reduction.*

*After that date, charges remained essentially unchanged until 2012 when a series of small CPI-type annual increases of 3 percent to 4 percent were applied.*

...

*We conclude that prior to a price restructure in 1990, Port charges were little more than a tax on different commodities with no attempt to reflect the costs of the services provided and that financial accounts were non-commercial and asset values understated or simply not recorded.*

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<sup>14</sup> Determination, [1.8].

<sup>15</sup> Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1 at [332]; see also at [333]-[334], [365].



64. PNO implemented a pricing review which took effect on 1 January 2015 - the first in 20 years - which took into account for the first time an assessment of the cost of service. At that time, the previous two tiered NSC construct was removed and replaced with a flat rate / gross tonnes (**GT**) for coal vessels, and the maximum NSC for large coal vessels was removed. The 2015 increase to \$0.69 per GT was still well below the actual cost of service.

		Pre price increase 2014	Post price increase 2015
<b>NSC First 50,000</b>	Per GT	\$0.4292	\$0.6900
<b>NSC Above 50,000</b>	Per GT	\$0.9656	\$0.6900
<b>Max NSC Charge</b>	Cap	\$45,633.68	None

65. Further, while the 2015 increase has been cited as a 40 – 60% increase based on a whole of vessel calculation,<sup>16</sup> the NSC (much less the portion of increase) per GT represents a small fraction of the delivered price per tonne of coal, which fluctuates on the world market for delivered coal in the range \$70 to \$150 per tonne over the past 2 years (and on the world market can vary on a daily basis in the ordinary course by more than the amount of the NSC).
66. The service at the Port for which the NSC is payable was previously declared and subject to the regulatory constraints under Part IIIA until September 2019. At that time, the National Competition Council (**NCC**) recommended that the declaration be revoked at that time on the basis that the declaration criteria were no longer fulfilled, the objectives of Part IIIA were no longer relevant to the declared service, the Treasurer acceded in that recommendation, and declaration was revoked.
67. The Applicants' assertion of an "absence of any regulatory constraints" on PNO is incorrect. PNO's statutory power to levy certain fees and charges under the PAMA Act is not "unconstrained":
- (a) PNO can only fix NSC in accordance with its operating licence;
  - (b) Part 6 of the PAMA Act contains a price monitoring mechanism for charges levied under the PAMA Act - including those levied by PNO. For example, PNO is required to give notice of any proposed changes to Port charges to the responsible Minister and on PNO's website;
  - (c) PNO is also required to provide an annual report to the responsible Minister on its charges, and is subject to directions from the Minister to produce specified information in respect of PNO's charges;<sup>17</sup> and
  - (d) the threat of declaration is a constant regulatory backdrop which constrains PNO.
68. The NSW Government would therefore be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets, or otherwise harm the public interest.
69. The Determination makes no reference or acknowledgement of the effect of these regulatory constraints on PNO.

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## 6. Issues for Tribunal to consider

70. PNO contends that the key issues for the Tribunal to consider are as follows:

<sup>16</sup> See NSWMC application at [1.21].

<sup>17</sup> PAMA Act ss 80-82.

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- (a) Whether the Proposed Collective Bargaining Conduct would be likely to result in any tangible public benefits at all?
- (b) If so, whether or not those benefits are “public” in contrast to “private” benefits?
- (c) Whether the Proposed Collective Bargaining Conduct would be likely to result in detriment to the public?
- (d) If so, whether any public benefits of the Proposed Collective Bargaining Conduct outweigh the public detriments?
- (e) Whether, in any event, authorisation should be granted as a matter of discretion?

71. PNO contends that the Tribunal should answer "no" to issues (a), (b), (d) and (e), and “yes” to issue (c), in summary because:

- (a) The Proposed Collective Bargaining Conduct involves cartel conduct, so it should not be authorised unless there is substantial net public benefit, because cartel conduct is presumptively harmful to competition.
- (b) However, there are no discernible public benefits arising from the Proposed Collective Bargaining Conduct:
  - (i) no increased certainty and efficient investment is likely to arise from the Proposed Collective Bargaining Conduct. PNO has been undertaking active negotiations over several months and is well aware of the parties' positions. Simply putting these positions collectively is unlikely to be of benefit. It is difficult to see how the Proposed Collective Bargaining Conduct will reduce asymmetry of information issues;
  - (ii) the competitiveness of the Australian export coal industry is unlikely to be enhanced by the Proposed Collective Bargaining Conduct. The NSC (at the level already set by PNO and likely to be the subject of negotiation by the Proposed Collective Bargaining Conduct) will not impact on the competitiveness of Hunter Valley coal in the international market; and
  - (iii) there are unlikely to be improved efficiencies through transaction cost savings. Amongst other things, collective negotiations will make reaching any negotiated outcome with PNO significantly less likely.
- (c) Further, the Proposed Collective Bargaining Conduct is likely to result in significant public detriments and competitive harm:
  - (i) the fact that participation in collective bargaining will be voluntary, both for the Applicants and PNO, does not mean that public detriments will not arise. The Proposed Collective Bargaining Conduct has the potential to detrimentally and substantially alter competitive dynamics in the market for access to port services at the Port. This concern arises from the pressure that will be placed on smaller producers to remain within the negotiating bloc in practice. The Proposed Collective Bargaining Conduct may well make it less likely for agreement to be reached; and
  - (ii) although authorisation would not extend to the sharing of certain sensitive information, it increases the potential for sharing of competitively sensitive information – which itself could adversely affect other markets in the Hunter Valley coal supply chain in which the coal producers participate – and for collective activity beyond the authorised conduct. It will be extremely difficult to detect and monitor any improper information exchange through the Working Group discussions.

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(d) In any event, the Tribunal should exercise its discretion not to grant authorisation, because any benefits that may result would be too insubstantial, and PNO is subject to ongoing NSW Government oversight.

72. If the Tribunal sets aside the Determination, and dismisses the application for authorisation, the interim authorisation granted by the ACCC also should be revoked.