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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
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

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Important information

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COMMONWEALTH OF AUSTRALIA

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

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No:	ACT 2 of 2020
Re:	Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020.
Applicant:	Port of Newcastle Operations Pty Limited

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Introduction

1. The most striking aspect of the submissions by NSWMC (and the ACCC) is how the claimed public benefits of authorisation have reduced. NSWMC does not appear to press the principal basis on which it originally sought, and the ACCC granted, authorisation, namely that authorisation was likely to lead to more efficient terms and conditions of access to the Port, which would in turn, enhance the competitiveness of the Hunter Valley coal industry. Instead, NSWMC now seeks to justify authorisation on a much more modest basis. NSWMC submits that authorisation is likely to lead to what it calls "more efficient … contracting" (NSWMC Submissions (**NS**), [4]), and lower transaction costs. The ACCC, consistent with the role it purports to adopt, does not suggest any broader basis. The Tribunal could not be satisfied that authorisation would be likely to result in any net cost saving that could amount to a non-trivial public benefit of substance, much less one that outweighs the detriment likely to result from authorisation.

Legal test

2. The parties appear to agree on the general framework that the Tribunal should apply for the assessment of NSWMC's authorisation application, subject to two matters.

3. *First*, the parties disagree about the meaning of "likely" in s 90(7)(b) of the CCA and the question of whether the "real chance" test applies. Both NSWMC and the ACCC submit that the "real chance" test applies (NS, [7]-[18]; ACCC Submissions (**AS**), [54]-[63]). PNO submits that it should not, for the reasons given in [10]-[11] of its submissions in chief (**PS**).

4. *Secondly*, there is disagreement about the approach which should be taken to the counterfactual in these proceedings. NSWMC submits that the "Tribunal must assume that the collective bargaining conduct in respect of which authorisation is sought in this case will occur" (NS, [25]). That is not correct, as the ACCC appears to accept (AS, [45]). Rather, the task of the Tribunal is to assess what is likely to occur in the future if the conduct is authorised. As the ACCC submits (AS, [41]-[42]), this can include a consideration of what would occur if PNO does enter into collective negotiations and what would occur if it does not, in each case taking into account the likelihood of those differing outcomes occurring.

5. On this issue, the only difference between the ACCC and PNO is that PNO submits that the Tribunal should find that there is a high likelihood that PNO will not take part in collective bargaining, while the ACCC (and NSWMC) submits that PNO will be forced to reconsider its position. Of course, PNO could not rule out a change of position if circumstances

changed, but neither NSWMC nor the ACCC points to any likely change of circumstances which might alter PNO's approach.

6. In any case, the outcome of the present matter does not depend on either of the above differences between the parties. Even if the Tribunal adopts the "real chance" meaning of likely, and assumes PNO will participate in collective bargaining, the Tribunal could not be satisfied that the proposed collective bargaining conduct is likely to result in any material benefit to the public, let alone one that outweighs the significant risk of detriment to which the proposed conduct gives rise.

7. In light of the much-reduced benefits now identified by both NSWMC and the ACCC, there is one additional principle that is relevant, namely that the Tribunal needs to be satisfied that the public benefit upon which the authorisation is based is material before granting authorisation. The Tribunal addressed the question of the size of public benefit in *Re Medicines Australia Inc* [2007] ACompT 4 (at [127]-[128]). The following comments were directed to the position where the anti-competitive detriment is small, which is not the case here. However, in that context the Tribunal recognised the following:

> Similarly, where the anti-competitive detriment is low to non-existent the ACCC may be entitled to say, as a matter of discretion, that it would only authorise the conduct if the public benefit to be derived from it, beyond that necessary to outweigh the anti-competitive detriment, or satisfy the per se conduct test is substantial. That is to say that the ACCC can require, in the proper exercise of its discretion, that the conduct yields some substantial measure of public benefit if it is to attract the ACCC's official sanction. The Tribunal is in a similar position.

8. The need to demonstrate public benefits of substance is even more important where, as here, the matters of public detriment are significant.

9. Authorities dealing with questions of public benefit in other provisions of the CCA are also instructive:

   (a) In *Re Application by Michael Jools* [2006] ACompT 5; (2006) 233 ALR 115 the Tribunal considered s 90(8) of the then *Trade Practices Act 1974* (Cth), which provided for the authorisation of conduct such as third line forcing which was previously *per se* prohibited by that Act. In that context, the Tribunal indicated (at [22]) that it considered that "something more than a negligible benefit is required before the power to grant authorisation can be exercised".

   (b) In the context of authorisation of mergers, the Full Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017]

FCAFC 150 indicated (at [8]-[10]) that the public benefits from a merger needed to be "of substance rather than ephemeral" and "non-trivial, not transitory". The first of those phrases reflected comments from the Tribunal in *Re Rural Traders Co-operative (WA) Ltd* (1979) 37 FLR 244 (at 262-263).

10. Even if the Tribunal is satisfied the authorised conduct is likely to result in a public benefit which exceeds any public detriment, having regard to the trivial nature of those benefits, this is an appropriate case for the Tribunal to exercise its residual discretion not to authorise the conduct.

Benefits

'More efficient contracting'

11. When NSWMC sought authorisation from the ACCC, it did so on the basis that collective bargaining would lead to more efficient terms of access, which would in turn encourage more efficient investment decisions within the Hunter Valley coal industry, and allow Australian coal companies to more efficiently export coal from the Hunter Valley: see, e.g., ACCC determination, [4.27], [4.43].

12. The ACCC accepted these arguments. The ACCC determined that the proposed collective bargaining conduct was likely to address an asymmetry of information between each of the authorisation applicants and PNO, and "in so doing, this is likely to facilitate more efficient and timely outcomes from negotiations, including the terms and conditions of the Producer Deed and ultimately, investment decisions within the Hunter Valley coal industry": ACCC Determination, [4.40]; see also [4.48] and [4.58].

13. In these review proceedings, NSWMC initially sought to advance the same arguments. NSWMC says in its SOFIC (at [5]) that the "Authorisation Applicants seek to collectively bargain with PNO, as the monopoly infrastructure provider, on access to the Port to ensure that Hunter Valley coal exports remain commercially viable and globally competitive now and into the future. This has both direct and indirect impacts on employment and investment in the Hunter Valley". At [67] – [98] of its SOFIC, NSWMC explained how the authorisation conduct would likely result in more efficient terms of access and resolution of associated industry issues. According to NSWMC (at [77]), this:

> … would create long term certainty for both coal producers and PNO, creating a more favourable environment for future investment in coal production and Port infrastructure. In turn, this would generate significant public benefits in Australia and improved commercial outcomes,

> including the maintenance of strong exports, employment, coal royalties for the State of New South Wales and economic growth.

14. Further, NSWMC contended (at [98]) that authorisation would promote a material increase in competition in a number of dependent markets, including the coal export market, the tenements market, and the specialist services market. NSWMC also identified that authorisation would be likely to result in transaction costs savings, but this was a minor aspect of the application (reflected in the fact that only a single paragraph of NSWMC's SOFIC was addressed to the topic: [99]).

15. In its SOFIC, the ACCC identified three benefits from authorisation: (i) transaction costs savings ([75] – [77]); (ii) more efficient investment as a result of coal producers having greater and more informed input into the Producer Deed and reduced information asymmetry ([78] – [81]); and (iii) increased competitiveness of the Hunter Valley export coal industry ([82] – [89]).

16. The ACCC also filed an expert report from Dr Rhonda Smith, which identified two types of benefits: (i) reduced transaction costs ([75] – [78]); and (ii) more efficient contractual outcomes ([78]). Mr Morton, in a report subsequently filed by NSWMC, supported Dr Smith's conclusions. Mr Morton summarised Dr Smith's views in relation to the second type of benefit, with which he agreed, as follows (at [14(b)]):

> More efficient contractual outcomes, with collective bargaining: helping to address the imbalance of bargaining power for users negotiating with a monopoly service provider which in turn should produce more efficient outcomes [Dr Smith ¶78]; allowing mining companies to be better informed in their negotiations thereby providing a better basis for decision making by both parties [Dr Smith ¶80, 86]; ultimately providing a positive incentive for investment by all parties (including PNO) as well as a greater ability to invest [Dr Smith ¶85].

17. Against this background, NSWMC's written submissions represent a striking departure and retreat from the position it had adopted previously. No longer does NSWMC contend that the proposed collective bargaining conduct is likely to lead to more efficient outcomes in the form of reduced or more certain prices. Nor does it contend that the proposed collective bargaining conduct is likely to promote more efficient investment in the mining industry or promote a material increase in competition in the coal export market or any other dependent market.

18. The ACCC does not contend for any broader basis, but rather confines its submissions to certain questions of principle. However, the position of the ACCC in this regard is unsatisfactory, given that: (i) in its submissions at [4], the ACCC states that it "continues to

rely on its Statement of Facts, Issues and Contentions", which contains much broader propositions, without supporting those propositions by any submissions; (ii) it appears to continue to rely on the evidence of Dr Smith; and (iii) it suggests that it might offer additional "assistance" at the hearing as appropriate (at AS, [48]).

19. NSWMC now seeks to persuade the Tribunal that it should decide to authorise the proposed collective bargaining conduct on the basis that it would likely result in: (i) more efficient bargaining and contracting for terms and conditions of access to the Port between PNO and coal producers; and (ii) a reduction of transaction costs associated with negotiating and complying with those terms: NS [4].

20. NSWMC submits that collective bargaining will allow coal producers to address "inefficient terms" in the producer deeds. At NS [34], NSWMC identifies two "inefficient terms": (i) the deeds contemplate that PNO will meet separately with each producer in relation to issues which are common to all producers, including capital expenditure and price rises; and (ii) the deeds contemplate that price rise disputes can only be resolved through bilateral dispute resolution processes (negotiation, mediation and arbitration).

21. If these provisions of the deeds were problematic, it is not apparent that authorisation is necessary to address any problems. It would be one thing if PNO had refused to accommodate the concerns of producers in bilateral negotiations, and there was some basis to conclude that PNO might adopt a different position in a collective framework. But here, the aspects of the deeds now said to be problematic were not the subject of negotiation between producers and PNO. There is no evidence (lay, as a matter of economic theory, or otherwise) that bilateral negotiation is incapable of addressing any concerns producers may have, or that collective negotiation would be more likely to result in better terms.

22. Further, it is not apparent that the relevant terms of the deeds are in fact problematic in the way claimed. In practice, the prospect of multiple, concurrent pricing disputes is most unlikely to eventuate, as there would be a number of ways in which that prospect could be avoided. For example, if several producers objected to a price rise, one producer could notify a pricing dispute, and if a mediated or arbitrated outcome resulted in a lower price, all the other producers who had signed deeds would receive the benefit of that outcome, by virtue of the non-discriminatory pricing clause. (At NS [45], NSWMC mischaracterises or misunderstands the operation of this provision, which was agreed to at the request of producers, and operates to ensure that all producers get the benefit of any price obtained by

a producer, whether through negotiation, or in the event of a dispute, a mediation or arbitration.)

23. Similarly, in the unlikely event that more than one producer commenced an arbitration, there is provision under the Australian Centre for International Commercial Arbitration (**ACICA**) Rules (which are picked up by the deeds[1]) for the consolidation of arbitrations,[2] including where "a common question of law or fact arises in both or all of the arbitrations" (art 16.1(c)). Therefore, the spectre of multiple, overlapping arbitrations is not a realistic possibility.

24. The "inefficiency" said to arise from multiple meetings is even more trivial. Under the vessel agent deeds and the pro-forma producer deeds, PNO has agreed to provide vessel agents, and offered to provide producers, with an annual forecast of its capital expenditure for the following 5-year period, and has also agreed to meet with vessel agents and producers at least twice annually to discuss PNO's delivery of "Vessel Services" to Covered Vessels under deeds, including (but not limited to) PNO's capital expenditure as it relates to those Vessel Services. NSWMC says it is inefficient for PNO to hold separate meetings with individual agents and producers. Again, this is not a matter which has previously been the subject of any complaint by producers. In those circumstances, there is no basis to conclude that collective bargaining is needed to address this "problem". But even assuming that PNO was more likely to agree to change this term in a collective framework than a bilateral one (which itself involves a leap), it is likely to make little difference. Either way, agents or producers will still need to attend a meeting, and the only potential saving would be PNO's time in attending multiple meetings. But from PNO's perspective, the benefits of being able to meet with agents or producers on a bilateral basis is likely to be worth any additional time incurred, as it would permit PNO to meet vessel agents or producers and discuss each person's specific concerns (which may have little to do with PNO's capex plans, given the wide scope of the consultation contemplated by the deeds).

25. NSWMC refers at NS [41] to the lack of pricing certainty caused by the deeds, and submits (at NS [42] – [43]) that this uncertainty could be addressed by the adoption of "pricing floor

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1 See Schedule 3 to the Pro-forma Producer Deed, Second Byrnes Affidavit, Annexure SB-5 (p 152) (HB 840).

2 See Australian Centre for International Commercial Arbitration, *ACICA Arbitration Rules* (1 April 2021), art 16 (Consolidation of Arbitrations) <https://acica.org.au/wp-content/uploads/2021/04/ACICA_Rules_2021-WFF3.pdf >.

and ceiling limits". But it does not explain why PNO would agree to such terms, or why such terms would be preferable.

26. For the reasons above, the Tribunal could not conclude that the proposed collective bargaining conduct will result in any benefit of any substance.

'Transaction Cost Savings'

27. The other benefit to which both NSWMC and the ACCC point is the saving of transaction costs.

28. It is insufficient for NSWMC and the ACCC to merely assert the existence of transaction costs savings. PNO accepts that such savings do not need to be quantified as dollar amounts (cf NS, [56]; AS, [29]). But, for the Tribunal to be satisfied of a public benefit, there must be some intelligible basis to conclude that it is likely to arise. In this regard, the criticisms by the ACCC in Part III of its submissions about the absence of any need for "proof" about "facts" overlook the requirement that there be a proper basis, resting on presently existing facts and circumstances, for contentions of future likelihoods, as the authorities cited by the ACCC make plain.

29. As set out by PNO at PS [39], collective bargaining may give rise to both costs savings (if each producer spends less time and cost dealing with PNO) and cost increases (if each producer spends more time and cost dealing with other producers). Neither NSWMC nor the ACCC appears to dispute that trade-off, and all the economic experts are agreed on this point (Joint Report, [29(a)]).

30. In light of that trade-off, in order to reach a conclusion that there will be a cost saving, there must be some coherent basis to say that the producers' cost savings from dealing with PNO will outweigh the producers' cost increases from dealing with each other. In the article by Dr Stephen King referred to by each of the economic experts, Dr King describes the position as follows:[3]

> Costs associated with the heterogeneity of the members of a bargaining group must be set against the benefits created by the group. However, it can be difficult for the ACCC to accurately identify these costs, as they can arise from broader market interactions involving the bargaining group and may change over time.

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3 King S, 'Collective Bargaining in Business: Economic and Legal Implications' (2013) *UNSW Law Journal* 36(1) 107, 132.

31. Difficulty of comparison is one thing. In the present case, the problem is more fundamental: neither NSWMC nor the ACCC attempts to carry out such a comparison by reference to economic principle or to any evidence of the features of the coal producers which seek authorisation. It is recognised in the economic literature and in various ACCC determinations,[4] and in the Joint Expert Report in this proceeding (at [29(c)] and [55] – [57]), that transactions costs savings are more likely in groups with homogenous characteristics, and less likely in groups with heterogeneous ones. Yet there is no analysis of the similarity (or otherwise) of producers and their interests in this case. NSWMC identifies that each of the producers receives a homogenous product from PNO (NS, [57]). But that says nothing about the similarities between the coal producers or their negotiating positions. In this regard, NSWMC simply asserts that there is "no meaningful heterogeneity between the producers in this respect" (NS, [57]), while the ACCC does not venture any analysis on the topic.

32. It cannot be correct that collective bargaining should be authorised on the basis of a purely theoretical and unsubstantiated saving in transaction costs arising from not needing to prepare for and engage in individual bargaining, or else virtually every application would be sought to be justified on that basis. Such an approach would be antithetical to the balancing process required by section 90(7)(b) of the CCA, which requires the identification of likely public benefits outweighing likely public detriments.

33. Even if the Tribunal were to conclude that there will be a saving in transaction costs, they are modest. The economists agree that if any benefits arise, they are small. Dr Smith describes the benefits as "modest" and "relatively small", Mr Morton describes them as "small" and Mr Houston describes them as "immaterial" (Joint Report, [109], [144], [148], [153]). It is also clear that any such gains will result in private benefits for coal producers. As the ACCC recognises, although private gains can constitute a public benefit, they will be given little weight without evidence that they will be passed through to consumers (AS, [31]-[32]). There is no such evidence here.

Detriments

34. The submissions of NSWMC and the ACCC do not grapple with the potential detriments of the proposed collective bargaining conduct in any meaningful way.

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[4] Ibid, 131-133.

35. The experts agree that a consequence of collective bargaining is increased risk of collusive conduct, including in upstream and downstream markets (Joint Report, [30(a)]). The ACCC (at AS, [36]) seeks to downplay that risk (agreed by the experts to be an inherent risk) by contending that the risk of collusion is already present because producers have "myriad other opportunities to engage with each other around town or at industry events".

36. This is an incongruous submission coming from the regulator charged with protecting competition: that an agreement that requires cooperative arrangements between competitors should be supported because there is already a risk of collusion "around town".

37. The authorisation of the proposed conduct magnifies any inherent risk. By reason of the authorisation, competitors would discuss and co-ordinate about matters which they are not accustomed to discussing with each other. Having had the usual shackles of the law loosened, there is a heightened risk of such discussions spilling over into matters which are not covered by the authorisation. The suggestion from the ACCC and NSWMC that the risk of collusion is minimal should be rejected.

38. As to the problem of small producers being marginalised as a result of collective bargaining (PS, [45]-[49]), the ACCC submits that differences between producers are not a difficulty, because producers can take the benefit of the collective negotiation for some matters and engage in bilateral negotiations in respect of others (AS, [39]). That possibility is contrary to the evidence (which shows that no producers have engaged in bilateral negotiations since interim authorisation was granted). But, more importantly, it is far too simplistic an analysis of how negotiations work. *First*, different topics may be linked, such that it is not possible (or not in the producer's own strategic interests) for the producer to agree with the collective on one matter and separately negotiate with PNO on another. The economists recognise this difficulty (Joint Report, [59]). *Secondly*, as Mr Houston recognises, there is likely to be continuing pressure from the collective to conform with the majority position (Houston Report, [269]). The experts recognise that each group member has a difficult balancing exercise to undertake before deciding whether to negotiate separately or not (Joint Report, [32(b)]). *Thirdly*, it is likely to take some time and effort, in the discussions between members of the collective, to even get to a position where the collective position is clear enough that the dissenting group member can decide to approach PNO separately. That time and effort would have been avoided by the producer putting its position directly to PNO. *Fourthly*, the fact that NSWMC and the ACCC are forced to rely on the ability of producers to continue to negotiate bilaterally about matters where they disagree with the collective

identifies the tenuous nature of the supposed benefits of that structure (see Houston Report, [270]). Every time that a producer is required to do so, the benefits of authorisation in respect of that producer are lost.

Discretion

39. NSWMC's suggestion (NS, [66]) that PNO does not rely on any matters of discretion is incorrect. PNO submits that even if the Tribunal were satisfied of a net public benefit from the authorisation, it should not exercise its discretion to authorise the conduct because any such benefit is no more than trivial and because any benefits are simply private gains accruing to coal producers and their shareholders (PNO SOFIC, [63]). There is no evidence that any such cost savings will be passed onto consumers or otherwise translate to some efficiency in the industry.

Conclusion

40. NSWMC has effectively abandoned much of the basis on which authorisation was sought and granted. What remains provides an insufficient basis for authorisation, and the meagre likely benefits are outweighed by the likely detriments. The ACCC's determination should be set aside, the interim authorisation revoked and NSWMC's application for authorisation dismissed.

DATED: 1 October 2021

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