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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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

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

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

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

Applicant: Port of Newcastle Operations Pty Limited

SUBMISSIONS OF NEW SOUTH WALES MINERALS COUNCIL

INTRODUCTION

1. On 26 March 2020, the New South Wales Minerals Council (**NSWMC**) sought authorisation from the Australian Competition and Consumer Commission (**ACCC**) on behalf of itself and certain coal producer members[1] to engage in the following conduct: (i) collectively discuss and negotiate the terms and conditions of access, including price, to the Port of Newcastle (**Port**) for the export of minerals through the Port; (ii) discuss amongst themselves matters relating to the above discussion and negotiations; and (iii) enter into, and give effect to, contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port (**collective bargaining conduct**).[2]

2. On 27 August 2020, the ACCC granted authorisation in respect of the collective bargaining conduct for ten years, until 30 September 2030, pursuant to section 90 of the *Competition and Consumer Act 2010* (Cth) (**CCA**).[3]

3. The applicant (**PNO**) seeks review of that decision pursuant to section 101(1) of the CCA.[4] The issue which arises is whether, for the purposes of section 90(7)(b) of the CCA, the Tribunal should be satisfied in all the circumstances that the collective bargaining conduct would be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would be likely to result from the conduct.

4. The NSWMC submits that the Tribunal should affirm the ACCC's determination. In summary, for the reasons outlined below, NSWMC submits that the Tribunal should be satisfied in all the circumstances that the collective bargaining conduct (in comparison to the likely future without the collective bargaining conduct) would likely result in (i) public benefits in the form of more efficient bargaining and contracting for terms and conditions of access to the Port between PNO and coal producers and reduction of transaction costs associated with negotiating and complying with those terms and (ii) no

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1 The coal producer members are: Yancoal Australia Limited; Peabody Energy Australia Pty Ltd; Bloomfield Collieries Pty Ltd; Centennial Coal Company Limited; Malabar Coal Limited; Whitehaven Coal Mining Limited; Idemitsu Australia Resources Pty Ltd; Mach Energy Australia Pty Ltd and Glencore Coal Assets Australia Pty Limited.

2 NSWMC **Application for Authorisation**, Hearing Book (**HB**), Folder 3, Tab 22 (HB.3.22) at 2185.

3 ACCC **Final Determination**, HB.3.21.

4 PNO Application to Tribunal for review, HB.1.1.

material detriments to the public. Accordingly, authorisation for the collective bargaining conduct should be granted.[5]

PRINCIPLES

5. The relevant statutory precondition for authorisation is set out in section 90(7)(b) of the CCA, which is in the following terms:

> The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless the Commission is satisfied in all the circumstances:
>
> …
>
> (b) that:
>
> (i) the conduct would result, or be likely to result, in a benefit to the public; and
>
> (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

6. NSWMC disagrees with two aspects of PNO's submissions concerning the principles applicable to this provision.[6] These issues are addressed below, but NSWMC submits that authorisation should be granted regardless of the resolution of those matters.

Meaning of "likely"

7. The first is PNO's submission that the word "likely" in section 90(7)(b) should be construed as meaning "more probable than not" (PS [10]). That submission should be rejected for the following reasons.

8. *First*, as PNO acknowledges, its proposed interpretation involves a departure from the established construction of section 90(7) and its like/predecessor provisions which has stood for more than 40 years. Since at least the Tribunal's decision in *Re Howard Smith Industries Pty Ltd* (***Howard Smith***), the phrase "likely" in the context of the authorisation provisions has consistently been construed as meaning a real chance or possibility that a public benefit or detriment will result.[7] The application of the "real chance" standard

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5 No question of discretion is raised by PNO.

6 PNO submissions dated 27 August 2021 (**PS**), [6]-[10], [26].

7 *Howard Smith* (1977) 28 FLR 385, 405; *Re Qantas Airways* (2004) ATPR 42-027 at [154]; *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120 at [83]; *Re Application by Michael Jools, President of the New South Wales; Taxi Drivers Association* (2006) ATPR 42-122 at [48]; *Re Medicines Australia Inc* (2007) ATPR 42-164 at [109].

was explained by French J in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* as follows:[8]

> The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility...The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the *Howard Smith* case, the Court is concerned with "commercial likelihoods relevant to the proposed merger". The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration.

9. This passage was endorsed by the Full Court in *ACCC v Pacific National Pty Limited* (***Pacific National***).[9]

10. *Secondly*, the basis upon which PNO seeks to distinguish *Howard Smith*, namely that it "concerned a different statutory formulation, which did not involve the weighing of benefits and detriments" (PS [10(e)]), is misconceived. *Howard Smith* concerned section 90(5) of the *Trade Practice Act 1976* (Cth) which at the time relevantly provided that authorisation could not be granted unless the Tribunal was satisfied the relevant conduct "results, or is likely to result, in a substantial benefit to the public, being a benefit that would not otherwise be available, and that, in all the circumstances, that result, or that likely result, as the case may be, justifies granting of the authorisation".[10] It is true that the provision did not expressly refer to the weighing of public benefits and detriments. But, as was made clear in *Howard Smith* itself, that is precisely what the provision, properly construed, in fact required.[11] There is accordingly no meaningful difference between section 90(7) of the CCA and the provision considered in *Howard Smith* which could justify a different interpretation of the word "likely".

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8 (2003) 137 FCR 317, [348]. Although these observations were made in respect of section 50 of the CCA, they have been held by the Tribunal to be equally applicable to the authorisation provisions in Pt VII: *Re Qantas Airways* (2004) ATPR 42-027 at [154].

9 (2020) 277 FCR 49 at [245].

10 See *Howard Smith* (1977) 28 FLR 285 at 391.

11 *Howard Smith* (1977) 28 FLR 285 at 391 ("The purpose of the Act is to promote and preserve competition. Consequently, the onus is placed squarely on the applicants to satisfy the tribunal that a substantial benefit to the public would or would be likely to result from the merger, sufficient to outweigh any detriment") and 393 ("Since it will ultimately be the balance between the public benefits and detriments which is important, it is the net benefit to the public which must be compared in the two situations"). This construction is consistent with how subsequent statutory formulations of the precondition for authorisation which similarly did not refer in express terms to a weighing of public benefits and detriments were construed: see *Re Medicines Australia Inc* (2007) ATPR 42-164 at 47,519 [112]-[115]; *ACCC* v *Australian Competition Tribunal* (2017) 254 FCR 341 at [5]-[7] (Besanko, Perram and Robertson JJ).

11. *Thirdly*, the decisive considerations which led the Full Court in *Pacific National* to refuse, in the context of section 50 of the CCA, to depart from the established interpretation of the word "likely" was that:[12]

> the word 'likely' has been construed to mean a likelihood that is less than probable for 40 years (from *Tillmans*) and there is no evidence of widespread inconvenience in the application of the law. To the contrary, the law has been amended on numerous occasions without any suggestion that the dual legal standard should be changed.

12. Those same considerations apply in respect of section 90(7).[13]

13. *Fourthly*, contrary to PNO's submission (PS [10(d)]), the fact that section 90(7) requires the weighing of likely public benefits and detriments from the proposed conduct does not support PNO's construction. Whichever interpretation of "likely" is adopted, section 90(7) requires an assessment of what may occur as a result of the conduct in the future, "taking into account the likelihood as a matter of possibility as well as probability, and weigh[ing] such predictions in the overall assessment"[14] of whether the conduct would result or be likely to result in a net benefit to the public. That task may require "an instinctive synthesis of otherwise incommensurable factors".[15] But far from being "elusive" or "almost impossible" (PS [10(d)]), that is a task which is both familiar to the law[16] and which has been undertaken by the ACCC and the Tribunal for more than four decades based on the established, "real chance", interpretation of the word likely.

14. Further, the task is the same regardless of whether the word "likely" is construed as meaning a "real chance" or a chance which is "more probable than not". In that regard, PNO makes no attempt to explain how it is any less 'elusive' or difficult to weigh competing possibilities which have a greater than 50% chance of occurring than it is to weigh competing possibilities which have a less than 50% chance of occurring.

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12 *Pacific National* (2020) 277 FCR 49, [243].

13 The dual legal standard has formed part of section 90 since the enactment of the *Trade Practices Act 1974*. The dual legal standard was retained in the re-enactment of the provision in the Act in 2010. Section 90 has been amended six times since then: see *Trade Practices Amendment (Cartel Conduct and Other Measures)* Act 2009 (No 59), Sch 1 Item 66; *Competition and Consumer Amendment Act (No. 1) 2011 (No. 185)*, Sch 1 Item 6; *Competition and Consumer Amendment (Competition Policy Review) Act 2017 (No. 114)* Sch 9 Pt 1 Item 2-4, 80-87; *Treasury Laws Amendment (2019 Measures No. 1) Act 2019 (No. 49)*, Sch 4 Pt 1 Item 7; *National Emergency Declaration (Consequential Amendments) Act 2020 (No. 129)*, Sch 1 Item 15-18;*Treasury Laws Amendment (2020 Measures No. 6) Act 2020 (No. 141)*, Sch 4 Pt 1 Div 1 Item 32.

14 *Pacific National* (2020) 277 FCR 49 at [217].

15 *ACCC* v *Australian Competition Tribunal* (2017) 254 FCR 341, [68].

16 *ACCC* v *Australian Competition Tribunal* (2017) 254 FCR 341, [7].

15. *Fifthly*, the dual legal standard expressed in the phrase 'would or would likely' is used in various other provisions of the CCA which have been interpreted consistently with *Howard Smith*.[17] The established interpretation of section 90(7) is therefore consistent with the usual presumption that the same words are intended to have the same meaning wherever they appear in the same statute.[18]

16. In that regard, PNO fails to grapple with the meaning of "likely" in section 90(7)(a) which is materially indistinguishable from section 50 of the CCA considered in *Pacific National*. If, consistently with *Pacific National*, the word "likely" in subsection 90(7)(a) does not mean "probable", the same must be true in respect of the use of the word "likely" in subsection 90(7)(b) (c.f. PS [10(e)]).

17. *Sixthly*, PNO's interpretation of section 90(7) would undermine the intended flexibility of the legislative scheme created by Parts VI and VII of the CCA because it would confine the ability of the Commission and Tribunal to authorise potentially beneficial conduct in the exercise of its discretion under the authorisation regime.

18. For these reasons, PNO's submission that "likely" should be construed as meaning "more probable than not" should be rejected. The Tribunal should instead apply the established "real chance" meaning.

<u>The future with and without test</u>

19. The second disputed aspect of PNO's submissions as to the proper construction of section 90(7)(b) concerns whether, in assessing the public benefits and detriments that would likely result from the proposed conduct, the Tribunal should assume that the collective bargaining conduct the subject of the authorisation application will occur. PNO appears to contend that such an assumption should not be made (PS [26]).

20. PNO's submission is undermined by the text of section 90(7)(b). The provision mandates consideration of whether *the conduct* would result, or be likely to result, in a benefit to the public and whether that benefit would outweigh the detriment to the public that would result, or be likely to result, from *the conduct*. The *conduct* must be understood as the

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[17] See *Pacific National* (2020) 277 FCR 49 at [192].

[18] *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at [65].

same *conduct* identified in the opening sentence of section 90(7), being the conduct in relation to which a determination granting authorisation under section 88 is sought.

21. In the present case, the collective bargaining conduct includes, inter alia, to "collectively discuss and negotiate the terms and conditions of access, including price, to the Port for the export of minerals through the Port" with PNO.[19] The authorisation test (s 90(7)(b)) requires consideration of that *conduct*. As the ACCC correctly held,[20] it does not involve a prediction whether the conduct for which authorisation is sought will in fact occur.[21]

22. Such a construction is also consistent with the purpose of the authorisation regime set out in Part VII of the CCA. That scheme "recognises that the benefits of competition may themselves be in competition with benefits flowing from anti-competitive conduct" and thus provides "an administrative process to remove the risk that proposed beneficial conduct may contravene competition laws".[22] In this context, authorisation is needed to *in fact* engage in the proposed conduct.

23. Further, it would frustrate the purpose of Part VII of the CCA if the target of the proposed conduct (such as PNO) were able to defeat an application for authorisation simply by asserting that it will refuse to participate in the conduct. Indeed, the likely result of PNO's construction would be to preclude collective bargaining from ever being authorised unless, in effect, it was consented to by the target.

24. In any event, PNO's stated refusal to engage in collective bargaining to date is illusory. The collective bargaining conduct allows a collective proposal to be developed and put to PNO as to the terms and conductions of access to the Port. Is PNO suggesting it would "turn a blind eye" to that collective proposal? We return to this issue below.

25. Accordingly, in applying the test in section 90(7)(b), the Tribunal must assume that the collective bargaining conduct in respect of which authorisation is sought in this case will occur, notwithstanding PNO's stated refusal to engage in collective bargaining to date.

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19 Application for Authorisation, HB.3.22 at 2185.

20 Final Determination, HB.3.21 at 2153 [4.13]-[4.14].

21 *Re Medicines Australia Inc* (2007) ATPR 42-164 at [120]. See also *Re Macquarie Generation and AGL Energy Ltd* [2014] ACompT 1 at [169]-[170]: "[the test is] one in which the Tribunal is to appraise the future in which the acquisition **does take place** 'in light of the alternative outcome, were the acquisition not to take place: *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225 at 276".

22 *Re Medicines Australia Inc* (2007) ATPR 42-164 at [105].

Benefits to the public

26. Subject to the foregoing, NSWMC agrees with the summary of relevant principles in PS [6]-[9]. On benefits to the public (PS [9]), NSWMC wishes to add the following.

27. The Tribunal has previously adopted a modified total welfare standard when identifying and assessing public benefit.[23] This means that the Tribunal has considered that gains flowing to only a limited number of members of the community may constitute a benefit to the public, but those gains will carry less weight than gains which flow to the community generally.[24]

28. Relatedly, public benefits do not need to involve competition. They may involve costs savings.[25] In *Application by Tabcorp Holdings Limited*,[26] the Tribunal said:

> Cost reductions free resources for use elsewhere in the economy and increased profitability generates benefits for Australian shareholders. Even if it created no benefits other than cost savings, a merger without detriments would still generate public benefits as long as those savings pass to Australian shareholders.

29. Public benefits may involve enhancement of industry stability.[27] In *Application of G&M Stephens Cartage Contractors*,[28] the Tribunal granted authorisation to a voluntary association of members engaged in the business of cartage of pre-mixed concrete sought authorisation to contract industry wide rates and conditions with concrete producers. The Tribunal relevantly said (at 245):

> Authorization in the terms sought by the Applicants would… authorize the participation of the producers, as a group, in negotiations as to such industry wide rates and conditions… In this sense, the result of the conduct for which authorization is sought is likely to make more even the bargaining power of owner/drivers and products. This we see as a benefit to the public.

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[23] *Qantas Airways Limited* (2004) ATPR 42-027 at [185].

[24] *Application by Tabcorp Holdings Limited* (2017) ATPR 42-550 at [62].

[25] Smith Report [59]. See also *Re Qantas Airways Limited* (2004) ATPR 42-027, [187]-[189]; *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, [62]-[68].

[26] *Application by Tabcorp Holdings Limited* (2017) ATPR 42-562 at [46]. See also *Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 186.

[27] *Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at 186. See also *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

[28] (1977) 31 FLR 193 at 245.

THE COLLECTIVE BARGAINING CONDUCT WILL LIKELY RESULT IN PUBLIC BENEFITS

30. NSWMC contends that the proposed collective bargaining conduct will likely result in the following public benefits.

More efficient bargaining and contracting for the terms of access to the Port

31. As a matter of economics, the capacity for collective bargaining to facilitate more economically efficient contracts is well-recognised.[29] As Professor King puts it:[30]

> Bargaining power will affect the efficiency of contracting. In general, if one party to a negotiation has most of the bargaining power, in the sense that most of the surplus from any negotiation is seized by that party. Then this will reduce the incentive for the other party to the negotiation to make mutually beneficial but non contractible investments…
>
> By sharing negotiation and contracting costs between group members, the collective bargaining group helps parties to negotiate past inefficient take-it-or-leave-it contracts in order to design more complex, mutually beneficial contracts that have fewer economic imperfections. The gains created by more efficient bargaining arise from the economies of scale in negotiations and can be shared by both collective bargaining group and counter party. In other words, both sides to the negotiations can become better off if collective bargaining occurs.

32. Those observations are apposite in this case, which arises in the following context.

(a) *First*, the need for access to the Port arises in circumstances where the Port is a natural "bottleneck" facility.[31]

(b) *Secondly*, PNO, as operator of the Port, enjoys the commercial negotiating position of being a monopoly service provider; it controls the terms and conditions of access to the Port, including the shipping channels and berthing facilities required for the export of coal from the Port.[32]

(c) *Thirdly*, coal producers have no practicable alternative to the Port for the export of their coal.[33]

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[29] Smith Report, [53]-[54] HB.2.18 at 2045.

[30] King S, 'Collective Bargaining in Business: Economic and Legal Implications' (2013) *UNSW Law Journal* 36(1) 107, 117-118. The article is cited by both Dr Smith and Mr Houston: see Houston Report, [167] HB.2.11 at 981; Smith Report, fn 25 and 32, HB.2.18 at 2043 and 2052. See also PS [39].

[31] *Application by New South Wales Minerals Council (No 3)* [2021] A CompT 4 at [1].

[32] *Application by New South Wales Minerals Council (No 3)* [2021] A CompT 4 at [2].

[33] *Application by New South Wales Minerals Council (No 3)* [2021] A Compt 4 at [1].

(d) *Fourthly*, the access services at the Port provided by PNO to coal producers are homogenous.

(e) *Fifthly*, the terms and conditions of access to the Port offered by PNO to coal producers are common standard terms. As an alternative to its published schedule of service charges, at the end of 2019, PNO invited coal producers to enter into bilateral long-term agreements (**Producer Deeds**).[34] [redacted].[35] The "Initial Term" of the Producer Deeds is 10-years.

(f) *Sixthly*, it would be in the interests of PNO, coal producers and the Hunter Valley coal industry if more efficient terms of access to the Port, including in relation to future pricing methodology, could be agreed. Indeed, the Producer Deeds have apparently been proposed by PNO expressly in acknowledgment of the fact that the long-term price certainty that the deeds have the potential to secure is important and mutually beneficial for both PNO and coal producers.[36]

(g) *Seventhly*, clause 5 of the Producer Deeds[37] contains a "non-discriminatory pricing" term. This clause relevantly requires, inter alia, PNO to "not enter into bilateral arrangements with any other coal producer concerning Coal Specific Charges to apply over the Initial Term…which are materially dissimilar to the relevant provisions of, or different to any such variations under the deed". In effect, this clause requires PNO to charge all coal producers who have entered into a deed the same Port charges[38] under the deeds, throughout the 10-year term.

(h) *Eighthly*, clause 7(b) of the Producer Deeds enables PNO to impose price rises on the Port charges of more than 5% at any time during the 10-year term provided only that they are consistent with the "Pricing Principles".[39] In turn, Schedule 3

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[34] A copy of the current proposed Producer Deed which has been published on PNO's website since 13 March 2020 is at Annexure SB-5 to the affidavit of Simon Byrnes affirmed on 25 June 2021, [35] (**25 June Byrnes Affidavit**), HB.1.9 at 828.

[35] Email from Simon Byrnes to Keiron Rochestor dated 13 March 2020, confidential annexure KR-4 to the Affidavit of Keiron Rochestor dated 30 June 2021, HB.2.14 at 1084.

[36] Email from Simon Byrnes to Brett Lewis dated 30 March 2020, HB.2.13 at1060 ("We feel that shortening the term would deprive the proposal of its most important purpose for both parties – long term certainty").

[37] HB.1.9 at 831.

[38] Defined as the Navigation Service Charge and Wharfage Charge.

[39] HB.1.9 at 833.

contains a compulsory dispute procedures for dealing with price rise disputes on a bilateral basis. That procedure requires in the first instance negotiations between senior representatives of the parties, failing which the parties shall refer the matter to mediation, failing which the matter shall be resolved by arbitration.[40] Any negotiation, mediation and arbitration is required under the Producer Deeds to be kept strictly confidential between PNO and the relevant coal producer counterparty under each deed (Sch 3, clause 5.3).[41]

(i) *Ninthly*, despite bilateral discussions, no coal producer has found it commercially acceptable to agree to the terms of the Producer Deeds offered by PNO. [42]

(j) *Tenthly*, the access terms and conditions to the Port are significant and important issues for the Hunter Valley coal industry. [43]

33. Against that background, it is relevantly the terms of the Producer Deeds which the authorisation applicants seek collectively to negotiate with the PNO.

34. The Producer Deed in its present form contains inefficient terms. The deeds contemplate that PNO will separately meet at least twice annually, throughout the 10-year term, with each and every producer who has entered into a Producer Deed in relation to issues which are common to all producers, including capital expenditures at the Port and price rise (clauses 7(c)(i) and 10). In addition, as explained above, the deeds contemplate that price rise disputes can only be resolved through a multiplicity of confidential bilateral negotiations, mediations and arbitrations with each and every producer, notwithstanding that the dispute will be common to all coal producers and the resolution of any pricing dispute under one of the deeds (including as a result of arbitration) can only be implemented under the "non-discriminatory pricing" clause if it is applied across all Producer Deeds (clause 5).

35. These inefficiencies are precisely the type of matters sought to be addressed in the collective bargaining conduct. The terms of the Producer Deeds, if agreed, would impose

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40 HB.1.9 at 840-1.

41 HB.1.9 at 842.

42 Lewis, [13] HB.2.13 at 1055; Dodd, [8] HB.2.12 at 1043; Rochester [14] HB.2.14 at 1072.

43 Final Determination, [1.22]-[1.33] HB.3 21 at 2141.

very high and manifestly inefficient transaction costs on all parties.[44] These are issues common to all producers and PNO.

36. The collective bargaining conduct will also help to address the imbalance of bargaining power that exists between PNO and individual coal producers.[45]

37. In that regard, it is not to the point that the majority of the Port's revenue is dependent on coal mining (PS [18]). Whereas each coal producer has no alternative to the Port for the export of their coal, PNO is not dependent upon any single coal producer. That imbalance of bargaining power is particularly acute in the case of smaller coal producers.

38. That imbalance is not improved by the existence of Vessel Agent deeds, which provide an outside option for PNO but not for coal producers who are not parties to the deeds and cannot enforce their terms particularly in respect of future price rises. [46]

39. The imbalance in bargaining power has resulted in the Producer Deeds which (in replica to the Vessel Agent deeds) contain inefficient terms, including the likelihood that the Port charges under the deeds during the 10-year term will exceed efficient prices.[47] That is because the "Pricing Principles" in the deeds allow PNO to charge prices that are above the stand alone costs of providing the Port services to producers by cross subsidisation[48] and allow PNO to charge prices that include depreciation on perpetual life assets[49] and include a return on user funded capital expenditures of the Port [50]. In addition, clause 7(a) allows PNO to increase Port charges by 4% price each year of the 10-year term if greater than CPI in circumstances where CPI is presently 1.1%.[51]

40. In any event, it is trite that the price rise methodology in the Producer Deeds ("Pricing Principles") creates substantial future pricing uncertainty for all parties.[52] The notion that it provides future price certainty is a mirage (PS [30]). That uncertainty lives in the

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44 Morton Report, [68] HB.2.16 at 1548.

45 Smith Report, [52] HB.2.18 at 2045; Morton Report, [14] HB.2.16 at 1530.

46 Cf. Houston Report, [112] HB.2.11 at 972.

47 Morton Report, [77] HB.2.16 at 1550.

48 Morton Report, [52]-[53] HB.2.16 at 1543.

49 Morton Report, [54]-[59] HB.2.16 at 1544.

50 Morton Report, [60]-[64] HB.2.16 at 1545.

51 Morton Report, [69]-[71] HB.2.16 at 1548.

52 Morton Report, [68] HB.2.16 at 1547.

Vessel Agent deeds. The existence of those deeds does not "remove the need for coal producers to enter into deeds with PNO" (PS [22]). Also, the very high transaction cost of price rise disputes under the Producer Deeds (including bilateral arbitration) is likely to operate as a substantial disincentive for individual coal producers (or vessel agents) to dispute PNO's price increases.[53] This is a serious industry issue common to all parties.

41. [redacted].[54] In particular, the lack of adequate price certainty caused by the "price opening" provisions of the deed (clause 7) and the "Pricing Principles" by which pricing disputes are proposed to be determined (including the treatment of user funded capital expenditures of the Port).[55]

42. These inefficiencies in the Producer Deeds could be addressed through the collective bargaining conduct (but not unilaterally), for example, by pricing floor and ceiling limits which are a feature of many access regimes and are designed to exclude any prices that are clearly inefficient and to prevent inefficient cross subsidy between services.[56] That is, in lieu of the contractual "Pricing Principles" in the Producer Deeds (PS [31]).

43. Despite its assertions (PS [26]-[27]), NSWMC submits that it is likely that PNO would engage in collective bargaining. It would be logical for PNO to participate in collective bargaining in the face of proposed terms which provide a more efficient terms about pricing disputes and more efficient (certain) future pricing methodology.[57] There can be no doubt that it would be in the best interests of both PNO, coal producers and the Hunter Valley coal industry such terms can be agreed (e.g. agreed floor and ceiling limits). PNO's assertion that it would not engage in collective bargaining is also inconsistent with its proposition that the "true relationship between PNO and coal producers is one of mutual dependence" (PS [18]). Collective bargaining would also save PNO substantial

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53 Morton Report, [68] HB.2.16 at 1544.

54 Email from Simon Byrnes to Keiron Rochestor dated 13 March 2020, confidential annexure KR-4 to the Affidavit of Keiron Rochestor dated 30 June 2021, HB.2.14 at 1084.

55 Rochester, [12] HB.2.14 at 1071; Lewis, [11] and [13] HB.2.13 at 1054-5; Dodd, [11] HB.2.12 at 1043.

56 Morton Report, [51] HB2.16 at 1543.

57 Smith Report, [16] HB.2.18 at 2033. See also Houston Report, [31(a)(ii)] HB.2.11 at 961.

transaction costs of negotiations with the coal producers, as explained below. It is rational that PNO would want to save those costs.

44. Even if PNO does not participate in collective negotiation, the collective bargaining conduct will allow the coal producers to develop more efficient terms of the Producer Deeds in order to put forward to PNO in bilateral negotiations.[58] They could jointly identify, strategise and propose solutions in relation to the standard form terms of the Producer Deeds in view of the common industry issues discussed above.[59] To this end, the proposed contract will be more "complete".[60]

45. Relatedly, PNO submits that its "commitment to a non-discriminatory pricing clause avoids the need for producers to agree a common position" (PS [40]). This term has the opposite effect. On PNO's approach, if one producer was to agree to the Producer Deed, by reason of the "non-discriminatory pricing" provision, all of the other Hunter Valley coal producers who had entered into a deed would be in effect stuck with those terms for the 10-year term of the deeds. Without collective bargaining, this is a classic "prisoner's dilemma". By contrast, collective bargaining conduct will overcome the information asymmetry as between the producers, as the ACCC correctly held,[61] in order to create more efficient terms on the common issues.

46. In contrast, in the likely future without the proposed collective bargaining conduct, the coal producers will be forced to deal with PNO about the terms of the Producer Deeds bilaterally and without the benefit of a joint proposal from all coal producers. In this event, there will be no mechanism in the Producer Deeds to enable any of the above inefficiencies that are common to all parties to be addressed.

47. In the circumstances, as the ACCC correctly found, the collective bargaining conduct (when compared to the likely future without) would likely to result in more efficient bargaining and contracting as to the terms of the Producer Deeds.[62] This is a public benefit under section 90(7)(b). It enhances economic efficiency. It facilitates stability in the

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58 Smith Report, [80] HB.3.18 at 2052; Morton Report, [14] HB.2.16 at 1530.

59 Final Determination, [4.41] HB.3.21 at 2158.

60 King S, 'Collective Bargaining in Business: Economic and Legal Implications' (2013) *UNSW Law Journal* 36(1) 107, 110 and 113.

61 Final Determination [4.40] HB.3.21 at 2158.

62 Final Determination, [4.40]-[4.41] HB.3.21 at 2158.

Hunter Valley coal industry. These are particularly public benefits having regard to the significant economic and social contribution that the Hunter Valley coal industry makes to the Hunter Valley region and Australia more broadly.[63]

48. In this respect, PNO has misapplied the authorisation test and missed the point. PNO seeks to frame the issues in a way that the application cannot succeed.

49. Contrary to PNO's argument (PS [16], [26]-[33]), the Tribunal does not need to be satisfied on evidence as to *how* the conduct would be likely to result in better outcomes. For the reasons explained above, it is enough for the purpose of public benefits that the bargaining process would be more efficient in the manner described above, which in turn should likely lead to more efficient terms in the Producer Deeds.[64]

50. Likewise, the Tribunal does not need to be satisfied that conduct would likely "result in better outcomes for coal producers" or an increase in "output" in the thermal coal export market (PS [34]). Mr Houston's evidence in this respect has no relevance to the statutory test. As he acknowledges, the legal standard of public benefits is wider that the economic specification of welfare cited by economists.[65]

51. Finally, contrary to PNO's case, the Tribunal does not have to be satisfied that the collective bargaining conduct "will promote more certain investment conditions, and [will] lead to improvements in efficiency and competition in the coal export market, and other dependant markets" (PS [35]). This puts the test far too high.

52. As a further public benefit, the ACCC found that the conduct would likely facilitate more efficient investment decisions for Hunter Valley coal producers[66] and enhancement of the competitiveness of the Hunter Valley coal industry with employment and investment benefits for Australia.[67] These are flow on benefits from the likely more efficient terms

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63 Affidavit of Dave Poddar dated 25 June 2021[18]-[21] HB.2.15 at 1089; *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [64].

64 Morton Report, [14(b)] HB.2.16 at 1530. Smith Report, [55]-[56] HB.3.18 at 2046.

65 Houston Report, [42] HB.1.11 at 962.

66 Smith Report, [84]-[85] HB.3.18 at 2053. Final Determination [4.41] HB.3.21 at 2158.

67 Final Determination [4.48] HB.3.21 at 2159.

in the Producer Deeds, increasing certainty for the future Port charges (an input into the delivered price of coal for international customers[68]) in the manner referred to above. [69]

Reduce transaction costs associated with the negotiation of the deeds

53. In addition, as the ACCC correctly held, the proposed collective bargaining conduct would likely reduce the transaction costs of negotiating the terms of the Producer Deeds.[70] Put another way, there would be economies of scale in transaction costs.[71]

54. There are normal transaction costs for each producer of preparing for and engaging in negotiations. Those costs would likely be less if costs are pooled and shared in collective bargaining conduct that would otherwise be the case without the conduct if the common contractual issues were to be the subject of a series of bilateral negotiations between PNO and each coal producer.[72] Likewise, if PNO participates in collective bargaining, there would be significant costs transaction costs savings for it. Rather than negotiating with each of them individually, collective bargaining will allow PNO to deal with the group.[73]

55. Cost savings of this kind constitute a public benefit under section 90(7)(b) of the CCA (cf. PS [41]).[74] As matter of economics, they generate productive efficiencies.[75] Contrary to Mr Houston's assertions, there is no need to provide evidence that the costs saving would be deployed elsewhere in the economy.[76]

56. PNO submits that the Tribunal should not accept that the proposed collective bargaining conduct would likely result in lower transaction costs for two reasons. *First*, PNO contends that the transaction costs savings have not been quantified (PS [38]). However, the authorisation test does not require quantification of the public benefits.[77]

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68 Lewis, [7] HB.2.13 at 1054; Rochestor, [5] HB.14 at 1070.

69 Final Determination [4.45] HB.3.21 at 2159.

70 Smith Report, [70]-[75] HB.3.21 at 2050. Final Determination, [4.57] HB.3.21 at 2160.

71 King S, 'Collective Bargaining in Business: Economic and Legal Implications' (2013) *UNSW Law Journal* 36(1) 107, 113.

72 Smith Report, [59] HB.3.18 at 2047.

73 Final Determination, [4.57] HB.3.21 at 2160.

74 See 28 above.

75 Smith Report [59] HB.3.18 at 2047.

76 Houston Report, [207]-[209] HB.1.11 at 985.

77 *Re Qantas Airways Limited* (2004) ATPR 42-027, [201]; *Re Medicines Australia Inc* (2007) ATPR 42-164 at [111].

57. *Secondly*, PNO submits that the increased transaction costs of coordination amongst the collective bargaining group need to be factored in (PS [39]). The NSWMC submits that the commonality of the issues in relation to the terms of the Producer Deeds between the coal producers (as discussed above) would ensure a likely significant net transaction cost saving. Contrary to PNO's arguments (PS [40]), there are no meaningful heterogeneity between the producers in this respect. That conclusion is fortified by the fact (as explained in paragraph 32 above) the terms of the deeds offered by PNO to producers are common standard terms, each producer receives homogenous Port services from PNO and [redacted].[78] We return to this issue below.

58. Further, for the reasons explained above, the increased transaction costs of coordination in the collective bargaining group would not be wasted merely because PNO asserts it would not engage in the collective bargaining process and the "non-discriminatory pricing" clause in the Producer Deeds does not ameliorate the transaction costs savings as a result of the collective bargaining conduct (PS [40]).

THE COLLECTIVE BARGAINING CONDUCT WILL NOT RESULT IN ANY PUBLIC DETRIMENTS

59. NSWMC contends that the collective bargaining conduct will not be likely to result in any public detriments, as correctly found by the ACCC.[79]

60. Two detriments are asserted by PNO.

61. *First*, PNO contends that granting authorisation for the collective bargaining conduct would increase the risk of the authorisation applicants engaging in collusive conduct in breach of the CCA (PS [43]-[44]). The point is without substance. There is nothing about the circumstances of this case to suggest the collective bargaining conduct (when compared to the likely future without the conduct) would be likely to materially increase the risk in this respect.

62. To the contrary, as the ACCC noted, the collective bargaining is limited in scope – it relates to PNO's publicly available Producer Deeds and authorisation is not sought to share competitively sensitive information that relates to customers, marketing strategies,

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[78] Email from Simon Byrnes to Keiron Rochestor dated 13 March 2020, confidential annexure KR-4 to the Affidavit of Keiron Rochestor dated 30 June 2021, HB.2.14 at 1084.

[79] Final Determination, [4.95] HB.3.21 at 2165.

volume / capacity projections.[80] The ACCC correctly found that the collective bargaining conduct would not increase the likelihood of the ground sharing commercially sensitive information.[81] Put simply, in circumstances where the Port access terms offered by PNO to coal producers are public and uniform, producers use of the Port service are homogenous (in the manner referred to in paragraph 32 above) and the Port is not capacity constrained (PS [19]), the collective bargaining conduct would not create an real occasion to share such information.[82]

63. *Secondly*, PNO contends that the collective bargaining conduct is likely to result in non-unique interests and preferences of some coal producers, particularly smaller producers, being overlooked or marginalised (PS [45]). However, as PNO acknowledges (PS[47]), the collective bargaining conduct is voluntary. To the extent any producer considers that its interests are not being advanced through collective bargaining, it would be open to them to revert to the status quo of seeking to negotiate bilaterally with PNO. Individual coal producers can be expected to engage in collective bargaining conduct if they consider there is a net benefit to them in doing so (c.f. PS [47]).

64. Moreover, PNO's submission about coal users have non-common interests in respect of the terms of the Producer Deeds does not withstand scrutiny. It ignores the reality that bilateral negotiations have resulted in a standard form Producer Deed which no coal producer has been prepared to enter into [redacted].[83] The differences identified by PNO (at PS [48]) are a function of information asymmetry between the coal producers and are not material differences as to the terms of the deeds.

65. Accordingly, PNO's assertion that the "individual preferences of coal producers when negotiating with PNO" (PS [49]) is likely to be better protected if the collective bargaining conduct is not permitted to occur must be rejected.

CONCLUSION

66. For the foregoing reasons, the collective bargaining conduct is likely to result in public benefits and is unlikely to result in any public detriments. No reason has been advanced

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80 Final Determination, [4.63] HB.3.21 at 2161.

81 Final Determination, [4.77] HB.3.21 at 2163.

82 Smith Report [64] HB.3.18 at 2048

83 See above fn 78.

as to why authorisation should be refused in the Tribunal's discretion. Authorisation should accordingly be granted.

DATED: 17 September 2021

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