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Lodgment and Details

Document Lodged:	Report
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HOUSTONKEMP
Economists

Collective bargaining for access to Port of Newcastle

A report for Clayton Utz

30 July 2021

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1. Introduction

1. I have been asked by Clayton Utz to prepare this report on behalf of Port of Newcastle Operations Pty Ltd (PNO). The context for my report is PNO's application to the Australian Competition Tribunal (the Tribunal) for review of the 27 August 2020 determination of the Australian Competition and Consumer Commission (ACCC) in relation to an application for authorisation (AA1000473) lodged by the New South Wales Minerals Council (NSW Minerals Council).

2. In March 2020, the NSW Minerals Council made an application to the ACCC on behalf of itself, certain coal producers that export coal through the Port of Newcastle and mining companies requiring future access to the Port of Newcastle. The NSW Minerals Council sought authorisation to negotiate collectively with PNO in relation to all terms and conditions of access to the port, including price, for the export of coal from the Port of Newcastle. The ACCC determined to authorise the proposed collective bargaining conduct on 27 August 2020 (ACCC determination).[1]

3. Clayton Utz has asked me to review and respond to the 25 June 2021 report of Euan Morton,[2] prepared on behalf of the NSW Minerals Council for consideration in the context of the Tribunal's review of the ACCC's determination. I have also been asked to review and respond to the earlier, 22 April 2021 report of Rhonda Smith,[3] prepared on behalf of the ACCC in the same context, and to which Mr Morton's report responds.

4. The NSW Minerals Council asked Mr Morton to set out his view on Dr Smith's expert report and how PNO may be expected to act in setting prices and negotiating access. Mr Morton states that he was asked to provide:[5]

    a. my view on the report prepared by Dr Rhonda Smith, particularly in relation to the types of public benefits and public detriments that may be expected to accrue from collective bargaining arrangements; and

    b. my view of how PNO may be expected to act in setting prices and negotiating access, given its economic circumstances and incentives. In addressing this issue, I consider whether the terms of the Producer Deed provide an opportunity for PNO to exert market power, consistent with its incentives, and whether this could lead to inefficient outcomes

5. The ACCC asked Dr Smith to prepare a report on various economic considerations arising in relation to the collective negotiation by coal producers of the terms and conditions of access to the port, including price, for the export of coal from the Port of Newcastle. Dr Smith was asked to address five questions in her report, ie:[7]

    1. Which market(s) are relevant to a consideration of the authorisation application?

    2. What economic principles, if any, are relevant in identifying public benefits? When is a benefit "private" rather than "public", and when is a benefit both private and public?

[1] ACCC, *Application for authorisation AA1000473 lodged by NSW Minerals Council and mining companies*, Determination, 27 August 2020 (hereafter, ACCC determination).

[2] Euan Morton, Synergies Economic Consulting, *Public benefits of collective bargaining at Port of Newcastle*, Expert report of Euan Morton, 25 June 2021 (hereafter, *Expert report of Euan Morton*, 25 June 2021)

[3] Rhonda Smith, *Application by Port of Newcastle Operations Pty Limited*, Report of Dr Rhonda Smith, 22 April 2021 (hereafter, *Expert report of Dr Rhonda Smith*, 22 April 2021)

[5] *Expert report of Euan Morton*, 25 June 2021, para 6.

[7] *Expert report of Dr Rhonda Smith*, 22 April 2021, Attachment 2, para 8.

3. What economic principles apply in relation to collective bargaining conduct? Applying those principles, what are the public benefits and public detriments, if any, that would result or be likely to result from collective bargaining conduct?

4. Applying the principles discussed in Questions 2 and 3, what are the public benefits, if any, that would result or be likely to result from the Proposed Collective Bargaining Conduct, and what is their magnitude?

5. PNO contends that the Proposed Collective Bargaining Conduct is a form of cartel conduct that is presumptively harmful (and therefore requires a substantial net public benefit before it is authorised). What is the likely harm from the Proposed Collective Bargaining Conduct?

6. My review of Mr Morton and Dr Smith's reports indicates that the nature and extent of public benefits and detriments that can be expected to arise from the proposed collective bargaining conduct can be synthesised into three types of economic effect, ie:[8]

   a. the potential for more efficient outcomes in primary and/or any dependent markets, or 'efficiency effects';

   b. the implications for the cost of negotiating and transacting for port access services, or 'transactions costs effects'; and

   c. the potential for collusive conduct to cause detriment to outcomes in primary and/or any dependent markets, or 'countervailing detriments'.

7. Consistent with the distinct nature of each of these potential effects, I have structured my report to address each of them separately.

1.1 Instructions

8. Clayton Utz has asked me to respond to the reports prepared by Mr Morton and Dr Smith. In preparing my opinion, Clayton Utz has asked me:

   a. to comply with the requirements of the Federal Court Expert Evidence Practice Note (GPN-EXPT) and its Annexure (the expert code); and

   b. to make a number of assumptions that, in summary, concern the circumstances in relation to which the authorised collective bargaining conduct applies.

9. I attach a copy of my instructions as Annexure A.

1.2 Experience and qualifications

10. I am a founding Partner of the economic consulting firm HoustonKemp. Over a period of more than thirty years I have accumulated substantial experience in the economic analysis of markets and the provision of expert advice and testimony in litigation, business strategy and policy contexts. I have developed that expertise in the course of advising corporations, regulators, and governments on a wide range of competition, regulatory and financial economics matters.

11. My industry sector experience spans aviation, beverages, building products, digital platforms, e-commerce, electricity and gas, employee remuneration, grains, healthcare, insurance, litigation funding, medical waste, mining, office products, payments networks, petroleum, ports, rail transport, retailing, scrap metal, securities markets, steel, stevedoring, telecommunications, thoroughbred racing, waste processing and water. I have filed expert reports and/or given expert evidence on these matters on numerous occasions before arbitrators, appeal panels, regulators, the Federal Court of

[8] See: *Expert report of Dr Rhonda Smith*, 22 April 2021; and *Expert report of Euan Morton*, 25 June 2021.

Australia, the Competition Tribunal, the Fair Work Commission, state Supreme Courts, the High Court of New Zealand and other judicial or adjudicatory bodies.

12. Of relevance to matters the subject of my report, I have advised clients and prepared expert reports on a wide range of competition and regulatory questions arising in relation to the ports sector, and its related upstream and downstream markets. I have also advised numerous clients and prepared expert reports on economic questions arising in the context of allegations of cartel conduct, and the economic effects of such conduct.

13. I note that I have previously been engaged by PNO to assist as an independent economic expert on various economic questions arising in relation to services provided at the Port of Newcastle.

14. I hold a BSc(Hons) in Economics, a University of Canterbury post-graduate degree, which I was awarded with first class honours in 1983. I attach a copy of my curriculum vitae as Annexure B.

15. I have been assisted in the preparation of this report and the associated research tasks by my colleague, Zoe Odgers. Notwithstanding this assistance, the opinions in this report are my own and I take full responsibility for them.

1.3 Organisation of this report

16. I have structured my report as follows:

    a. in section two, I review and provide my opinion in relation to the economic framework adopted by Mr Morton and Dr Smith for assessing the nature and extent of the public benefits that may be expected to arise in relation to the collective bargaining conduct;

    b. in section three, I examine the extent to which a future with collective bargaining conduct is likely to lead to more efficient outcomes in one or more relevant markets, as compared with a future without the authorised conduct;

    c. in section four, I examine the extent to which a future with collective bargaining conduct is likely to lead to transaction cost savings, as compared to a future without the conduct, and assess the extent to which any transaction cost savings arising from the collective bargaining conduct are likely to represent private or public benefits;

    d. in section five, I examine the extent to which collective bargaining conduct is likely to lead to public detriments by way of facilitating anti-competitive conduct or outcomes in dependent markets;

    e. in section six, I summarise the conclusions drawn from the analysis presented in the previous sections; and

    f. section seven contains my declaration, in accordance with the provisions of the expert code.

2. Framework for assessing public benefits

17. In this section, I review and provide my opinion in relation to the framework adopted by Mr Morton and Dr Smith for assessing the nature and extent of the public benefits that may be expected to arise in relation to the collective bargaining conduct. This framework encompasses:

    a. the specification and comparison of the future with and without the authorised conduct;

    b. the economic principles that govern the distinction between public and private benefits; and

    c. the extent to which it is necessary to define the various markets that may be affected by the authorised conduct.

18. These elements of the framework adopted by Mr Morton and Dr Smith derive from the essential task of the Tribunal in assessing the case for authorisation, which requires consideration of:[9]

    a. first, whether the conduct is likely to result in public benefits; and

    b. second, whether those public benefits are likely to outweigh the detriments arising from any potential lessening of competition.

19. Both the public benefits assessment and countervailing detriments considerations require the comparison of two states of the world, being that with the authorised conduct, as compared to that without the authorised conduct. [10]

2.1 Future with and without collective bargaining

20. In this section, I review and provide my opinion in relation to Dr Smith's specification and analysis of the with and without or factual and counterfactual scenarios applying in relation to the collective bargaining conduct.

21. I agree with Dr Smith that the questions the subject of her report require a comparison of:[11]

    a. the future where coal producers have the ability to negotiate collectively in relation to the terms and conditions of access to the port, which she identifies as the factual; and

    b. the future where coal producers do not have the ability to negotiate collectively in relation to the terms and conditions of access to the port, which she identifies as the counterfactual.

22. I note that Mr Morton's report does not explicitly define either the factual or counterfactual applying in relation to the collective bargaining conduct, beyond indicating his agreement with Dr Smith's assessment of the economic principles that apply in relation to the public benefits and detriments that would be likely to result from collective bargaining conduct.[12] Rather, the focus of Mr Morton's report is the incentives applying to PNO and the extent to which the pro forma Producer Deed proposed by PNO may constrain those incentives.[13] Mr Morton does not provide an assessment of how or the

[9] *Competition and Consumer Act 2010* (Cth), s 90(7)(b). See also: PNO, *Statement of facts, issues and contentions*, 14 December 2020, paras 53-57; and ACCC, *Statement of facts, issues and contentions*, 8 February 2021, para 55.

[10] ACCC, *Statement of facts, issues and contentions*, 8 February 2021, para 56.

[11] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 11.

[12] *Expert report of Euan Morton*, 25 June 2021, para 14.

[13] *Expert report of Euan Morton*, 25 June 2021, para 6b.

extent to which collective bargaining conduct is likely to alter outcomes in relation to the pro forma Producer Deed.

23. Dr Smith's analysis of the factual and counterfactual framework in relation to bargaining for services provided by PNO draws essentially two conclusions, ie;

    a. it is 'quite probable' PNO will change its present stance – whereby it has and will continue to refuse to engage in collective negotiations – within the ten year period for which authorisation is sought;[14] and

    b. collective bargaining is voluntary and that each coal producer will retain the ability to engage in bilateral negotiations with PNO.[15]

24. These observations imply that the factual scenario identified by Dr Smith can be described as a future where coal producers:

    a. have the ability to discuss between themselves the terms and conditions of access to the port;

    b. may have the ability to negotiate the terms and conditions of access collectively with PNO, in the probable outcome where PNO reconsiders its stance in relation to collective negotiation in the face of reduced coal demand and so profits; while also

    c. having the ability to negotiate bilaterally with PNO.

25. In my opinion, two observations are warranted in relation to Dr Smith's specification of the factual. First, I agree with Dr Smith's observation that PNO and the coal producers have a mutual interest in ensuring that there are no unnecessary impediments or disincentives for the export of coal through the port.

26. It follows that the probable constraint on PNO's future profits and so negotiating conduct identified by Dr Smith as arising from an anticipated decline in coal demand, should be incorporated into any assessment of the future with collective bargaining.

27. However, the existence or emergence of such constraints on PNO's negotiating conduct should also be taken into account in the future without collective bargaining. The implications of the mutual interest and declining market conditions identified by Dr Smith will equally affect both the factual and counterfactual scenarios, and the magnitude of the public benefits arising from any distinction between the two.

28. Second, Dr Smith assumes that the ability for the coal producers to negotiate bilaterally with PNO is an intrinsic element of the factual scenario.

29. However, in my opinion it is appropriate to apply some doubt as to the likelihood of such ability being exercised. In particular, I note that in the four month period prior to the ACCC's interim decision to authorise collective bargaining made on 2 April 2020, active bilateral negotiations took place between PNO and several coal producers in relation to the terms of the navigation services. Material changes were made to the pro forma Producer Deed in light of those negotiations, although no agreement was finalised.[16]

30. I have been asked to assume that PNO remains willing to engage in further bilateral negotiations with coal producers.[17] Notwithstanding, in the fifteen month period since the ACCC's interim decision to

[14] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 16.

[15] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 7 and 14.

[16] Clayton Utz, Letter of instruction to Greg Houston, 30 July 2021, para 9(h).

[17] Clayton Utz, Letter of instruction to Greg Houston, 30 July 2021, para 9(l).

authorise collective bargaining on 2 April 2020, there have been no further bilateral negotiations between PNO and coal producers.[18] In light of this observed conduct, I assume that no coal producer is willing to enter into bilateral negotiations with PNO for so long as the collective bargaining conduct remains authorised.

31. On these considerations and assumptions, in my opinion Dr Smith's assessment of the applicable factual and counterfactual specifications warrants refinement so that:

    a. in the factual (ie, the future with authorisation), coal producers:

        i. have the ability to discuss between themselves the terms and conditions of access to the port;

        ii. may have the ability to negotiate the terms and conditions of access collectively with PNO, in the quite probable outcome where PNO reconsiders its stance in relation to collective negotiation in the face of reduced coal demand and so profits; but

        iii. are unwilling to negotiate bilaterally with PNO; and

    b. in the counterfactual (ie, the future without authorisation), coal producers:

        i. do not have the ability to discuss between themselves the terms and conditions of access to the port;

        ii. do not have the ability to negotiate the terms and conditions of access collectively with PNO; but

        iii. are willing to negotiate bilaterally with PNO.

32. I address the implications of this refined factual specification in my assessment of the transactions costs effects and countervailing detriments in sections 4 and 5.

2.2 Public and private benefits

33. In this section, I review Dr Smith and Mr Morton's discussion of the economic principles that govern the distinction between public and private benefits.

34. For the purposes of my review, unless explicitly indicated otherwise I have taken the term 'public benefits' to be consistent with the concept of economic welfare or efficiency. Nevertheless, I acknowledge that the legal standard of public benefits may also contemplate types of benefit that are wider than this precise, economic specification.

35. In my opinion, the potential for public benefits from the authorised conduct requires that collective bargaining gives rise to both:

    a. a change in economic conduct, ie, the form and outcome of negotiations with PNO are different as compared with what they would have been absent the collective bargaining conduct; *and*

    b. an increase in either the quantity or quality[19] of output for the access service, or in one or more markets upstream or downstream to the access service, that would not have arisen in the absence of the collective bargaining conduct.

[18] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, para 81.

[19] Economists generally consider the potential for a tangible increase in the quality of a good or service as having equal conceptual status – in terms of specifying a form of allocative efficiency gain and so public benefits – to an increase in the quantity of a good or service, on the basis that both forms of change are valued by consumers. However, in the absence of any indication that the access

36. Unless *both* these conditions are satisfied, collective bargaining cannot give rise to any increase in economic efficiency or welfare.

37. Dr Smith presents her economic interpretation of public benefits primarily by reference to the potential for increase in the closely aligned concept of the total surplus generated by the outputs in a market. In the sub-sections below, I make a number of clarifying observations on the framework for distinguishing public and private benefits described by Dr Smith.

38. Mr Morton does not describe his understanding of the distinction between public and private benefits or how these may be either identified or distinguished by reference to the potential for collective bargaining to alter the terms upon which coal producers receive services at the port. Rather, Mr Morton states that he agrees with Dr Smith's analysis.[20]

2.2.1 Dr Smith's public benefits framework

39. In her explanation of public and private benefits, Dr Smith draws two key distinctions. First, Dr Smith explains that private benefits occur when any change in economic conduct or outcomes have the effect of transferring economic surplus *between* a buyer and a seller (as may occur in a bargaining situation).[21] Any such change represents private benefits to the transferee and, correspondingly, private disbenefits to the transferor.

40. Second, Dr Smith explains that public benefits may occur when any change in economic conduct or outcomes have the effect of increasing economic surplus (or welfare), as arises when either the output in a market is increased or the quality of the product is increased.[22]

41. Dr Smith also notes that increased economic surplus may accrue in a static sense, where productive and allocative efficiency increase by reference to known market conditions, and dynamically, where future productive and allocative efficiency will be increased in the face of changing market conditions, such as may arise through more efficient investment.[23]

42. I agree with the economic foundations of each of these propositions. I also agree with Dr Smith's observation that the legal standard of 'public benefits' may well be wider than the economic specification of welfare generally cited by economists.[24]

43. However, in terms of the practical application of Dr Smith's framework in the present context, some clarifications are warranted.

44. Dr Smith presents her framework for assessing public benefits by reference to the sum of:[25]

    a. the economic profits earned by a firm supplying the relevant services; and

    b. the consumer surplus accruing to the purchaser of those outputs.

45. In practice, both these economic concepts are very challenging to measure. For that reason, in assessing the potential for any public benefits to arise from a particular form of conduct, it is often helpful to focus on the narrower but equally valid question as to whether output in any market is likely

services at the Port of Newcastle to which the conduct applies involve any potential distinctions in terms of their quality dimension, for ease of exposition throughout the remainder of my report, I refer only to the potential for changes in the quantity of the access service.

[20] *Expert report of Euan Morton*, 25 June 2021, para 13.

[21] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 54-55.

[22] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 31.

[23] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 35-41.

[24] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 32.

[25] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 29-31.

to be increased. Dr Smith also recognises the importance of change in output as an arbiter of the potential for public benefits.[26]

46. In my opinion, by reducing the focus to the question of whether output in any market is likely to increase by consequence of the collective bargaining conduct, the relevant inquiry as to the existence public benefits becomes much clearer. By way of illustration, I set out below the range of potential collective bargaining conduct scenarios implied by the analyses of both Dr Smith and Mr Morton, and the principal relevant public benefit question associated with each.

Scenario one

47. If collective bargaining conduct was expected to give rise to a reduction in the port access charges paid by coal producers and/or vessel agents, the relevant questions become:

    a. would the relevant reduction in port access charges (as compared with the counterfactual) give rise to any near term change in the quantity of port access services demanded by coal producers or vessel agents? and/or

    b. would the relevant reduction in port access charges (as compared with the counterfactual) give rise to increased efficient investment by coal producers (say, to increase their future production capability), so that the longer term quantity of port access services demanded by coal producers or vessel agents could be expected to increase?

48. I note that whilst expressing the relevant 'Does output change?' question in terms of the quantity of port access services demand by coal producers and vessel agents, the question could equally be posed by reference to the quantity of coal exported from the port, from which derives the demand for port access services.

Scenario two

49. If the collective bargaining conduct was expected to give rise to a reduction in the aggregate transaction costs (say, in the form of external legal costs) associated with negotiating and agreeing the port access charges paid by coal producers and vessel agents, the relevant questions become:

    a. would the overhead costs savings thereby accruing to the coal producers (as compared with the counterfactual) give rise to any change in the quantity of port access services demanded by coal producers or vessel agents, say because:

        i. in the near term, the reduction in overhead costs would enable more coal to be produced; or

        ii. in the longer term, the reduction in overhead costs would enable increased efficient investment in coal production capacity, thereby enabling more coal to be produced in the longer term? and/or

    b. would resources freed up by means of the overhead cost savings – which, in the first instance represent a reduction in output in one or more of the dependent markets for inputs (say, legal services) supplied to coal producers – give rise to a more than offsetting output expansion through redeployment of those resources to higher value activity elsewhere in the economy?

50. I note again that, whilst expressing the relevant 'Does output change?' question in terms of the quantity of port access services demand by coal producers and vessel agents, the question could equally be posed by reference to the quantity of coal exported from the port, from which derives the demand for port access services.

[26] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 31.

2.2.2 Distinction between consumer and producer welfare not meaningful in this context

51. Finally, I note that Dr Smith presents her total surplus framework by reference to the sum of profits accruing to 'businesses' or firms and consumer surplus accruing to 'consumers', but also refers to the jurisprudential 'modified welfare standard', where enhanced consumer welfare has the potential to be given relatively greater weight than enhanced producer welfare.[27]

52. In my opinion Dr Smith's reference to the 'modified welfare standard' is of limited or no relevance in the context of the authorised collective bargaining conduct, since the port access services in question are a business input and none of the markets for which effects are contemplated involve 'consumers', as distinct from other, downstream producers.

2.3 Defining the relevant markets

53. In this section, I discuss the extent to which it is necessary to define the various markets that may be affected by the authorised conduct for the purpose of a public benefit assessment, and review and provide my opinion on the markets defined for this purpose by Dr Smith and Mr Morton.

54. The framework for analysis I describe at paragraph 17 requires an assessment of the economic effects of the collective bargaining conduct. Given this purpose, in my opinion the identification and definition of the relevant markets should focus on those for which some form of economic effect of the collective bargaining conduct is likely to arise.

55. It follows that, in assessing the extent of public benefits arising with the authorised conduct, it is necessary to identify:

    a. those markets that will be affected by the authorised conduct (as compared to the counterfactual, without the authorised conduct), whether:

        i. directly, being the primary market; or

        ii. consequentially by means of one or more dependent markets; and

    b. the public benefits and any countervailing detriments arising in those markets.

2.3.1 Primary markets

56. Dr Smith states that the market in which the authorised conduct applies needs to be defined, and that the relevant market – which I take to be the primary market – is:[28]

> 'the supply of port services which enables (sic) ships to enter the port in order to be loaded with coal (or possible other minerals).'

57. Dr Smith describes the geographic dimension of this market as being the Port of Newcastle.[29] Mr Morton states that he concurs with Dr Smith's conclusions on the market(s) relevant to the authorisation.[30]

58. In my opinion, the product dimension of Dr Smith's definition of the relevant market would be assisted by further clarification as to the purpose of defining a primary market, and its role in informing the 'effects' analyses I describe at paragraph 5.

[27] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 33-34.

[28] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 20.

[29] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 22.

[30] *Expert report of Euan Morton*, 25 June 2021, para 12.

59. By way of example, coal loading and harbour towage services are both 'port services' provided at the port and used in relation to the export of coal. However, such services are neither provided by PNO nor within the scope of the collective bargaining conduct.

60. Consistent with Dr Smith's inference,[31] in my opinion the scope of the authorised conduct should guide the definition of the relevant primary market(s). On that principle, there are two, each of which reflects the services and associated charges potentially affected by the collective bargaining conduct. The primary markets are those for the provision of:

    a. navigation and/or shipping channel access services supplied by PNO at the port in relation to the export of the producers' coal, for which:[32]

        i. the applicable charge is a navigation services charge (NSC), payable by reference to the gross registered tonnage (GRT) of each visiting vessel; and

        ii. the buyers of this service are vessel agents; and

    b. the availability of a site at which stevedoring operations may be carried out by PNO at the port in relation to the export of the producers' coal, for which: [33]

        i. the applicable charge is a wharfage charge (WCh), payable by reference to each tonne of producers' coal loaded onto a vessel; and

        ii. the buyers of this service are coal producers.

61. For ease of exposition, when referring throughout my report to these two primary markets in a context where there is no need to distinguish between them, I use the term 'port access services'.

62. It follows from the framework I describe at paragraph 35 that public benefits arising in relation to these primary markets by consequence of the authorised conduct should therefore be assessed by reference to the potential for an increase in the quantity of coal transported through the port under the factual, as compared with the counterfactual.

2.3.2 Other markets

63. Dr Smith identifies that 'other markets' may be affected by the conduct for which authorisation is sought, and defines 'an international market' for 'the supply and acquisition of thermal coal'.[34]

64. Similarly, Mr Morton agrees that 'other markets…may be affected, albeit to a lesser extent' by the conduct, and refers to:[35]

> the most relevant of these being the market for export of thermal coal in the Asia Pacific region, and the market for thermal coal tenements in the Newcastle catchment area.

65. Mr Morton explains that these markets are likely to be affected by the authorised collective bargaining conduct 'to a lesser extent' than the primary market. However, Mr Morton does not elaborate as to how an analysis of public benefits arising from the authorised conduct would be assisted by the addition of considerations arising in relation to international coal markets, as distinct from the primary markets.

[31] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 19.

[32] *Ports and Maritime Administration Act 1995*, Part 5, Division 2, para 50.

[33] *Ports and Maritime Administration Act 1995*, Part 5, Division 5, para 61.

[34] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 26-27.

[35] *Expert report of Euan Morton*, 25 June 2021, para 12.

66. Similarly, Dr Smith notes that: [36]

> any price increases that would be avoided/reduced through collective bargaining….[will either]…be passed through directly reducing competitiveness; or they will be absorbed by coal producers thus reducing profitability and reducing wiliness to invest and this may indirectly reduce competitiveness on international markets..

67. However, Dr Smith also does not elaborate as to how an analysis of public benefits arising from the authorised conduct would be assisted by the addition of considerations arising in relation to international coal markets, as distinct from those arising in relation to the primary markets.

68. In my opinion, as a matter of principle relevant other markets may arise for each element of the analysis I identify at paragraph 5, ie:

    a. the 'efficiency effects' analysis;

    b. the 'transactions costs effects' analysis; and

    c. the 'countervailing detriments' analysis.

69. In relation to the 'efficiency effects' and 'transactions costs effects' analyses, the purpose of identifying such other markets should be to capture the potential for any change in the price of either navigation or wharfage services brought about by the authorised conduct that, in turn, gave rise to output changes in other markets that went beyond the extent of any output changes in the primary markets.

70. In concept, the effects hypothesised by both Dr Smith and Mr Morton as potentially giving rise to an expansion of output in a dependent market – such as in international markets for thermal coal and/or any regional market for coal tenements – could constitute a public benefit. However, neither Dr Smith nor Mr Morton offer any relevant explanation or analysis as to how this effect would occur.

71. Finally, I note that relevant 'other markets' may also arise in relation the countervailing detriments analysis, the broad potential scope of which I discuss in section 5.

[36] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 13.

3. Efficiency effects of collective bargaining

72. In this section, I examine the extent to which a future with collective bargaining conduct is likely to lead to more efficient outcomes in one or more relevant markets, as compared to a future without the authorised conduct. Any potential increase in efficiency involves the realisation of public benefits, and so contributes to the assessment of the likely net benefits of the authorised conduct.

73. I explain at paragraph 35 that the potential for economic efficiency and so public benefits from the authorised conduct requires that collective bargaining gives rise to both:

    a. a change in economic conduct, ie, the form and outcome of negotiations with PNO are different as compared with what they would have been absent the collective bargaining conduct; *and*

    b. a change in either the quality or quantity of the access service, or in a market upstream or downstream to the access service, that would not have arisen in the absence of the collective bargaining conduct.

74. Importantly, both these conditions must be satisfied for more efficient outcomes and so public benefits to arise from the collective bargaining conduct. An improvement in the terms of access to the port that does not give rise to an increase in output in one or more markets represents a transfer of economic surplus from one party to another rather than an increase in total welfare.

75. In the remainder of this section, I assess the extent to which these conditions have been fully evaluated by Dr Smith and Mr Morton.

3.1 Authorised conduct unlikely to impose additional constraint on PNO

76. Dr Smith and Mr Morton both contend that PNO has substantial market power, which will be constrained by the authorised conduct such that the efficiency of outcomes in one or more markets will increase.[37] However, in my opinion neither Dr Smith nor Mr Morton has given sufficient consideration of the constraints that already apply to PNO under the counterfactual, in the absence of the collective bargaining conduct.

77. In this section, I assess the extent to which the authorised conduct will impose any additional constraint on the terms by which PNO provides access to the port, and so can be expected to give rise to a different bargaining outcome. I approach this assessment by examining:

    a. the existing constraints on PNO's ability to set inefficient prices;

    b. the balance of bargaining power between PNO and coal producers in the absence of collective bargaining; and

    c. the likely incremental effect of the authorised conduct on bargaining outcomes.

3.1.1 PNO is constrained by the threat of regulation and countervailing bargaining power

78. Dr Smith and Mr Morton both contend that PNO holds a substantial degree of market power in the provision of access services at the port and that it has a strong incentive to exercise this power to the

[37] See, for example: *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 13-14, 76-78; and *Expert report of Euan Morton*, 25 June 2021, para 79.

detriment of coal producers.[38] Mr Morton describes PNO as a monopolist and implies that PNO is effectively unconstrained in relation to its port access charges.[39]

79. In such circumstances, Dr Smith and Mr Morton contend there is a material risk that the prices and other terms negotiated between a buyer and a seller may lead to inefficient economic outcomes.[40] By consequence of these assessments, Dr Smith and Mr Morton conclude that the collective bargaining conduct will constrain the ability of PNO to exercise its substantial market power, relative to the counterfactual.[41]

80. In my opinion, Dr Smith and Mr Morton overlook a number of important, existing constraints on PNO's ability to exercise its market power, and so do not give sufficient weight to the circumstances already applying when assessing the effects of collective bargaining, relative to purely bilateral bargaining.

Review of Mr Morton's analysis

81. In the sub-section below, I review Mr Morton's analysis of PNO's ability and incentive to exercise its market power, noting three significant shortcomings. I note that Mr Morton does not provide an analysis of how he expects collective bargaining to change the circumstances applying to PNO.

82. First, Mr Morton contends that extensive quantitative analysis he undertook in 2018 and 2019 indicates that PNO has an incentive and ability to impose substantial increases in the price of access to the port.[42]

83. Mr Morton states that his modelling initially revealed that PNO could increase its profits by raising prices by at least $3 per tonne,[43] and that subsequent modelling found that PNO could charge a profit maximising price in the vicinity of $12.50 per tonne.[44] Mr Morton states:[45]

> Synergies considered increases of up to $15/t and found that only under a coal price assumption of $75/t would profit start to decline with an access price increase of $12.50… this approach provided an indication of the likely magnitude of price increases that could be applied in order to maximise PNO's profits.

84. By referring to such analysis Mr Morton implies that there is no other effective constraint on price increases that may be imposed by PNO, and that coal producers are likely to base their investment decisions on 'conservatively high estimates' of PNO's charges, such as those provided in his analysis.[46]

85. In my opinion, the overly simplistic and misdirected nature of Mr Morton's prior analysis is best illustrated by the fact that, in the intervening period, PNO has not set prices for access to the port at anything like the levels Mr Morton implies could be profitably applied. Rather, under the Agents Deed

[38] See for example, *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 13, 76-78; and *Expert report of Euan Morton*, 25 June 2021, paras 17-19.

[39] *Expert report of Euan Morton*, 25 June 2021, para 23-24, 34.

[40] See, for example: *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 13-14, 76-78; and *Expert report of Euan Morton*, 25 June 2021, para 79.

[41] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 78; and *Expert report of Euan Morton*, 25 June 2021, para 79.

[42] *Expert report of Euan Morton*, 25 June 2021, para 20.

[43] *Expert report of Euan Morton*, 25 June 2021, para 20.

[44] Expert report of Euan Morton, 25 June 2021, para 20.

[45] *Expert report of Euan Morton*, 25 June 2021, para 20.

[46] *Expert report of Euan Morton*, 25 June 2021, para 24.

that PNO has entered into in respect of all vessels visiting the port since April 2020, the currently applicable NSC is $0.8121 cents per vessel gross tonne.[47]

86. The prevailing price for access to the port by vessels seeking to load producers' coal is therefore approximately 15 times lower than Mr Morton suggests PNO could charge without seeing a decline in its profits.

87. Further, the circumstances in which PNO provide port access services present substantial challenges for an analysis of the kind undertaken by Mr Morton to determine a profit maximising price. In markets where prices are constrained by demand-side considerations, the 'profit maximising' price is set by reference to demand or the 'willingness to pay' of buyers. The willingness to pay for port access services provided at the Port of Newcastle is derived from the international coal price, which fluctuates not only daily but also in accordance with multi-year cycles in the balance between global supply and demand. This implies that the derived demand for port access services provided by PNO and so the theoretical, unconstrained profit maximising price is constantly changing, by orders of magnitude.

88. A calculation of the simplistic form undertaken by Mr Morton is further detached from real world complexities by:

    a. the constraints faced by coal producers – such as apply in relation to mine to ship infrastructure – from ramping their production up or down in response to changes in prices; and

    b. the incidence of port access charges, since the WCh is paid by coal producers while the NSC is paid by vessel agents.

89. In my opinion, the fact that PNO sets prices for access that are so substantially different from those which arose from Mr Morton's modelling amply demonstrates that PNO's prices – which Mr Morton suggests would be significantly higher – are subject to very significant constraints that have neither been recognised nor accounted for in the analytical framework that Mr Morton seeks to apply.

90. Second, Mr Morton raises concerns that PNO will be able to engage in unconstrained price discrimination when negotiating bilaterally with producers on the terms of the Producer Deed.[48] These contentions stand in contrast to the available empirical evidence. In the four month period prior to interim authorisation being granted, PNO and producers engaged in active bilateral negotiations in relation to the terms of a pro forma Producer Deed.[49]

91. During this time PNO fielded responses from producers and amended a common version of the pro forma Producer Deed, as distinct from seeking to differentiate prices.[50] In the course of that process, a 'most-favoured-nation' clause was incorporated into the pro forma Producer Deed following feedback from coal producers, the effect of which was to preclude PNO from engaging in price discrimination.[51]

92. Notwithstanding, in the context of markets involving business to business transactions within a supply chain, price discrimination does not necessarily result in any public detriment. Rather, price discrimination is more likely to increase output and economic surplus, representing a public benefit.[52] Any potential for PNO to discriminate between coal producers in the setting of prices for port access

[47] PNO, *Statement of facts, issues and contentions*, 14 December 2020, para 38, and PNO, *Vessel agent pro forma long term pricing deed*, 13 March 2020, p 9, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf

[48] *Expert report of Euan Morton*, 25 June 2021, para 21.

[49] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, para 9(h).

[50] See: Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 66-67.

[51] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 55-57.

[52] I explain that public benefits arise from a particular form of conduct when there is an increase in output in paragraph 45.

services is not therefore a relevant detriment when assessing the collective bargaining conduct of coal producers.

93. Finally, Mr Morton presents an analysis of changes in charges for PNO's port access service since it was privatised in 2014 relative to other Australian coal ports as evidence that PNO has demonstrated a willingness to exercise its market power for its commercial benefit.[53] Mr Morton presents his analysis as a line graph plotting increases in the price index for port access charges at five Australian ports between 2014 and 2021.

94. However, the overly simplistic nature of Mr Morton's analysis means that few, if any, conclusions can be drawn from the graph presented. A substantial shortcoming of the material presented by Mr Morton's analysis is that price changes are shown on an indexed basis, relative to 2014, so that relevant information is obscured. For example, it is not possible to compare the absolute values of port charges and it may well be the case that prices are much higher at other ports compared with the Port of Newcastle.

95. In addition, by setting the index relative to 2014, the evolution of prices prior to this date is omitted and the absolute value of prices in 2014 determines the base value for proportional increases. For example, a price increase of $0.50 relative to a base of $1.00 represents an index value of 150, while the same price increase relative to a base value of $2.00 represents an index value of 125. The existence of a relatively low price in 2014 means that small price increases appear to be more significant using an index.

96. Mr Morton's analysis also does not consider the extent to which PNO's prices up to 2014 (ie, prior to privatisation) were sustainable or reflected the recovery of PNO's efficient costs.[54] It is therefore not possible to draw meaningful conclusions about the constraints on PNO's ability to exercise market power from the data he presents.

97. It follows from the analysis and reasoning I set out above that there is no conceptual or empirical basis for Mr Morton's claim that PNO's ability to set profit maximising prices is unconstrained, and there is no clear basis from which to conclude that the authorised collective bargaining conduct is likely to impose any additional, meaningful constraint on bargaining outcomes.

Constraints on PNO's prices

98. Rather, in my opinion the more likely explanation for the observed outcomes in terms of the prevailing and future agreed price of access at the port is a combination of:

    a. PNO's apprehension of the threat of further regulatory intervention in relation to the terms of access for the navigation and/or channel services; and

    b. the countervailing power of coal producers in the absence of the authorised conduct, deriving from:

        i. the long term, mutually dependent relationship between PNO and the coal producers; and

        ii. the existence of more than 50 per cent excess capacity at the port.[55]

99. I assume that the scope of potential regulatory intervention in relation to the terms of access for navigation and/or channel services provided at the port includes all available regulatory and/or

[53] *Expert report of Euan Morton*, 25 June 2021, paras 31-33.

[54] PNO, *Application to Tribunal for review by Port of Newcastle Operations Pty Ltd*, 17 September 2020, para 63.

[55] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, para 9(o).

enforcement measures under existing New South Wales and Commonwealth laws, and the potential for legislative change that would expand the range of available measures.

100. PNO is dependent on trade with coal producers to remain viable as a business. It has a strong disincentive to set prices and other terms that discourage efficient investment by coal producers, because it has a 98-year lease over the Port of Newcastle and relies on coal export operations for more than 70 per cent of its revenue.[56] On the assumption that PNO is seeking to maximise returns over the expected life of its lease, it has a strong incentive to encourage competition between and efficient investment by all of the coal producers, so as to achieve the maximum long term level of coal exports. This effectively constrains the prices that it would be prudent to be set by PNO.

101. Further, I explain below that PNO is also likely to be constrained by the countervailing bargaining power of coal producers arising from the mutually dependent relationship between the two parties.

3.1.2 Balance of bargaining power unlikely to change

102. In my opinion, the most appropriate economic framework to apply to the circumstances in which coal producers and PNO negotiate over the terms and conditions applying to purchase and sale of a substantial quantity of port access services at the Port of Newcastle is a 'bargaining' framework. A bargaining framework is appropriate when analysing commercial situations where buyers and sellers interact in a series of one-on-one bilateral relationships, rather than in an open market.[57]

103. Dr Smith similarly adopts a bargaining framework in her analysis of the economic principles applying in relation to the collective bargaining conduct.[58] However, Dr Smith focuses solely on the bargaining power of producers arising from the authorised conduct (under the factual),[59] and gives little attention to the balance of bargaining power in the absence of the collective bargaining conduct (the counterfactual). Dr Smith also does not offer any assessment of the outside options available to either PNO or the coal producers to support her conclusions.

104. Bargaining frameworks focus on the determination of how a buyer and seller divide between them the amount of total net benefit (to both buyer and seller) arising from an agreement, otherwise known as the 'joint surplus' from the deal.[60]

105. The negotiations between coal producers and PNO principally concern the division of the total profits available to be earned by the two parties from the export of coal for sale in international markets, independent of other costs incurred and profits earned in the supply chain.

106. In a bilateral bargaining relationship, bargaining power is exercised where a party threatens to impose a cost, or to withdraw a benefit, if the other party does not grant a concession, such as a price discount.[61]

107. An important insight from the economic considerations applying under a bargaining framework is that the outcome depends on the best outside options for both parties, ie, the payoffs available to each if they do not reach an agreement.[62] The best outside option represents the minimum each party is willing to accept in a negotiation, so that the better is a party's outside option, the better outcome that party may receive from bargaining.

[56] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, p 9(r).

[57] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 311.

[58] See, for example: *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 50-51.

[59] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 76-78.

[60] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 311.

[61] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 312.

[62] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 513.

Bargaining power absent the authorised conduct

108. Applying a bargaining framework, I first consider the outside options available to PNO and the coal producers when negotiating bilaterally in the absence of the authorised conduct. The outside option is the payoff value of the next best alternative if the parties do not reach an agreement to trade.

109. In my opinion, PNO has few or no near term outside options if it is not able to reach agreement with an individual coal producer, or a vessel agent carrying producer coal. The port is not capacity constrained and there are no viable alternative customers waiting to use the port in the absence of trade with any coal producer.[63] PNO cannot redeploy its resources, because they primarily consist of fixed, sunk infrastructure assets. By consequence of these circumstances, the value of PNO's best outside option is likely to be close to nil.

110. Individual coal producers also have no or few outside options to bypass the port. Although a coal producer may technically be able to consider alternative sources of transport to access export markets, the cost of such alternatives is likely to be prohibitive, and so not economically viable.[64]

111. These circumstances reinforce the mutual dependence between the coal producers of the Newcastle catchment, who rely on the access to the port to serve demand in downstream markets, and PNO, which relies on coal export operations for 70 per cent of its revenue and 96 per cent of its annual trade.[65] If the parties are unable to reach agreement, both are likely to suffer substantial economic harm.

112. However, in the absence of collective bargaining, coal producers that do not reach an agreement with PNO over the terms of the pro forma Producer Deed have the benefit of the very similar terms under the existing, agreed Agents Deed.[66] In my opinion, this provides producers with a strong outside option, and establishes the maximum price and related terms that coal producers are likely to accept in negotiations. The current level of the NSC agreed in the Agents Deed is $0.8121 per tonne.[67]

113. Drawing together these opposing positions, in the absence of collective bargaining, the range of acceptable levels for the NSC in a negotiation between an individual coal producer and PNO is likely to fall between the average total cost of supplying port services and, if higher, 81 cents per tonne.[68]

114. In my opinion, these considerations reinforce that the strength of PNO's bargaining position is not nearly as powerful as contended by Dr Smith or Mr Morton. Rather, the presence of the Agents Deed, which themselves have been put in place in the context of the likely apprehension by PNO of the risk of further regulatory intervention, imposes an important constraint on the prices able to be set by PNO in the absence of collective bargaining conduct.

Changes to bargaining power

115. In my opinion, collective bargaining conduct is unlikely to have a material effect on the outcomes of the existing balance of bargaining power that I describe above. In particular:

[63] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, para 9(o).

[64] ACCC, *Statement of facts, issues and contentions*, 8 February 2020, para 67.

[65] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, p 9(r); and PNO, *Port of Newcastle trade report 2020*, 2020, p 2.

[66] PNO, *Statement of facts, issues and contentions*, 14 December 2020, paras 38-39.

[67] PNO, *Vessel agent pro forma long term pricing deed*, 13 March 2020, p 9, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf

[68] A price set at the average total cost would provide PoN with a zero payoff, equivalent to the value of the outside option.

a. the value of PNO's outside option when negotiating with producers will remain at zero, since it has excess capacity and no meaningful, alternative customers for its navigation and channel access service;[69] and

b. the coal producer bargaining group's best outside option will continue to be the access terms already in place under the Agents Deed.

116. I acknowledge that, by acting collectively it may be more viable for coal producers to contemplate the development of a substitute facility in order to bypass the port; however, I assume the cost of any such option is unlikely to be less than the available terms in the Agents Deed.[70] It follows that this outside option bears no influence on the range of acceptable negotiating outcomes.

117. When assessed by reference to a bargaining framework, in my opinion, there is no economic evidence to suggest that collective negotiations will materially alter the countervailing bargaining power of coal producers in relation to the terms of access to the port.

118. In contrast, Dr Smith states that:[71]

> The ability of the coal producers to collectively negotiate with PNO will help to address the imbalance of bargaining power which should increase the efficiency of the bargaining process in that it should produce better outcomes relative to those where the bargaining power is bilateral and less equal.

119. In expressing this opinion, Dr Smith overlooks two important considerations, ie:

a. the extent of existing countervailing bargaining power of coal producers, stemming from PNO's mutual reliance on them in order to remain a viable business; and

b. the very low likelihood that collective bargaining will change the balance of bargaining power, because it does not have a meaningful influence on the outside options already available to either party.

120. To summarise, in my opinion the authorised collective bargaining conduct is unlikely to impose any meaningful, incremental constraint on PNO in terms of its ability and incentive to set terms for port access services provided at the port, as compared with those that apply in the absence of the authorised conduct.

3.2 Conduct unlikely to induce more favourable bargaining outcomes

121. The second condition for collective bargaining conduct to lead to increased output and so public benefits is that any additional constraint that collective bargaining may impose on PNO's ability to exercise any market power in relation to the terms of access to the port must give rise to an improvement in the bargaining outcomes that would not otherwise have occurred. Specifically, there must be a material prospect that the terms of the existing pro forma Producer Deed, including the level of the NSC, will alter so as to be more favourable for coal producers.

122. In my opinion, even if collective bargaining could alter the balance of bargaining power – an outcome that I explain above is unlikely – there is limited scope for achieving bargaining outcomes that are more favourable to coal producers. This derives from the existing constraints on PNO's price setting power, described in section 3.1.1 above.

[69] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, para 9(o).

[70] See, for example: ACCC, *Statement of facts, issues and contentions*, 8 February 2020, para 67.

[71] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 78.

3.2.1 Scope for more favourable bargaining outcome is limited

123. In my opinion, the scope for the producers – acting collectively – to achieve more favourable bargaining outcomes, relative to bilateral bargaining, is limited by several factors, ie:

    a. the default terms provided by the Agents Deed;

    b. the active bilateral negotiations that took place prior to the granting of interim authorisation;

    c. information sharing on PNO's website and in relation to capital expenditure; and

    d. the limited scope of port access charges remaining to be negotiated.

124. First, PNO has previously agreed to 10-year Agents Deeds, by means of bilateral negotiations with vessel agents.[72] This means the default terms and conditions applicable to the navigation service are already established. Further, the terms of the Agents Deeds have been established in the context of the existing constraints applying to PNO, including its apprehension of the threat of regulation and the countervailing bargaining power of producers.

125. Second, in the period between December 2019 and April 2020, active bilateral negotiations took place between PNO and several coal producers in relation to the terms of the navigation service.[73] Material changes were made to the Producer Deed following requests by coal producers made during those negotiations. Most notably, the changes included the incorporation of:[74]

    a. provisions giving effect to non-discrimination as to the charges applying as between one coal producer and another; and

    b. provisions offering coal producers visibility of and the opportunity to comment on capital expenditure proposed to be incurred by PNO.

126. PNO provided the amended Producer Deed to coal producers in draft form, which was later published by PNO on 13 March 2020.[75] In my opinion, these actions suggest the parties are likely to be able to negotiate acceptable, efficient agreements in the absence of the authorised conduct.

127. Third, Dr Smith suggests that 'better information sharing' between coal producers will result in more efficient contracts, noting that:[76]

> Collective bargaining may allow the group to coordinate information collection, monitor that collection, aggregate and interpret the information. This may mean that the information provided as part of the negotiation is better and more complete than would be available in bilateral negotiations.

128. In my opinion, it is not clear how collective bargaining will make relevant information more readily available for coal producers when compared with the counterfactual. The pro forma Producer Deed is published on PNO's website and includes an anti-discrimination clause,[77] thereby implying the strong potential for all coal producers to benefit from the existence of information that may affect the negotiations with any one of them.

[72] Clayton Utz, *Letter of instruction to G Houston*, 30 July 2021, para 9(c).

[73] Clayton, Utz, *Letter of instruction to G Houston*, 30 July 2021, p 9(h).

[74] PNO, *Position paper – Long term producer specific charges*, 19 February 2020, pp 1-2 in Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, pp 133-134.

[75] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 72-73.

[76] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 80.

[77] PNO, *Producer pro forma long term pricing deed*, 13 March 2020, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

129. Further, I note that PNO has committed to providing and discussing its forecasts of capital expenditure with producers in the terms of the pro forma Producer Deed, which can be presumed to take place on a bilateral basis.[78]

130. Consequently, there is no evidence to suggest that the ability on the part of coal producers to bargain collectively (even if limited to sharing and discussing amongst themselves information conveyed to them by PNO) will give rise to additional information or perspectives generated by those producers collectively, that would otherwise not be capable of being generated and conveyed to PNO by one or more coal producer individually.

131. To the extent such additional information or perspectives may arise, there is no evidence to suggest that this would alter the capital expenditure decisions made by PNO, as consistent with the requirement for some form of public benefit to arise.

132. Finally, Dr Smith assumes that the existence of the agreed Agents Deed means that the WCh is the primary matter which remains to be negotiated between PNO and producers.[79] However, the bargaining outcomes arising in relation to negotiations over the WCh seem unlikely to differ materially under the factual relative to the counterfactual, because:

    a. PNO's Chief Commercial Officer and General Counsel notes that he is not aware of any disagreement in relation to the level of the WCh by producers, and that this issue has not been raised in other settings;[80] and

    b. the applicable WCh under the existing pro forma Producer Deed is set at $0.08 per tonne of producer coal,[81] implying that there is very little scope for negotiation in relation to its already very low level.

3.2.2 Producer's needs are not uniform

133. In addition to the considerations set out above, I note that important aspects of the circumstances applying to the coal producers are heterogeneous. For example, each coal producer faces different circumstances in terms of factors such as:[82]

    a. the size, location, and throughput of mines, causing differences in marginal and average costs;

    b. the type and quality of coal produced, since both thermal and metallurgical coal, with varying grades of quality, is transported through the port;

    c. the nature of trading agreements, since coal can be sold either CIF or FOB, through long term contracts or in spot markets, which may be a relevant consideration affecting the incidence of the NSC;

    d. remaining mine lives, which will influence the priorities and incentives of producers; and

    e. different mine costs characteristics, so that the rate of profitability and potential for shut down, in the face of highly cyclical international coal markets are very different.

[78] PNO, *Position paper – Long term producer specific charges*, 19 February 2020, pp 1-2 in Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, pp 133-134.

[79] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 72.

[80] Byrnes, S, *Second affidavit of Simon Byrnes*, 25 June 2021, paras 16-18.

[81] PNO, *Producer pro forma long term pricing deed*, 13 March 2020, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

[82] See, for example: Wood Mackenzie, *Scenario Development and Planning*, Prepared for Port of Newcastle, January 2021, pp 25-27, 84; and National Competition Council, *Application for declaration of certain services at the Port of Newcastle - Recommendation*, 18 December 2020, para 7.120.

134. These considerable differences mean that, in price-terms, the willingness to pay of individual producers is likely to be quite varied. In addition, producers are likely to have heterogeneous non-price preferences, such as for the term of any pricing agreement. By consequence, efficiencies may well be available if terms can be agreed bilaterally between PNO and producers. Consistent with this heterogeneity, PNO's experience in bilateral negotiations is that not all producers have sought the same changes to the pro forma Producer Deed.[83]

135. By its nature, collective bargaining is only likely to be able to achieve a better bargaining outcome if a common position in the interests of all producers can be agreed. However, the heterogeneity of coal producers seems likely to reduce the scope of any potential gains from collective bargaining.

136. Taken together, the considerations I describe above imply that the scope for more favourable outcomes to be achieved through collective bargaining is very limited.

3.3 Conduct unlikely to lead to more efficient outcomes

137. I describe at paragraph 35 that for collective bargaining to give rise to more efficient outcomes when compared with the counterfactual (ie, where negotiations are only bilateral), two conditions must be met, ie:

    a. the conduct must lead to an improvement in the terms of the pro forma Producer Deed, which may include a lower NSC price; and

    b. the change in the terms must lead to an increase in output in one or more related markets.

138. In sections 3.1 and 3.2 I explain the basis for my opinion that collective bargaining is unlikely to produce a significantly more favourable outcome for coal producers than would be agreed through bilateral bargaining, because it is unlikely to impose any incremental constraints on the terms that PNO is able to achieve for access services to the port.

139. In this section, I assess the extent to which any more favourable outcome for coal producers is likely to lead to an increase in the quantity of coal moving through the port or an increase in output in any related market.

3.3.1 Context in which price changes may occur

140. In order to determine the likely effect on output of the authorised collective bargaining conduct, it is necessary first to consider the economic context in which price changes may arise as a result of the conduct.

141. Dr Smith and Mr Morton both make observations and/or offer their opinion that the demand for port access services provided by PNO is not responsive to changes in the price.[84] In economic terms, this implies that demand for access services provided at the port is highly inelastic at current prices.

142. By way of example, Mr Morton states:[85]

> …coal demand has only a limited responsiveness to port prices.

143. Similarly, Dr Smith notes that there has been a:[86]

[83] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 39-62.

[84] See: *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 19-21; and *Expert report of Euan Morton*, 25 June 2021, para 19.

[85] *Expert report of Euan Morton*, 25 June 2021, para 19.

[86] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 21.

> …lack of response in terms of the quantity of coal exported through the Port of Newcastle to price increases which have been applied since 2014.

144. By these observations, Mr Morton and Dr Smith imply that an incremental improvement in the NSC that may be achieved through collective bargaining, is highly unlikely to influence output in the dependent market for thermal coal and consequently the quantity of coal moving through the port.

145. The principal reason for these observations is likely to be that demand for access services provided by PNO is derived from the export-related demand for producer coal, for which the prevailing charges for access services comprise only a very small proportion of either the price paid for export coal or the total cost of producing and transporting coal.[87]

146. Spot prices for coal exported via the port are set in an international market and fluctuate daily as well as showing substantial variation over time.[88] I assume that producers decide on the quantity of coal to produce from their respective mines, and consequently the quantity to move through the port, primarily by reference to their expectations of international coal prices.

147. By consequence of these circumstances, demand for port access services provided by PNO is highly inelastic at current prices for access to the port, as reflected in the existing navigation service and wharfage charges.

148. Mr Morton's quantitative analysis implies that the demand for access services provided by PNO is highly inelastic, so that a significant percentage increase in the price of those services will result in a much smaller percentage decrease in coal output and so the demand for port access services.[89]

149. By the same economic reasoning, when demand is highly inelastic, a large percentage reduction in the price of access services provided by PNO is likely to result in a barely discernible increase in coal output and so demand for port access services.

150. If demand for access services provided by PNO was perfectly inelastic at current prices for the service – a circumstance that may well be the case within a reasonable range of prices for such services – then an increase or decrease in the price of access will have no discernible effect on output. In such circumstances, any change in the level of the applicable charges could only result in a private benefit (in the primary market), reflecting that the full extent of such change would amount to a transfer of economic surplus between the buyer and seller.

151. If collective bargaining conduct was to lead to a lower price[90] for access services in the context of highly inelastic demand for access, such that there would be no resulting change in the quantity of coal moving through the port, this would represent a transfer of economic surplus from PNO to producers and involve no public benefit arising from increased output in the primary market.

152. I depict such circumstances at figure 3.1 below, using a standard supply and demand diagram adapted to reflect highly inelastic demand for the port access service. Figure 3.1 shows that, in the presence of highly inelastic demand, a price change does not give rise to any change in output, so that the full amount of the price change represents a transfer of surplus between the seller and the buyer.

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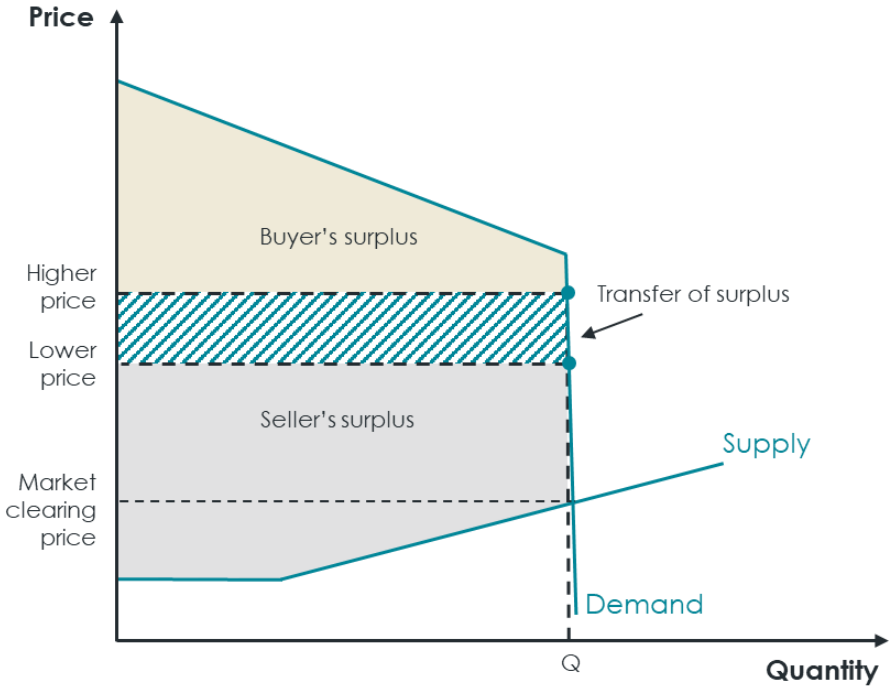
[87] For a breakdown of costs, see: Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 27-28.

[88] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, para 24(d).

[89] Mr Morton's quantitative analysis suggests that PNO could increase port access charges by orders of magnitude while increasing revenues, implying demand is highly inelastic. *Expert report of Euan Morton*, 25 June 2021, paras 18-20.

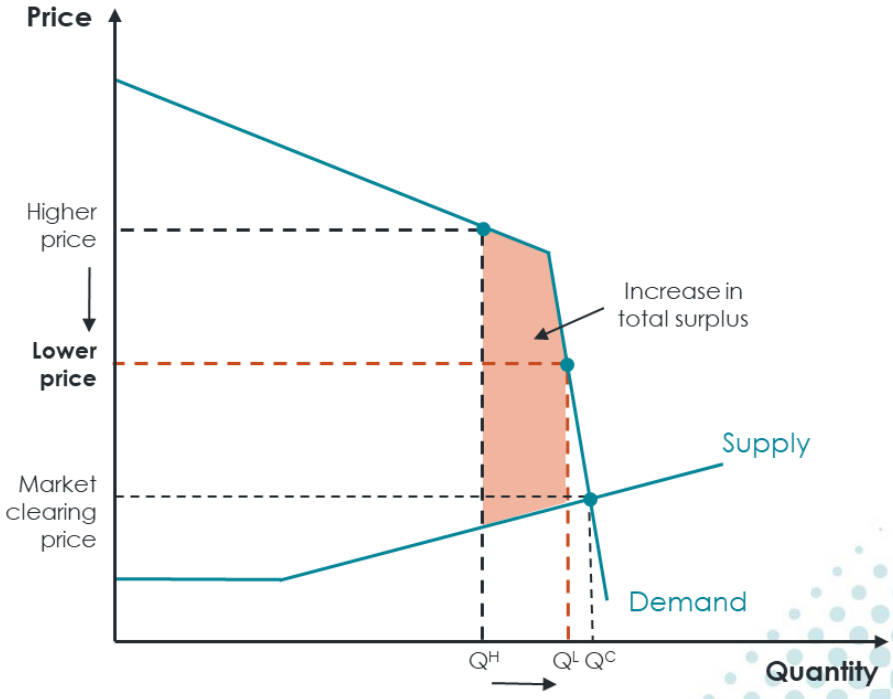
[90] By way of example, if by bargaining collectively the coal producers were able to achieve a reduction in the 81 cent NSC applying under the Agents Deed to the 61 cent per tonne NSC determined by the Australian Competition and Consumer Commission in its September 2018 arbitration – the latter of which is effectively contended at para 64 of Mr Morton's report as being an 'efficient price' – the presence of highly inelastic demand for port access services implies that such a 20 cent price reduction could not be expected to have any discernible effect on coal export volumes, and so would not give rise to any public benefit.

Figure 3.1: Private benefits associated with highly inelastic demand



153. By contrast, for public benefits to arise in the primary market, a price decrease must give rise to an increase in demand for and so output of the service, such that total economic surplus is increased and the dead weight loss – being the value of lost output, relative to the market clearing prices – is reduced. This is illustrated in figure 3.2 below.

Figure 3.2: Public benefits associated with less inelastic demand



3.3.2 Public benefits are unlikely to be discernible

154. Dr Smith and Mr Morton do not provide any clear economic reasoning or empirical evidence that the constraints they assume will be imposed on PNO's bargaining power will lead to an increase in total welfare, as distinct from a transfer of economic surplus from PNO to producers.

155. A substantial proportion of the value over which PNO and producers are bargaining is likely to comprise economic rent, ie, the existence of total surplus that is allocated – by means of the negotiation process – between one or other party to the bargain.

156. Unless there is a reasonable expectation of changes in output in one or more markets arising from the introduction of collective bargaining, any change to the negotiation arrangements deriving from the authorised conduct can only give rise to a transfer of economic surplus between PNO and other firms in the coal market supply chain, without any increase in total welfare.

157. In my opinion, any potential changes to the negotiation arrangements are unlikely to influence output in related markets and are most likely to represent a transfer of economic surplus from:

    a. one firm that is seeking to maximise its profits within the applicable constraints, being PNO; to

    b. another set of firms also seeking to maximise profits within the applicable constraint, being the coal producers.

158. By way of context for her assessment of potential public benefits, Dr Smith assumes that coal producers receive prices for the export of thermal coal that are determined in an international market, which she refers to as *price takers*.[91]

159. Consistent with this presumption, there can be no change in the terms and conditions applying to the provision of port access services as may be secured through collective bargaining that would, in turn, be likely to affect the quantity of coal moving through the port.

160. Such a conclusion is also consistent with a cost breakdown analysis undertaken by PNO in 2015, which found that the NSC made up 0.44 per cent of the cost of purchasing coal at the time.[92] Although international coal prices and the NSC have both changed since that time, the NSC continues to make up a very small proportion of the international spot price for coal, and therefore an even smaller proportion of total buyer-incurred costs of coal.[93] Plausible changes in the level of the NSC are therefore unlikely to have a material effect on either the production of or demand for coal.

161. Dr Smith accepts coal producers' claims that greater certainty in relation to port access charges arising from collective bargaining will lead to more investment in the Hunter Valley.[94] However, these claims are highly speculative and not supported by empirical evidence.

162. In my opinion, there is no evidence to suggest that collective bargaining is likely to have any bearing on investment decisions. By way of reasoning, there are much more significant sources of uncertainty affecting investment decisions in the coal sector, as illustrated by the very substantial changes in the price of coal over the past two years.[95] As a result, collective bargaining is unlikely to result in a material increase in output due to greater investment, relative to bilateral negotiation.

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[91] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 10.

[92] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, para 26-28. The figure is based on an NSC of $0.69/GT, spot thermal coal price of $84.02/tonne, and an export destination of Japan.

[93] National Competition Council, *Application for declaration of certain services at the Port of Newcastle - Recommendation*, 18 December 2020, para 7.226.

[94] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 81.

[95] Department of Industry, Science Energy and Resources, *Resources and energy quarterly*, June 2021, p 58; and Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, para 24(d).

163. These considerations imply that a more favourable outcome for coal producers in relation to the terms of the NSC is highly likely to represent a transfer of economic rent from PNO to producers rather than an increase in economic surplus. Consistent with these observations, there is no economic evidence to suggest that collective bargaining is likely to give rise to an increase in total welfare or public benefit.

4. Transactions costs effects

164. In this section, I examine the extent to which a future with collective bargaining conduct is likely to lead to transaction cost savings as compared to a future without the conduct and, further, whether any such transaction cost savings are likely to represent a public benefit.

165. Transaction costs can be defined as the costs associated with negotiating, reaching and enforcing agreements.[96] These costs may include internal resources, such as the time and attention of managers, as well as external resources, such as legal services of those of other special advisers.

4.1 Potential transactions costs effects of collective bargaining

166. Collective bargaining may give rise to two forms of effect on the transaction costs of negotiating an agreement, ie:

    a. some types of transactions costs may be reduced, because members of the bargaining group can pool resources when interacting with a counterparty; whereas

    b. other types of transactions costs may be increased, because members of the bargaining group must negotiate internally and agree on a common position.

167. These distinct effects are recognised in the economic literature, including in the paper cited by Dr Smith, which states:[97]

> …while collective bargaining may allow for a sharing of negotiation costs between the members of the bargaining group, it also creates the need for coordination within the bargaining group. This coordination can be costly and may lead to contracts that address the needs of the average member of the bargaining group rather than the needs of individual members.

168. It follows that the transactions costs effects of the authorised conduct need to be assessed by reference to both these offsetting considerations, in order then to inform the potential extent of any public benefits arising. I address both these considerations in the context of the collective bargaining conduct in the sub-sections below.

4.1.1 Transaction cost savings seem unlikely

169. In this section, I assess the potential for certain transaction costs to be reduced due to the collective bargaining conduct and respond to the analyses of Dr Smith and Mr Morton.

170. Transaction costs may be reduced across a group of coal producers because of the potential for the cost of commonly required services – such as legal and special advisory services – to be shared and other individual costs to be reduced when negotiating collectively.[98] Such cost savings may include reductions in the total number of hours spent negotiating, the cost of legal and specialist advisors, and efficiencies in the pooling of limited resources.

[96] Church, J and Ware, R, *Industrial organisation: A strategic approach*, Irwin McGraw-Hill, Boston, 2000, p 73.

[97] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, p 110.

[98] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, pp 113-114.

171. Mr Morton states that he supports the view expressed in response to the fourth question put to Dr Smith that the 'proposed conduct is likely to result in transaction costs savings'.[99] Mr Morton states that:[100]

> I consider that collective bargaining will significantly reduce the transaction costs associated with negotiating the Deed.

172. However, the basis for Mr Morton's opinion and the significance he places on the cost reductions is unclear – he neither quantifies nor provides an analysis of the potential source of such savings.

173. Dr Smith notes that the extent of any public benefits from savings in transaction costs will depend on four factors, ie:[101]

    a. the existence of matters that need to be negotiated;

    b. the time taken in bilateral negotiations to reach agreement when compared with collective negotiations;

    c. the number of coal producers that engage in collective negotiation, since participation is voluntary; and

    d. whether negotiations are on a 'one-off' basis or ongoing.

174. I agree with Dr Smith as to the relevance of each of these factors in determining potential changes in transaction costs that may arise from the collective bargaining conduct. However, the basis for Dr Smith's subsequent application of these principles to the circumstances at hand – from which she concludes that the savings in transactions costs associated with collective negotiation will be 'more than trivial' for producers – is unclear.[102]

175. In my opinion, Dr Smith's conclusion as to the non-trivial nature of transaction cost saving for producers overlooks a number of potentially important considerations. First, Dr Smith assumes that the existence of the agreed Agents Deed with vessel agents, which sets the NSC, confines the scope for negotiations between PNO and producers to the WCh and other matters.[103]

176. On that basis, I assume that Dr Smith's assessment of the potential transaction cost savings has been made by reference to these negotiations alone. I explain at paragraph 132 that the bargaining outcomes relating to the WCh are unlikely to differ materially under the factual relative to the counterfactual. It follows that the transaction costs arising in relation to these bargaining outcomes are unlikely to differ materially, for similar reasons, ie:

    a. the absence of disagreement in relation to the level of the WCh by coal producers has been noted by PNO's Chief Commercial Officer and General Counsel;[104] and

    b. the existing pro forma Producer Deed sets the applicable WCh at $0.08 per tonne of producer coal,[105] implying there is little scope remaining open for negotiation in relation to its already very low level.

[99] *Expert report of Euan Morton*, 25 June 2021, para 14.

[100] *Expert report of Euan Morton*, 25 June 2021, para 79.

[101] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 71.

[102] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 75.

[103] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 72.

[104] Byrnes, S, *Second affidavit of Simon Byrnes*, 25 June 2021, paras 16-18.

[105] PNO, *Producer pro forma long term pricing deed*, 13 March 2020, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

177. Second, Dr Smith notes that PNO intends not to engage in collective discussions with producers and appears to assume that:[106]

> On this view, the factual and the counterfactual will both relate to a future where negotiation is bilateral rather than collective.

178. In contrast, Dr Smith does not seem to have considered the relevance of this assumption when forming her opinion as to the extent of transaction cost savings arising from the authorised conduct.

179. If bilateral negotiations are the most likely circumstance applying under both the factual and the counterfactual, there is no apparent basis to conclude that the authorised conduct will cause transaction costs to be reduced. Rather, in circumstances where producers would first need to negotiate internally to reach a common position and then subsequently engage in bilateral negotiations with PNO, the more likely outcome of the authorised conduct is that there will be a duplication of costs.

180. In my opinion Dr Smith's conclusion that transactions cost savings 'will be more than trivial' derives from considerations that will be prone to overestimate the magnitude of transaction cost savings that could arise by consequence of the collective bargaining conduct.

181. In terms of the empirical evidence that is available to inform the potential for any transactions costs savings, none is capable of suggesting that the collective bargaining conduct would be likely to reduce the extent of transaction costs in negotiating the terms of the pro forma Producer Deed. To the extent any such evidence may become available, it would need to address both the countervailing considerations from the economic literature that I identify at paragraph 167, and weigh their relative effects.

182. Further, I note that the scope of terms remaining to be negotiated in the Producer Deed is relatively limited, since a pro forma version is available under both the factual and the counterfactual, which incorporates outcome of a prior process of bi-lateral negotiation. The existence of the pro forma Producer Deed will itself reduce the potential for transactions cost savings to be realised.

183. Finally, I note that the 'most-favoured-nation' (MFN) clause included in the pro forma Producer Deed reduces the potential for incremental transactions cost savings to be caused by the collective bargaining conduct. Under the MFN clause, favourable terms negotiated by one producer are to be applied to all producers that have entered the Deed.[107] This term implies that some producers may be able to avoid costly negotiations by relying fully on the actions of others.

184. To summarise, Dr Smith and, by agreement, Mr Morton, both contend that the transaction cost effects of the authorised conduct will give rise to 'more than trivial' cost savings. In my opinion, there is no clear basis for these contentions. Rather, the ambiguous nature of the theoretical underpinnings for the transaction costs consequences of collective bargaining, in combination with the limited empirical evidence that is available, imply that it would be unsafe to conclude that any such savings should be expected to arise.

4.1.2 Internal negotiation costs are overlooked

185. In the material below, I assess the likely extent of the additional costs of coordination that can be expected to arise with the collective bargaining conduct.

186. The requirement for coal producers to negotiate between themselves to agree on a common position before engaging with PNO when negotiating collectively will cause additional transactions costs to be

[106] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 12.

[107] PNO, *Producer pro forma long term pricing deed*, 13 March 2020, available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

incurred. Such costs would not arise in the absence of collective bargaining, while their magnitude is likely to increase with the heterogeneity of priorities amongst the coal producer group.

187. Economic literature examining these effects explains that additional coordination costs involve two aspects, ie:[108]

> …the actual costs of intra-group negotiation and the costs involved in contractual compromise if group members accept a contract with the counterparty that is based on parameters negotiated for the bargaining group as a whole rather than for their specific business.

188. Dr Smith acknowledges the existence of intra-group negotiation costs and states that, in principle:[109]

> …to negotiate collectively, members of the group will need to agree their joint position which will also result in a cost, and that cost is likely to be greater the more heterogeneous the group membership is, and the more their interests diverge.

189. I agree with this statement of principle, including that the costs of contractual compromise are likely to be greater the more heterogeneous are the members of the group and their interest.

190. However, Dr Smith does not seek to apply this principle by considering the extent of heterogeneity of the producer group and so the likely extent of intragroup negotiation costs, when forming her conclusion in relation to the transactions costs effects of collective bargaining.[110]

191. By overlooking the additional cost of intragroup negotiation and compromise that will be required between producers to agree on a common position, Dr Smith and Mr Morton are both likely to have overstated the extent of any potential transaction cost savings.

192. In my opinion, the intragroup discussions required between producers in a future with collective bargaining are likely to impose additional transaction costs on individual producers, as compared to a future with only bilateral bargaining. Evidence that the preferences of producers vary in relation to the terms of the Producer Deed,[111] reinforces that individual coal producers will need to expend resources in order to reach a common position.

193. The likely increase in transaction costs arising from the internal negotiations that will be necessary for the coal producers to agree their joint position so as to engage in collective bargaining conduct must be weighed against any potential reductions in transaction costs to determine the net effect.

194. In my opinion, there is no clear basis on which to conclude that the net effect on transaction costs will be either higher or lower under the authorised conduct.

4.2 Distinguishing public and private benefits of transaction cost effects

195. In this sub-section, I assess the extent to which any potential net transaction cost savings arising from the collective bargaining conduct would be likely to represent a public benefit.

4.2.1 Transaction cost effects are presumptively private benefits

196. Any savings in net transaction costs that arise as a result of the collective bargaining conduct would amount to a presumptively private benefit, since their immediate effect is to increase the economic surplus available to the party realising the cost savings.

[108] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, p 131.

[109] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 61.

[110] Consistent with the importance of this consideration for economic effects of collective bargaining generally, I examine the potential extent of contractual compromise likely to arise from heterogeneity of the coal producer group in section 5.4.

[111] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 39-62. I also describe the heterogeneity between producers in section 3.2.2.

197. I explain in section 2.2.1 that the potential for transaction cost savings to give rise to public benefits in the context of the port requires that:

    a. such savings must give rise to an expansion in the quantity of port access services demanded by coal producers, either contemporaneously or subsequently by way of increased investment by coal producers in future mining capability; or

    b. the resources freed up by means of the cost savings are redeployed to more productive uses elsewhere in the economy.

198. I note that, in the circumstances I describe above 'output' may equally refer to the quantity of coal exported from the port, from which derives the demand for port access services.

199. In principle, an increase in output in one or more relevant markets may arise for one of two reasons. First, lower costs incurred by individual coal producers may enable negotiations in relation to port access services to take place that would not otherwise occur, resulting in more efficient contracts and an increase in the demand for port access services, relative to a take-it-or-leave-it transaction.

200. Second, transaction cost savings may enable coal producers to produce more coal, leading to greater demand for port access services.

201. From a public benefit perspective, it is critical to distinguish the potential for such outcomes from the circumstance where any transactions cost savings are alternatively captured as increased profits for the relevant shareholders, with no consequences for output in any relevant market, and thereby represent a private benefit.

202. Further, a separate empirical question arises as to whether the prospect of any such reduction in transaction costs, and the consequent increase in output in one or more dependent markets, may be discernible or meaningful.

4.2.2 Transaction cost effects are unlikely to result in material public benefits

203. In this section, I apply the economic framework I describe above to Mr Morton and Dr Smith's analysis of the potential for net transaction cost savings to give rise to public benefits.

204. In my opinion, even if it could be concluded with some confidence that transaction cost savings may be realised under collective bargaining conduct, it is much less likely that these would give rise to public benefits.

205. In his description of the potential transaction cost savings arising from collective bargaining conduct, Mr Morton does not address the question as to whether such cost savings may represent private or public benefits. Rather, Mr Morton states that he supports Dr Smith's view.[112]

206. Dr Smith describes her conclusion that:[113]

> …collective negotiation between the coal producers and PNO would increase efficiency by reducing transaction costs and consequently would be a public benefit.

207. In my opinion, Dr Smith's analysis is not sufficient to conclude that transaction cost savings arising from collective bargaining conduct will give rise to public benefits. Although Dr Smith notes that lower transaction costs 'save resources',[114] she overlooks the critical ancillary requirement that, for a public benefit to arise from resource savings, those resources must be productively redeployed elsewhere.

[112] *Expert report of Euan Morton*, 25 June 2021, para 14.

[113] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 70.

[114] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 59.

208. I explain in section 2.2.1 that, for public benefits to be realised as a result of transaction cost savings, the reduction must give rise to expanded output in one or more mining-related markets, or resources saved must be redeployed to more productive uses elsewhere in the economy.

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

210. Rather, I would expect that any reduction in transaction costs for coal producers would be more likely to manifest as an increase in economic surplus (profit) accruing to producers, as distinct from any increase in economic welfare.

211. My expectation as to this outcome arises from the economic circumstance where the coal producers of the Newcastle catchment can generally be said to be inframarginal (low cost) producers of thermal coal, which is predominantly sold in an international, dependent market.[115] It follows from these circumstances that each coal producer's output is largely independent of small changes in their cost of production – such as would arise from a reduction in transaction costs of negotiation.

212. By consequence of these circumstances, in my opinion coal producers are highly likely to produce and sell the same quantity of coal if transaction costs were alternatively not reduced, and the same quantity of coal will move through the port. It follows that any reduction in transactions costs will most likely be limited to increasing the economic rents accruing to the coal producers.

213. Further, irrespective of the countervailing effect of collective bargaining on transaction costs that I explain must be weighed in section 4.1 above, in my opinion such costs are likely to be immaterial, relative to both the quantum and extent of volatility in the profits of the producers.

214. By way of relevant consideration, I observe that the magnitude of the annual market value of coal exported from the port is in the order of A$15 to $20 billion.[116] It follows that – even if realised – any potential reduction in transaction costs is unlikely to amount to a discernible proportion of a producer's total costs and so would be very unlikely to result in an increase in coal throughput at the port.

215. To summarise, there is no clear basis to conclude that transaction costs will be either higher or lower under collective bargaining. Further, to the extent any net reduction in transaction costs may the expected to arise as a result of the collective bargaining conduct, this can presumptively be taken to be a private benefit to the party realising the savings and is unlikely to translate into any public benefit.

[115] Wood Mackenzie, *Scenario Development and Planning*, Prepared for Port of Newcastle, January 2021, p 36.

[116] The trade value of coal exports from the Port of Newcastle was $18.5 billion in 2020. See: PNO, *Port of Newcastle trade report 2020*, 2020, para 2.

5. Countervailing detriments

216. In this section, I examine the extent to which the authorised collective bargaining conduct is likely to lead to countervailing detriments, by means of the risk the authorised conduct will 'spill over' to the facilitation of anti-competitive conduct and so outcomes in other markets, or by the 'flattening' of the diverse interests and priorities of coal producers in the primary markets.

217. I have structured this section so as:

    a. first, to explain the two principal forms of detriment arising in relation to collective bargaining that are identified in the economics literature;

    b. second, to summarise the opinions given by Dr Smith and Mr Morton in relation to those detriments; and

    c. finally, to provide my assessment of Dr Smith's and Mr Morton's analysis by reference to those two principal forms of countervailing detriment.

5.1 Collective bargaining facilitates wider collusive conduct

218. It is well recognised in the economics literature that collective bargaining increases the potential for collusive conduct between members of the bargaining group in relation to activities that extend beyond those authorised, as well as for other anti-competitive effects.[117] For example, collective bargaining can lead to:[118]

    a. anti-competitive coordination between members of the bargaining group that compete as sellers or buyers in vertically separate related markets;

    b. contracts that address the needs of the average, or largest, member of the bargaining group rather than the needs of the individual members;

    c. harm to competitor businesses that are not part of the bargaining group; and

    d. distortions in downstream markets if some firms receive a better deal from members of the bargaining group than their downstream competitors.

219. Competition economics presumes that firms should not be allowed to engage in any conduct that may reduce the competition that is otherwise expected to arise between them individually, particularly in relation to:

    a. the markets in which output is sold;

    b. the markets in which inputs are procured; and/or

    c. investment or other business decisions that may affect long term outcomes in either input or output-related markets.

220. The principal countervailing detriment of collective bargaining is the risk of facilitating collusive conduct in relation to any of the above three bases for potential competition by members of the bargaining

[117] See, for example: Doyle, C and Han, M A, *Cartelization through buyer groups*, Review of industrial organization, 44(3), 2014; and Normann, H T, Rosch, J and Schultz, L M, *Do buyer groups facilitate collusion?* Journal of Economic Behavior and Organization, 109, 2015.

[118] See, for example: King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013; and UK Office of Fair Trading, RBB Economics, *The competitive effects of buyer groups*, January 2007.

group, each of which involves a vertically related market in which they continue to compete, separate from the market in which the conduct is authorised to take place.

221. By way of further potential countervailing detriment, unless negotiated outcomes are capable of catering for the complete range of priorities held by members of the bargaining group, collective bargaining may also dampen competition between buyers in the market of direct interest.

222. Countervailing detriments of collective bargaining will arise if the collective bargaining conduct results in a lessening of competition in any related markets, such that there is a reduction in output and so total welfare in any such market.

223. In the material below, I assess the potential countervailing detriments of the authorised collective conduct, by reference to this economic framework. In my opinion, a careful assessment of these risks is particularly important in the overall weighing of benefits and detriments, given the limited likelihood of material public benefits arising from the authorised conduct that I identify in sections 3 and 4.

5.2 Opinions of Dr Smith and Mr Morton

224. Dr Smith explicitly recognises the risk of public detriments arising as a result of the collective bargaining conduct by coal producers, stating in relation to the economic principle to be applied that:[119]

> …collective negotiation may have anti-competitive effects (which reduce efficiency and are detriments to the public). The co-operation required for collective bargaining may dull the incentive to compete, that is, it provides an incentive for collusion. Collective bargaining may also provide or increase the ability to collude more broadly, that is, beyond the areas covered by collective negotiation. This is because collective bargaining involves interactions between competitors which enables the transfer of information between them.

225. Applying this framework, Dr Smith expresses her opinion that little, if any, public detriment is likely to result from collective negotiation when compared to bilateral negotiation.[120]

226. Mr Morton states that he agrees with the opinions of Dr Smith,[121] but does not appear to consider the possibility there may be countervailing detriments arising from the authorised conduct.

227. In my opinion and applying the principles I describe in section 5.1 above, both Dr Smith and Mr Morton have overlooked some important potential countervailing detriments arising in relation to the collective bargaining conduct.

228. The risk of countervailing detriments arising as a result of the anti-competitive effects of the authorised collective bargaining conduct manifest in several ways. These include:

    a. the increased risk of collusion or cartel conduct by producers in the upstream or downstream markets in which they compete, including:

        i. the downstream market for coal exports; and

        ii. the upstream input procurement markets, such as those for labour, tenements, and construction and mining equipment; and

    b. the flattening of the diverse interests and priorities of coal producers when negotiating the terms of the Producer Deed, leading to less efficient contracts and dampened competition.

[119] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 63.

[120] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 98.

[121] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 98 in *Expert report of Euan Morton*, 25 June 2021, para 14.

229. In the following sub-sections, I set out my assessment of Dr Smith and Mr Morton's analysis, by reference to each of these considerations. Given the weighing task that I describe in section 2 and the limited extent of likely public benefits implied by the analysis I present in sections 3 and 4, it follows that even relatively minor potential countervailing detriments require careful consideration.

230. In presenting my assessment, I acknowledge that there are legal limitations to the authorised conduct, including that the coal producers cannot:[122]

    a. engage in any collective boycott activity; or

    b. share competitively sensitive information that relates to customers, marketing strategies, or volume or capacity projections of individual applicants.

231. Notwithstanding that such collusive conduct is prohibited, in my opinion the collective bargaining conduct that is authorised is sufficiently close to that recognised generally in the economics literature to involve the intrinsic risk that 'spill over' or unauthorised conduct may nevertheless occur. Such risks arise by means of the opportunities for coordination between producers that are likely to present in the course of authorised collective discussions.

5.3 Conduct may give rise to unauthorised collusive behaviour

232. Collusion refers to the phenomenon of firms coordinating their decisions – typically to raise prices, reduce output and earn greater profits than would otherwise apply, in the absence of such conduct.[123] Successful collusion requires a group of firms to reach an agreement on price and output (or buying decisions), and depends on the market power of the combined group. Market power will typically stem from relatively inelastic demand in the relevant market, the number of firms colluding and the extent of barriers to entry.

233. Collective bargaining may risk the emergence of collusive conduct in any of the upstream or downstream markets in which the coal producers compete, so long as there are incentives for producers to earn greater profits and opportunities for collusive agreements to emerge.

234. Dr Smith states that collusion arising from collective bargaining reduces efficiency and represents a public detriment.[124] I agree with this observation, both generally and in the context of the weighing of the potential public benefits and countervailing detriment arising from the authorised conduct.

235. In the remainder of this section, I describe the risks of collusive conduct arising in the context of the authorised collective bargaining, by reference to the interest of the coal producers in both downstream and upstream markets.

5.3.1 Risks of collusion in downstream coal export markets

236. Collective bargaining risks harming competition in downstream markets wherever the opportunity for collusive conduct weakens the incentives for members of a bargaining group to compete with each other in those downstream markets.[125]

237. In my opinion, the authorised conduct materially increases the risk of collusive conduct by coal producers in relation to the export market for thermal coal.

[122] ACCC, *Final determination*, 27 August 2020, para 5.10.

[123] Church, J and Ware, R, *Industrial organisation: A strategic approach*, Irwin McGraw-Hill, Boston, 2000, p 357.

[124] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 66.

[125] UK Office of Fair Trading, RBB Economics, *The competitive effects of buyer groups*, January 2007, pp 12-13.

238. In contrast, Dr Smith concludes that the risk of coal producers engaging in collusive behaviour in coal output markets is 'not likely or not likely to be significant' for several reasons.[126] Dr Smith describes competition between producers for local and international sales as strong and that the coal producers are *price takers* in international markets, stating that attempts to raise prices would be unprofitable and unsustainable.[127] Dr Smith also contends that coal producers are unable to raise prices due to the uncertain outlook for coal.[128]

239. Mr Morton states that he agrees with Dr Smith, although he does not undertake any separate analysis or describe the reasons that underpin his agreement.[129]

240. Dr Smith draws her empirically orientated observations in the absence of any apparent inquiry, and so these can only be as robust as any empirical evidence capable of underpinning them.

241. In my opinion, it would be unsafe to rely on the robustness of at least two of the empirical considerations or assumptions by which Dr Smith draws her observation. First, the medium to long term outlook for international coal market is not so uncertain as to eliminate the potential gains from collusion by coal producers serving those markets by means of the facilities at the port. Forecasts of annual coal volumes expected to be exported from the port over the next 15 years are generally 10 per cent higher than those applying in 2020.[130]

242. Second, in describing coal producers as *price takers*,[131] Dr Smith implies that the international market for thermal coal is close to perfectly competitive, ie, market prices will not be affected by the production decisions of any one or group of suppliers.

243. In contrast with Dr Smith's presumption, in my experience the economic conditions typically governing the production and sale of natural resources differ substantially from those prevailing under perfect competition, where firms are *price takers* and have no ability to influence market prices. In particular:

    a. in international markets for natural resources, such as thermal coal, world prices are generally determined by the costs of the marginal or highest cost producer that is necessary to meet market demand;

    b. varying natural endowments, geography and other local factors mean that a producer in one location may face very different costs of production from producers in another location – including as between one mine and another, even though those mines may be proximately located;

    c. the consequences of such variability in the costs of production are that:

        i. changes in market demand can give rise to substantial changes in the market price – as higher cost, marginal producers enter or leave the market; and

        ii. the production decisions of even low cost or inframarginal producers – whether individually or collectively – can also give rise to substantial changes in the market price.

244. Perhaps the best-known example of these economic characteristics of resources markets and the associated ability for the production decisions to have substantial implications for market prices is the OPEC oil producer cartel.

[126] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 95.

[127] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 92.

[128] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 93.

[129] *Expert report of Euan Morton*, 25 June 2021, para 14.

[130] Wood Mackenzie, *Scenario Development and Planning*, Prepared for Port of Newcastle, January 2021, p 6.

[131] *Expert report of Dr Rhonda Smith*, 22 April 2021, paras 10, 92.

245. Dr Smith suggests that coal producers of the Newcastle catchment area could not profitably *ask for* higher prices because of strong competition in international markets.[132] However, this observation overlooks the potential influence on market prices of actions that may alter the output of one or more producer.

246. In my opinion, it is highly likely that a coordinated reduction in supply by a collective of inframarginal coal producers – such as those exporting from mines that rely on port access services at the port – would affect the world price of thermal coal. Such effects would arise as replacement tonnes of coal are made up by higher cost producers located elsewhere.[133]

247. By way of context for this observation, Australia exports approximately 20 per cent of the thermal coal traded on international markets, of which approximately 75 to 80 per cent is exported through the port.[134] It may therefore be quite possible that some or all of the ten coal producers in the region, acting collectively, have the ability to put upward pressure on world prices by restricting supply. The incentive for such collusive conduct would arise if the increase in the world price of thermal coal was sufficient to offset the value of the associated reduction in output.

248. The outcome of any such conduct would represent a substantial countervailing detriment arising by reference to the authorised conduct, involving reduced economic efficiency by means of its output and price effects on coal supply chains and final consumers internationally.

249. In my opinion, the risk of collusive conduct of this form, facilitated by the process of the collective negotiation conduct, should be carefully assessed as a potential, material countervailing detriment of the authorised conduct.

5.3.2 Risk of collusion in local input markets

250. Collective bargaining also risks harming competition in upstream or input markets wherever the collusive conduct facilitates the incentive and opportunity for members of the buying group to prevent entry into the market by new competitors or to extract economic surplus from suppliers.

251. By design, the collective bargaining conduct is intended to strengthen the buying power of producers in their negotiations with PNO. Although I acknowledge the legal boundaries that apply to this conduct, by its nature the arrangements are likely to present opportunities for coal producers to collude in a context where they have a clear incentive to increase their buying power vis a vis other suppliers.

252. Both Dr Smith and Mr Morton overlook the potential for collusive conduct to arise in these upstream markets, with the consequence that they have not considered the full extent of the potential countervailing detriments of the authorised conduct.

253. In my opinion, the potential scope of local input markets for which there is a risk that competition will be reduced extends to those including labour, tenements, and mining equipment. The risk of countervailing detriments arising in those markets will arise if coordinated conduct by coal producers by reference to any of these input markets gives rise to an imbalance in bargaining power with the relevant providers of those inputs. The form of that detriment is likely to manifest as reduced output, including by that otherwise arising from potential entry by new miners.

254. The ten coal producers who, along with NSW Minerals Council, sought authorisation comprise the majority of mine operators in the Newcastle catchment area.[135] Acting collectively, the group

[132] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 92.

[133] Wood Mackenzie, *Scenario Development and Planning*, Prepared for Port of Newcastle, January 2021, p 36.

[134] Australia exported approximately 200 million tonnes of thermal coal in 2020, with 158 million tonnes moving through the Port of Newcastle. See: Department of Industry, Science Energy and Resources, *Resources and energy quarterly*, June 2021, pp 51, 60; and PNO, *Port of Newcastle trade report 2020*, 2020, p 2.

[135] See: NSW Minerals Council, *Application for authorisation, Schedule one*, 5 March 2020.

represents a buyer with significant bargaining power relative to many potential suppliers in otherwise presumptively competitive, upstream markets. If coal producers were to collude in relation to their procurement of inputs or supplies in these markets, the corresponding increase in bargaining power of the producers may reduce the outside options available to suppliers. Such conduct would allow coal producers to seek lower prices and erode the profits of suppliers, which in turn may give rise to the countervailing detriment of reduced output in the near term, and reduced investment thereby causing reduced output in the longer term.

255. Drawing together these considerations, in my opinion there are many potential markets that would potentially be at risk of countervailing detriment in the circumstance where the collective bargaining conduct gave rise to the opportunity for coal producers to engage in collusive conduct that extended beyond the envelope of that which is authorised. In my opinion, Dr Smith and Mr Morton do not sufficiently recognise these risks.

5.4 Diverse interests and preferences likely to be restrained

256. Collective bargaining requires the bargaining group to agree on a common position before engaging in negotiations with a counterparty.

257. When members of a bargaining group have conflicting interests and priorities, there are costs involved for individual members of accepting a contract that is based on commonly agreed parameters, as opposed to parameters that may be specific to its business.[136] These costs represent a public detriment if they result in a less efficient contract than would otherwise be agreed through bilateral negotiations.

258. Further, engagement with the collective bargaining group is likely to create pressure for uniformity between members and reduce the incentive for innovation or renegotiation of more favourable terms in a contract.[137] This may occur because the negotiated position applies to the whole group, so individual members have fewer incentives to differentiate their preferences.[138] More efficient contracts, encouraging allocative and dynamic efficiency, may therefore be achieved bilaterally.

259. Applying these principles, in my opinion:

    a. the interests of coal producers are unlikely to be perfectly aligned on all parameters the subject of negotiation; so that

    b. the individual interests of coal producers must be restrained to reach a unified position for the purpose of collective bargaining; and

    c. dominant producers are likely to be able to obtain the terms most favourable to them, marginalising smaller producers and reducing non-price competition.

260. In contrast, Dr Smith states that any detriment in this regard is likely to be small and implies smaller producers with different interests will not be disadvantaged because collective bargaining is voluntary.[139] I note that Mr Morton does not put forward any analysis or opinion in relation to these considerations.

261. In my opinion, Dr Smith's proposition is speculative and stems from a mischaracterisation of the factual and counterfactual, as I explain in section 2.1. In particular, no bilateral negotiations have taken place between PNO and coal producers since interim authorisation was granted on 2 April 2020.[140] It

[136] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, p 131.

[137] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, p 133.

[138] King, S, *Collective bargaining in business: Economic and legal implications*, UNSW Law Journal, 36(1), 2013, p 133.

[139] *Expert report of Dr Rhonda Smith*, 22 April 2021, para 96.

[140] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, para 81.

therefore seems reasonable to assume that the coal producers will not engage in bilateral negotiations while collective bargaining conduct remains authorised.

262. In light of this presumption in relation to the factual, two other forms of other countervailing detriments are likely to arise from the collective bargaining conduct, which I explain below.

263. First, there is likely to be a range of disparate interests held by coal producers, such as may derive from differences in size, operational complexity, remaining mine life or other factors.[141] By engaging in collective bargaining, the implications of such variation for the optimal configuration of commercial terms in relation to the navigation service may be lost, because larger coal producers can be expected to dominate the collective process and the requirements of all producers cannot be met simultaneously.

264. There is already evidence that different coal producers favour different commercial terms – such as, the period over which any Producer Deed is to apply[142] – and it is quite conceivable that differences may arise in relation to several factors, for example:

    a. the implications of any contemplated capital investment will vary depending on mining investments – producers with a longer remaining mine life are more likely to favour capital investment that will underpin an expansion of long term, non-producer demand for port access services;

    b. the commercial implications of the level of navigation service charges will differ according to whether a particular producer sells its coal on an FOB or CIF basis; and

    c. the differences in corporate emphasis as to the importance of navigation service charges are likely to give rise to different appetites in terms of the applicable negotiation periods.

265. The implication is that collective bargaining can only reduce the extent of any such non-price competition between coal producers.

266. Second, collective bargaining may increase information asymmetry between PNO and coal producers, leading to less complete contracts as compared with the counterfactual.

267. Under collective bargaining, I assume that coal producers will share information internally before submitting a common position to PNO. In contrast to the counterfactual, in which active bilateral negotiations have taken place, the individual interests and preferences of producers will not be revealed to PNO or considered in negotiations. This loss of information may lead to less complete contracts and therefore greater inefficiencies if PNO and individual producers may have otherwise agreed on individual matters.

268. By way of example, PNO engaged in positive bilateral discussions with a number of producers prior to interim authorisation being granted on 2 April 2020.[143] It is my understanding that PNO and some producers came close to an agreement on the terms of the Producer Deed after negotiating on particular matters.[144] In contrast, under collective bargaining, coal producers seem unlikely to discuss their individual needs with PNO and will instead adopt a common position.

269. Although it is voluntary to engage in collective bargaining, it can be presumed that there will be continuing pressure for individual coal producers to conform with the majority. This is consistent with the likelihood of the additional benefits of remaining a member of the bargaining group, particularly in the context of potential gains from tacit collusion. The inherent tension between individual coal

[141] I describe the basis for these disparate interests in more detail at section 3.2.2.

[142] Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 39, 58-61.

[143] Clayton Utz, Letter of instruction to Greg Houston, 30 July 2021, para 9(h).

[144] See, for example: Byrnes, S, *First affidavit of Simon Byrnes*, 15 March 2021, paras 68-75.

producer interests and the potential benefits of collective conduct is consistent with the economic principles that inform the dynamics between individual and collective interests in any collusive arrangement.

270. Notwithstanding, to the extent any individual coal producers choose to engage in bilateral negotiations to secure individual terms, the magnitude of any transaction cost savings – the implications of which I identify in section 4 above – will be reduced accordingly.

271. In summary, in my opinion there are a number of significant risks of public detriments arising from collective bargaining conduct of coal producers in the Newcastle catchment area. Most notably, authorised collective bargaining:

    a. may give rise to unauthorised collusive conduct by coal producers in upstream or downstream markets; and

    b. is likely to restrain the individual preferences of coal producers when negotiating the terms of the pro forma Producer Deed, potentially leading to less efficient contracts than under the counterfactual.

272. In my opinion, the potential for these countervailing detriments should be carefully weighed against the limited potential for any public benefits flowing from the authorised conduct, the basis for which I explain in sections 3 and 4.

6. Summary and conclusions

273. In this section I draw together my analysis and conclusions in relation to the matters raised in the reports of Mr Morton and Dr Smith.

274. I have applied the same framework adopted by Mr Morton and Dr Smith, which derives from the essential task of the Tribunal in assessing the case for authorisation, being to consider:

    a. first, whether the conduct is likely to result in public benefits; and

    b. second, whether those public benefits are likely to outweigh the detriments arising from any potential lessening of competition.

275. I present my analysis and conclusions by reference to the distinct economic considerations arising by reference to this framework, ie:

    a. the economic principles that govern the distinction between public and private benefits; and

    b. the three forms of economic effects of collective bargaining that can be synthesised from the reports of Mr Morton and Dr Smith, being:

        i. the potential for more efficient outcomes in primary and/or any dependent markets, or 'efficiency effects';

        ii. the implications for the cost of negotiating and transacting for port access services, or 'transactions costs effects'; and

        iii. the potential for collusive conduct to cause detriment to outcomes in primary and/or any dependent markets, or 'countervailing detriments'.

276. I present my conclusions below in relation to these distinct economic considerations, in each case by reference to a specification and comparison of the future with and without the authorised collective bargaining conduct.

Framework for assessing public benefits

277. In my opinion, the potential for public benefits from the authorised conduct requires that collective bargaining gives rise to both:

    a. a change in economic conduct, ie, the form and outcome of negotiations with PNO are different as compared with what they would have been absent the collective bargaining conduct; and

    b. an increase in either the quantity or quality of output for the access service, or in one or more markets upstream or downstream to the access service, that would not have arisen in the absence of the collective bargaining conduct.

278. Unless both these conditions are satisfied, collective bargaining cannot give rise to any increase in public benefits.

279. In specifying and comparing the future with and without the authorised conduct, I define:

    a. the future with authorisation or the factual, as that where coal producers have the ability to discuss between themselves the terms and conditions of access to the port, and may have the ability to negotiate collectively with PNO, but are unwilling to negotiate bilaterally with PNO; and

b. the future without authorisation or the counterfactual, as that where coal producers do not have the ability to discuss between themselves the terms and conditions of access to the port, or negotiate collectively with PNO, but are willing to negotiate bilaterally with PNO.

Efficiency effects of collective bargaining

280. For a future with collective bargaining conduct to give rise to efficiency benefits, two conditions must be met, ie:

a. the collective bargaining conduct must lead to an improvement in the terms of the pro forma Producer Deed, which may include a lower NSC; and

b. the change in the terms for port access services must give rise to an increase in output in either of the port access services markets I have identified, or one or more related markets.

281. In contrast to the conclusions of Mr Morton and Dr Smith, in my opinion there is limited scope for an improvement in the terms of the pro forma Producer Deed to be achieved by way of collective bargaining that could not otherwise be achieved through bilateral negotiations.

282. This is because the prevailing and future agreed charges for port access services are already constrained by a combination of factors that will continue to apply under the counterfactual. Those constraints include the countervailing bargaining power of coal producers, which derives from the mutually dependent nature of their commercial relationship with PNO and the existence of the executed Agents Deed.

283. Even if charges for port access services that were more favourable for coal producers could be negotiated by means of collective bargaining, the highly inelastic nature of demand for port access services means that incremental price changes are highly likely to give rise only to a transfer of economic rent from PNO to coal producers. Any such transfer would represent a private benefit for coal producers but not an increase in economic surplus.

284. Neither Mr Morton nor Dr Smith has presented any economic evidence to suggest that collective bargaining is likely to give rise to an increase in the output of a primary or dependent market, and so the potential for public benefits.

Transactions costs effects

285. Mr Morton and Dr Smith both contend that the authorised conduct will give rise to 'more than trivial' savings in the transactions costs associated with negotiating and agreeing the terms for port access services, as compared with bilateral negotiations.

286. In my opinion, there is no clear basis for these contentions. Both Mr Morton and Dr Smith overlook the likelihood that the intra-group discussions required between coal producers in a future with collective bargaining are likely to impose additional transactions costs on individual producers, as compared to a future with only bilateral bargaining. By consequence of these offsetting considerations as to the likely effects on transactions costs of collective bargaining, there is no clear basis on which to conclude that the net effect on transaction costs will be either higher or lower under the authorised conduct.

287. Even if it could be expected that the net effect of these offsetting economic considerations was expected to result in there being some transactions costs savings under the authorised conduct, it is highly unlikely these would give rise to any public benefit. Dr Smith notes – and Mr Morton agrees – that lower transactions costs 'save resources' and consequently would be a public benefit. However, these contentions overlook the critical, ancillary requirement that, for a public benefit to arise from resource savings, those resources need to be productively redeployed elsewhere.

288. To summarise, there is no clear economic basis to conclude that transactions costs will be either higher or lower under collective bargaining. Moreover, such costs are likely to be immaterial, relative to

both the quantum and extent of volatility in the profits of the coal producers, and so would be very unlikely to result in an increase in coal throughput at the port. Further, to the extent net resource cost savings may be expected to arise as a result of the collective bargaining conduct, these can presumptively be taken to be a private benefit to the party realising the savings and are unlikely to translate into any public benefit.

Countervailing detriments

289. Collective bargaining conduct increases the risk of countervailing detriments arising as a result of collusive conduct that extends beyond that authorised, as well as other anti-competitive effects. These include:

    a. the increased risk of collusion or cartel conduct by producers in the upstream or downstream markets in which they compete, including:

        i. the downstream market for coal exports; and

        ii. the upstream input procurement markets, such as those for labour, tenements, and construction and mining equipment; and

    b. the flattening of the diverse interests and priorities of coal producers when negotiating the terms of the Producer Deed, leading to less efficient contracts and dampened competition.

290. Dr Smith explicitly recognises the risk of countervailing detriments arising as a result of the increased risk of collusion in upstream or downstream markets and expresses the opinion that little if any detriment is likely to result. Mr Morton agrees with Dr Smith's ultimate opinion but does not appear to consider the possibility there may be detriments of the kind identified by Dr Smith.

291. In my opinion, the authorised conduct materially increases the risk of collusive conduct by coal producers in relation to the export market for thermal coal. It is highly likely that a coordinated reduction in supply by a group of inframarginal producers exporting coal from the port would affect the world price of thermal coal. It follows that the risk of collusive conduct of this form, facilitated by the process of the collective negotiation conduct, should be carefully assessed as a potential, material countervailing detriment of the authorised conduct.

292. Similarly, there is a potential risk for the authorised collective bargaining conduct to present opportunities for coal producers to engage in collusive conduct in relation to procurement decisions in local input markets, such as for labour, tenements and mining equipment. Such conduct may give rise to the countervailing detriment in those markets of reduced output in the near term, and reduced investment thereby causing reduced output in the longer term.

293. Finally, the authorised conduct is likely to restrain the individual preferences of coal producers when negotiating the terms of port access services, potentially leading to less efficient contractual arrangements. The inherent tension between the potential private benefits of collective conduct and the costs of the necessary compromises to the interests of individual coal producers is not taken into account by either Mr Morton or Dr Smith, even though the existence of such costs is consistent with the economic principles that inform the dynamics between individual and collective interests in any collusive arrangement.

Conclusion

294. In my opinion, the reports of Mr Morton and Dr Smith do not present any clear economic evidence that the authorised collective bargaining conduct will give rise to a discernible net public benefit, relative to the future without the conduct. Mr Morton and Dr Smith's analyses and opinions also overlook some important sources of likely detriment arising in relation to the collective bargaining conduct.

295. Across the three forms of economic effects identified by Mr Morton and Dr Smith, in my opinion:

a. there is no economic evidence to suggest that collective bargaining is likely to give rise to an increase in the output of a primary or dependent market, and so the potential for public benefits;

b. there is no clear economic basis to conclude that transactions costs will be either higher or lower under collective bargaining; and

c. the authorised conduct increases the risk of collusion by coal producers in relation to both the export market for thermal coal and local input markets, while also suppressing the interests of individual coal producers that could otherwise be pursued in bi-lateral negotiations.

296. Accordingly, in my opinion there is no clear economic basis on which to conclude the authorised collective bargaining conduct will give rise to any net public benefit.

Declaration

297. In accordance with the requirements of the Code:

a. I acknowledge I have read and complied with the code and agree to be bound by it, and that my opinions are based wholly or substantially on specialist knowledge arising from my training, study, or experience; and

b. I declare that I have made all inquiries that I believe are desirable and appropriate, and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Court.

Greg Houston
30 July 2021

Annexure A – Letter of instruction

CLAYTON UTZ

Privileged and confidential

Email 30 July 2021

Mr Greg Houston
Partner
HoustonKemp Economists
Level 40, 161 Castlereagh Street
Sydney NSW 2000

greg.houston@houstonkemp.com

Dear Greg

ACT 2 of 2020: Application by Port of Newcastle Operations Pty Limited

1. We act for Port of Newcastle Operations Pty Limited (**PNO**) in the above proceeding, being an application by PNO to the Australian Competition Tribunal (**Tribunal**) pursuant to s 101 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for review of a determination of the Australian Competition and Consumer Commission (**ACCC**) dated 27 August 2020 (Commission file no. AA1000473) (**Determination**).

2. The purpose of this letter is to engage you to prepare an independent report as an expert in answer to the questions set out in this letter, which may be used in this proceeding before the Tribunal.

Background

3. On 27 August 2020, the ACCC granted authorisation to enable the New South Wales Minerals Council (**NSWMC**) and certain coal producers that export coal through the Port of Newcastle (**Port**) (together, the **Applicants**) to collectively negotiate with PNO in relation to the terms and conditions of access, including price, to the Port.

4. By its Determination, the ACCC authorised the Applicants to engage in the following conduct for a period of 10 years:

   (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 discussion 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**).

5. PNO applied to the Tribunal for review of the Determination on 17 September 2020. A review by the Tribunal under s 101 of the CCA is a re-hearing of the matter: s 101(2).

Questions

6. Having regard to your specialised knowledge, based upon your training, study or experience in economics, please prepare a report responding to the report of Euan Morton dated 25 June 2021, filed in this proceeding by NSWMC. In this context, please also consider and respond to the earlier report of Dr Rhonda Smith dated 22 April 2021, filed in this proceeding by the ACCC, to which Mr Morton's report responds.

7. Your report should comply with the following requirements. It should specify:

   (a) that you have read, complied with and agree to be bound by the Federal Court Expert Evidence Practice Note (GPN-EXPT) and its Annexures (**Expert Code**). A copy of the Expert Code is **attached** to this letter;

   (b) your qualifications as an expert in the field of economics that provide the basis for your expert opinions, together with a curriculum vitae to be attached to your report;

   (c) the questions that you have been asked to address, the facts and matters on which you rely in drawing your conclusions and the assumptions, if any, you have made in your report. A copy of this letter may be attached to your report;

   (d) any areas that you have been asked to consider that fall outside of your area of expertise;

   (e) any literature or other material utilised in supporting your opinions expressed in the report; and

   (f) that you have made all enquiries you believe are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which you regard as relevant have, to your knowledge, been withheld from the Tribunal.

Briefed Materials

8. You have been provided with the following documents for the purpose of your report:

   (a) the Determination;

   (b) PNO's application to the Tribunal for review dated 17 September 2020;

   (c) the Statements of Facts, Issues and Contentions filed by PNO, NSWMC and the ACCC in this proceeding;

   (d) the confidential affidavit of Simon Byrnes affirmed 15 March 2021 in this proceeding (**First Byrnes Affidavit**);

   (e) the confidential affidavit of Gabriella Sainsbury affirmed 15 March 2021 in this proceeding (**Sainsbury Affidavit**);

   (f) the affidavit of Bruce Lloyd affirmed 15 March 2021 in this proceeding;

   (g) the second confidential affidavit of Simon Byrnes affirmed 25 June 2021 in this proceeding (**Second Byrnes Affidavit**);

(h) the expert report of Dr Rhonda Smith prepared on behalf of the ACCC dated 22 April 2021;

(i) the expert report of Euan Morton prepared on behalf of NSWMC dated 25 June 2021; and

(j) PON's 2021-2025 Capex Plan as provided to vessel agents in about March 2021 under clause 7(c) of the Vessel Agent Deeds.

Assumptions

9. In preparing your report, please assume that:

(a) The Proposed Collective Bargaining Conduct includes collective bargaining by the Applicants in relation to the terms of a long term pro-forma pricing deed for coal producers published by PNO (**Producer Deed**) in relation to navigation service charge (**NSC**) and wharfage charge (**WhC**) paid for services provided by PNO at the Port of Newcastle. A copy of the pro-forma Producer Deed is at Annexure SB-5 (pages 140 to 158) of the Second Byrnes Affidavit with which you have been briefed.

(b) The Producer Deed includes terms in relation to:

(i) the WhC paid in relation to producer coal, loaded onto a **Covered Vessel**; and

(ii) the NSC paid by Covered Vessels.

(c) The definition of a Covered Vessel in the Producer Deed does not exclude vessels for which the responsible vessel agent has entered into a long term pro-forma pricing deed for vessel agents published by PNO (**Agents Deed**). A copy of the pro-forma Agents Deed is at Annexure GS-2 (pages 54 to 71) of the Sainsbury Affidavit with which you have been briefed. The scope of the Agents Deed extends to any vessel carrying producer coal. With effect from 1 January 2020, PNO has entered into long-term pricing arrangements with all of the coal vessels calling at the Port for the next ten years setting the charges in respect of navigation services supplied at the Port. The terms of these arrangements are the same as the Agents Deed.

(d) PNO provides navigation services to Covered Vessels, for which the applicable NSC is paid by agents on behalf of those vessels in accordance with terms set out in an executed Agents Deed between the two parties.

(e) Vessel agents pass the cost of the NSC onto the party that owns or has chartered a Covered Vessel. The NSC is not generally paid by coal producers, because the majority of coal exported from the Port is sold ‘free on board’ (FOB), as distinct from being sold as ‘cost, insurance and freight’ (CIF).

(f) Where PNO and a coal producer agree any producer-specific NSC and WhC (as set out in the Producer Deeds), those rates can be applied to coal carried on Covered Vessels. That is, PNO will apply the producer-specific charges to the coal produced by that producer. These charges apply when prescribed information about the vessel and the coal to be loaded for shipping from the Port is provided to PNO by producers in advance of the arrival of the Covered Vessel.

(g) The current pro-forma Agents Deed specifies the NSC that is to apply over the years to December 2029, and the circumstances in which the agreed NSC may be amended. This means that:

(i) absent any different agreement between a coal producers and PNO, the default outcome is that the specified NSC will apply over the entire period in respect of coal vessels that have entered into an Agents Deed; and

(ii) amendments to the Agents Deed may only be made by agreement or, in the event of dispute, following the decision of an arbitrator.

(h) In the period between December 2019 and April 2020, active bilateral negotiations took place between PNO and several coal producers in relation to the terms of the navigation service. Material changes were made to the Producer Deed following requests by coal producers made during those negotiations. However, no coal producer has entered into a Producer Deed with PNO. Since around April 2020, there have been no further substantive bilateral negotiations with coal producers. These matters are set out in the First and Second Byrnes Affidavits with which you have been briefed.

(i) PNO has published the pro-forma Producer Deed on its website since around 13 March 2020.

(j) PNO has to date refused to engage in collective negotiations with the Applicants in relation to the Producer Deed.

(k) In January 2021, Wood Mackenzie prepared a confidential report for PNO entitled *Scenario Development and Planning*. That report contains forecasts of annual coal volumes expected to be exported from the Port over the fifteen year period to 2035. That report is described at paragraphs 10 to 14 of, and appears at Confidential Annexure SB-1 (pages 9 to 105) to, the Second Byrnes Affidavit with which you have been briefed.

(l) PNO remains willing to engage in further bilateral negotiations with coal producers, however no bilateral negotiations with individual coal producers have taken place since the ACCC's interim decision to authorise collective bargaining on 2 April 2020.

(m) Since 1 January 2020:

(i) the only adjustment that PNO has made to the NSC for all coal vessel operators under the Vessel Agent Deeds is the annual adjustment contemplated by cl 7(a);

(ii) PNO has not exercised a contractual right under cl 7(b) to increase the NSC for any coal vessel operator who has entered into a Vessel Agent Deed with PNO.

(n) Since the commencement of PNO's long term lease over the Port in 2014, PNO has not discriminated on price or non-price terms between:

(i) coal producers whose coal is exported through the Port in respect of any Port charges, including the Wharfage Charge payable by the coal

producers in respect of the availability of a site at which stevedoring operations may be carried out; or

(ii) coal vessel operators with respect to the NSC payable for the use of the channels and berths at the Port.

(o) In 2020, the shipping channel at the Port of Newcastle operated at less than 50% of its capacity.

(p) PNO's current five-year capital expenditure forecast (**Capex Plan**) does not include provision for capital expenditure on any future channel improvements, future berths (other than the planned expenditure at the K1 liquids bulk berth as set out in Capex Plan), or a container terminal because such capital expenditure is not planned to be undertaken by PNO (or a related body corporate) or its shareholders in the period 2021-2025.

(q) A copy of the Capex Plan has been provided to vessel agents in accordance with the terms of the Vessel Agent Deed, and was also produced to the Tribunal on 16 June 2021 in this proceeding in response to the notice under ss 90(6)(c) and 102(1) of the CCA dated 2 June 2021. A copy of the Capex Plan is enclosed with this letter.

(r) PNO derives more than 70 per cent of its revenue from coal export related operations.

10. In preparing your report, you should consider any matter which you believe to be relevant having regard to the matters set out above, in particular, the Expert Code.

11. In addition to your report, you may be required to:

(a) prepare supplementary reports in this proceeding;

(b) confer with other expert witnesses in relation to such matters and on such terms as directed by the Tribunal; and

(c) appear during the hearing of the proceeding.

12. Please treat all material prepared and obtained by you in connection with this engagement as confidential.

Yours sincerely

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Encl

Our ref 219/20838/80207163

FEDERAL COURT OF AUSTRALIA

EXPERT EVIDENCE PRACTICE NOTE (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"), including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"); and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence

being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) **t**he agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

Annexure A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the

[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee

knowledge of the expert, been withheld from the Court;

(j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

[3] Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

(a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

(b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

(c) the experts will take the oath or affirmation together, as appropriate;

(d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

(e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether

arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Annexure B – Curriculum vitae

Greg Houston

Partner

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Overview

Greg is a founding partner of HoustonKemp. He is an expert in the application of economics to assist high stakes decision-making in competition, finance, policy and regulatory matters.

In the antitrust sphere, Greg is regularly sought to advise on the competitive effects of proposed merger transactions, and to provide expert testimony in antitrust enforcement proceedings. His evidence has been cited favourably in numerous proceedings before the Federal Court, the Competition Tribunal and in the decisions of Australian and international arbitrators. For many years, Greg has been listed by Who's Who Legal as one of the world's leading competition economists. More recently, Greg has been recognised in WWL's Thought Leaders – Competition for his contributions to competition economics.

On regulatory matters, Greg has played a substantial role in shaping the development of economic regulatory regimes governing communications, energy, transport and water services infrastructure in Australia and the Asia Pacific region. His clients in this area include governments, regulators, infrastructure service providers and trade associations.

Greg is also the foremost expert in the region on the application of economics to critical questions arising in securities class actions, insider trading and market manipulation. He has filed expert reports in numerous proceedings concerning the adequacy and effect of disclosures in relation to listed and unlisted securities, in both Australia and New Zealand. Greg's evidence was accepted in the only two wrongful disclosure matters for which final judgment on substantive elements was informed by economic evidence before the Federal Court.

In April 2014, Greg – together with Adrian Kemp – founded HoustonKemp, a firm dedicated to applying economic analysis to bring clarity and focus to complex problems arising in competition, finance, policy and regulation.

Greg holds a first class honours degree in economics from the University of Canterbury, and is a member of the Competition and Consumer Committee of the Law Council of Australia.

Qualifications

1982	**University of Canterbury, New Zealand** B.Sc. (First Class Honours) in Economics

Prizes and scholarships

1980	University Junior Scholarship, New Zealand

Career details

2014-	**HoustonKemp Economists** Partner, Sydney, Australia
1989-2014	**NERA Economic Consulting** Director (1998-2014) London, United Kingdom (1989-1997) Sydney, Australia (1998-2014)
1987-89	**Hambros Bank, Treasury and capital markets** Financial Economist, London, United Kingdom
1983-86	**The Treasury, Finance sector policy** Investigating Officer, Wellington, New Zealand

Project experience[1]

Competition, access and mergers

2020-21	**DLA Piper/Perth Airport** **Market value assessment** Expert reports prepared in the context of *quantum meruit* proceedings before the Supreme Court of Western Australia in relation to the market value of aeronautical services provided at Perth Airport to Qantas Group airlines between July and December 2018.
2020-21	**Chapman Tripp & DLA Piper/Confidential client** **Competition market study** Advice and analysis in relation to the New Zealand Commerce Commission's market study of the retail grocery sector.
2017-21	**Gilbert + Tobin/Confidential client** **Alleged cartel conduct** Advice and analysis in relation to an Australian Competition and Consumer Commission investigation and then prosecution of alleged cartel conduct.
2020	**Allens/Confidential client** **Alleged misuse of market power** Advice and analysis in relation to Federal Court proceedings brought by a private party in relation to below cost pricing of a fast moving consumer good.
2020	**Ashurst/ASN** **Exclusive dealing** Expert report on the competitive effects of the exclusive dealing notification to the ACCC by the dedicated TV shopping channel retailer TVSN, proposing to be able to acquire products from suppliers on an exclusive basis.

[1] Past ten years only.

2019-20	**King & Wood Mallesons/Confidential client** **Merger authorisation** Advice and preparation of expert report for use in a pending application for authorisation to be made to the Australian Competition and Consumer Commission.
2018-20	**Squire Patton Boggs/Confidential client** **Market power provision** Advice and expert report prepared on the application of an industry-specific regulation directed at limiting a firm's pricing conduct in circumstances where it has market power.
2018-20	**Queensland Rail** **Access to facilities** Advice in relation to the Queensland Competition Authority's review of the declared status of services provided by QR's five rail networks, as well as the QCA's simultaneous review of the access undertaking applying to those networks.
2018-20	**DLA Piper/DBCT Management** **Access to facilities** Expert reports submitted to the Queensland Competition Authority's review of the declared status of services provided by the Dalrymple Bay Coal Terminal.
2017-19	**Johnson Winter & Slattery/Ramsay Healthcare** **Alleged misuse of market power** Expert reports and testimony in context of Federal Court proceedings brought by the Australian Competition and Consumer Commission against Ramsay Healthcare in relation to conduct by Coffs Harbour-based surgeons.
2017-19	**Wilson Harle/Wilson Parking** **Competitive effects of merger** Expert report submitted in High Court of New Zealand proceedings (settled shortly before trial) brought by the Commerce Commission concerning the competitive effects of an already completed merger transaction.
2017-20	**King & Wood Mallesons** **Competition analysis** Advice to a major digital platform service provider on competition matters arising in the Australian Competition and Consumer Commission's digital platforms inquiry, and the development of the news media and digital platforms bargaining code.
2015-20	**Port of Newcastle Operations** **Access to facilities** Advice and expert reports submitted to the National Competition Council on matters arising in applying the criteria for declaration under Part IIIA, in the context of applications by Glencore and the NSW Minerals Council seeking recommendation that navigation service be declared, and PNO's application for recommendation that the declaration of services be revoked.
2018	**Westpac Banking Corporation** **Competition analysis** Expert report prepared for the Productivity Commission in response to the draft finding in its banking competition inquiry that each of Australia's banks holds substantial market power.

2017-19	**Ashurst/Confidential client** **Anti-competitive bundling** Advice in relation to an Australian Competition and Consumer Commission's investigation of bundled discounts that were alleged to have had an anti-competitive effect.
2017	**Minter Ellison Rudd Watts/Complete Office Supplies** **Competitive effects of merger** Expert reports submitted in High Court of New Zealand proceedings concerning the proposed acquisition of OfficeMax by Platinum Equity injunction.
2017	**Minter Ellison/CrownBet** **Merger authorisation** Expert reports and testimony in Competition Tribunal proceedings concerning the proposed acquisition of Tatts by Tabcorp.
2016	**Bird & Bird/Generic Health** **Competitive effects of patent infringement** Expert reports and testimony in Federal Court proceedings concerning the damages arising from infringement of a pharmaceutical patent in relation to a pharmaceutical patent.
2016	**Manildra Group** **Competition analysis** Advice and preparation of an expert report assessing competitive constraints in the supply of fuel grade ethanol.
2016	**Clayton Utz/Anglo American** **Competitive effects analysis** Expert reports assessing the economic impact on the equine critical industry cluster if certain thoroughbred breeding operations were to leave the Upper Hunter.
2014-16	**Ashurst and Gilbert + Tobin/Confidential client** **Competitive effects of agreements** Analysis and advice prepared in context of an Australian Competition and Consumer Commission investigation of agreements between a supplier and its major customers that are alleged to harm competition.
2015	**Corrs/Confidential client** **Merger clearance** Analysis, advice and expert report submitted to the Australian Competition and Consumer Commission in the context of a proposed acquisition in the office products sector.
2014-15	**Australian Government Solicitor/Commonwealth of Australia** **Competition and trade analysis** Expert report on competition and trade in tobacco products, prepared in the context of the World Trade Organisation dispute settlement proceedings concerning Australia's tobacco plain packaging legislation.
2014-15	**King & Wood Mallesons/Confidential client** **Competitive effects of agreement** Analysis and advice prepared in context of an Australian Competition and Consumer Commission investigation of agreements between a supplier and its major customers that were alleged to harm competition.

2013-14	**Corrs/Australian Competition and Consumer Commission** **Effect of cartel conduct** Expert report filed in the Federal Court on the price effects of an alleged market sharing arrangement in relation to the supply of forklift gas, prepared in the context of proceedings brought against Renegade Gas (Supagas).
2013-14	**Australian Competition and Consumer Commission** **Merger clearance** Expert report and testimony before the Competition Tribunal in the context of the Australian Competition and Consumer Commission's decision to oppose the acquisition of Macquarie Generation by AGL Energy.
2013-14	**Ashurst/BlueScope** **Merger clearance** Expert reports submitted to the Australian Competition and Consumer Commission in the context of the clearance of three approved transactions in the domestic steel industry.
2013-14	**Australian Government Solicitor/ACCC** **Merger clearance** Analysis and advice prepared in the context of the Australian Competition and Consumer Commission review of the proposed acquisition of petrol retailing sites in South Australia.
2013	**Corrs/Generic Health** **Patent damages estimation** Expert report on the nature and extent of the analysis necessary to estimate damages in a patent infringement proceeding**.**
2012-13	**Minter Ellison/Confidential client** **Merger clearance** Expert reports submitted to the Australian Competition and Consumer Commission in the context of a confidential application for clearance of a proposed acquisition in the industrial gases industry.
2011-12	**Gilbert + Tobin/Pact Group** **Merger clearance** Expert reports submitted to the Australian Competition and Consumer Commission on the competitive implications of the proposed acquisition of plastic packaging manufacturer Viscount Plastics by Pact Group.
2011	**Gilbert + Tobin/Caltex** **Access to facilities** Expert report submitted to the National Competition Council on matters arising in the applying the criteria for declaration under Part IIIA, in the context of the application by the Board of Airline Representatives of Australia for the declaration of services provided by the Caltex jet fuel pipeline serving Sydney airport.
2010-12	**Mallesons/APA** **Merger clearance** Expert reports submitted to the Australian Competition and Consumer Commission on the competitive implications of the proposed acquisition of the gas pipeline assets of Hastings Diversified Utilities Fund by APA Group.

2010-11	**Johnson Winter & Slattery/ATC and ARB** **Competitive effects of agreement** Expert reports and testimony in Federal Court proceedings concerning the competitive effects of restrictions on the use of artificial techniques in the breeding of thoroughbred horses for racing.
2010-11	**Victorian Government Solicitor/State of Victoria** **Competitive effects of agreement** Expert report prepared for the state of Victoria on the effects of restrictions applying to the trading of water rights on inter-state trade in the context of a constitutional challenge brought against the state of Victoria by the state of South Australia.
2009-11	**Arnold + Porter/Visa Inc, Mastercard Inc and others** **Payment card markets** Expert reports and deposition testimony on behalf of defendants in the United States Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, on the effects of regulatory interventions in the Australian payment cards sector.

Regulatory analysis

2019-21	**DLA Piper/Dalrymple Bay Infrastructure** **Review of access undertaking** Advice and expert reports prepared in the context of the Queensland Competition Authority's review of the access undertaking for users of the Dalrymple Bay coal terminal.
2019	**Brookfield Asset Management/Bank of America** **Regulatory due diligence** Vendor due diligence report on all regulatory aspects of the arrangements – and potential developments therein – applying to the Dalrymple Bay coal terminal
2018	**Johnson Winter & Slattery/Queensland Competition Authority** **Apprehension of bias claim** Expert reports submitted to the Queensland Supreme Court showing the chain of causation necessary for a connection between the QCA's Aurizon draft decision and the economic interests of the Port of Newcastle.
2017-18	**King & Wood Mallesons/Tasmania Gas Pipeline** **Gas pipeline arbitration arrangements** Expert reports on economic aspects of the Part 23 regime arbitration with Hydro Tasmania on the terms of access to the Tasmanian Gas Pipeline.
2017-18	**Victorian and South Australian electricity distribution networks** **Productivity adjustments** Expert report on the conceptual and empirical basis for pre-emptive productivity adjustments to DNSPs' projected operating expenditure.
2017-18	**Jemena** **Gas pipeline arbitration arrangements** Advice and analysis in relation to the new rules for arbitration of prices for services provided by non-scheme gas pipelines.

2016-18	**APA Group** **Gas market reform** Expert reports submitted to the Gas Market Reform Group in the context of its review of the gas pipeline coverage criteria, and the proposal to introduce the compulsory auction of contracted but unnominated gas pipeline capacity.
2016-17	**Minter Ellison Rudd Watts/Trustpower, New Zealand** **Transmission pricing methodology** Expert reports submitted to the Electricity Authority and to the High Court of New Zealand in relation to proposed reforms to the transmission pricing methodology and the distributed generation pricing principles.
2016	**Johnson Winter & Slattery/Australian Gas Networks** **Materially preferable decision** Expert report reviewing whether aspects of the Australian Energy Regulator's (AER's) draft access arrangement decision would be likely to result in a materially preferable decision in terms of achievement of the national gas objective.
2015-17	**Government of New South Wales** **Economic regulation for privatisation** Advisor to government of New South Wales on all economic regulatory aspects of the proposed partial lease the electricity transmission and distribution entities, TransGrid, AusGrid and Endeavour Energy.
2014-16	**Powerco** **Input methodologies review** Advice and several expert reports prepared in the context of the Commerce Commission's reviews of cost of capital and others aspects of the Input Methodologies governing the determination of maximum prices for New Zealand electricity and gas distribution networks.
2015	**ActewAGL** **Regulatory price review** Expert report on the economic interpretation of provisions in the national electricity law and rules in relation to the application of the national electricity objective to the entire price determination of the Australian Energy Regulator.
2014-16	**Atco Gas** **Access price review** Expert reports on the economic interpretation of provisions in the national gas law and rules in relation to depreciation and the application of the national gas objective to the entire draft decision, submitted to the Economic Regulation Authority of WA.
2014-16	**Government of Victoria** **Economic regulation for privatisation** Advisor to government of Victoria on the design, development and application of the framework for economic regulation of the Port of Melbourne Corporation in the context of the privatisation of the port by way of long term lease.
2013	**Actew Corporation** **Interpretation of economic terms** Advice on economic aspects of the decision of the Independent Competition and Regulatory Commission in relation to the price controls applying to Actew.

2012-13	**Ashurst/Brisbane Airport Corporation** **Draft access undertaking** Advice, analysis and expert reports in the context of the preparation of a draft access undertaking specifying the basis for determining a ten year price path for landing charges necessary to finance a new parallel runway at Brisbane airport.
2012	**King & Wood Mallesons/Origin Energy** **Interpretation of economic terms** Expert reports and testimony in the context of judicial review proceedings before the Supreme Court of Queensland on the electricity retail price determination of the Queensland Competition Authority.
2012	**Contact Energy, New Zealand** **Transmission pricing methodology** Advice on reforms to the Transmission Pricing Methodology proposed by Electricity Authority.
2011-12	**Energy Networks Association** **Network pricing rules** Advice and expert reports submitted to the Australian Energy Market Commission on wide-ranging reforms to the network pricing rules applying to electricity and gas transmission and distribution businesses, as proposed by the Australian Energy Regulator.
2010-12	**QR National** **Regulatory and competition matters** Advisor on the competition and regulatory matters, including: a range of potential structural options arising in the context of the privatisation of QR National's coal and freight haulage businesses, particularly those arising in the context of a 'club ownership model' proposed by a group of major coal mine owners; and an assessment of competitive implications of proposed reforms to access charges for use of the electrified network.
2002-12	**Orion New Zealand Ltd, New Zealand** **Electricity lines regulation** Advisor on regulatory and economic aspects of the implementation by the Commerce Commission of the evolving regimes for the regulation of New Zealand electricity lines businesses. This role has included assistance with the drafting submissions, the provision of expert reports, and the giving of expert evidence before the Commission.
2011	**Meridian Energy, New Zealand** **Undesirable trading situation** Advice on the economic interpretation and implications of the New Zealand electricity rule provisions that define an 'undesirable trading situation' in the wholesale electricity market.
2011	**Ausgrid** **Demand side management** Prepared a report on incentives, constraints and options for reform of the regulatory arrangements governing the role of demand side management in electricity markets.

2010-11	**Transnet Corporation, South Africa** **Regulatory and competition policy** Advised on the preparation of a white paper on future policy and institutional reforms to the competitive and regulatory environment applying to the ports, rail and oil and gas pipeline sectors of South Africa.
2010-11	**Minter Ellison/UNELCO, Vanuatu** **Arbitral review of decision by the Vanuatu regulator** Expert report and evidence before arbitrators on a range of matters arising from the Vanuatu regulator's decision on the base price to apply under four electricity concession contracts entered into by UNELCO and the Vanuatu government, including country risk component of the allowed rate of return and bringing to account events from the prior regulatory period.
2007-11	**Powerco/CitiPower** **Regulatory advice** Wide ranging advice on matters arising under the national electricity law and rules, such as the framework for reviewing electricity distribution price caps, the treatment of related party outsourcing arrangements, an expert report on application of the AER's efficiency benefit sharing scheme, the potential application of total factor productivity measures in CPI-X regulation, and arrangements for the state-wide roll out of advanced metering infrastructure.
1999-2004, 2010-11	**Sydney Airports Corporation** **Aeronautical pricing notification** Wide ranging advice and expert reports on regulatory matters, including advice and expert reports in relation to SACL's notification to the ACCC of substantial reforms to aeronautical charges at Sydney Airport in 2001. This involved the analysis and presentation of pricing principles and their detailed application, through to discussion of such matters at SACL's board, with the ACCC, and in public consultation forums. Subsequent advice on two Productivity Commission reviews of airport charging, and notifications to the ACCC on revised charges for regional airlines.

Securities and finance

2021	**Maurice Blackburn Lawyers/Representative proceeding** **Appropriate litigation funding commission** Expert reports prepared in the context of proceedings before the Supreme Court of Victoria seeking approval of a group costs order (CGO) for application in representative proceedings brought against ANZ and Westpac banks concerning the application of flex commissions in the sale of moto vehicles.
2019-21	**Shine Lawyers/Representative proceeding** **Breach of disclosure obligations** Expert reports submitted in the context of proceedings before the Federal Court concerning the effect of certain disclosures on the price of ASX listed securities in Iluka Limited.
2020	**Corrs/Balance Legal Capital** **Appropriate litigation funding commission** Expert report prepared in the context of proceedings to approve the settlement of a consumer class action brought against Swann Insurance, on the reasonable range of and return on investment implied by historically observed funding commission rates in previous class action proceedings in Australia.

2020	**Johnson Winter & Slattery/Representative proceeding** **Group cost order application** Expert report prepared in the context of an application to be brought before the Supreme Court of Victoria to make a group cost order (GCO), under which the legal costs and funding commission for a representative proceeding would be set by reference to a percentage of the settlement amount.
2020	**McCabe Curwood/Lewer Corporation** **Economic interpretation of loan agreement** Expert report prepared for the Supreme Court of Victoria as to whether a US dollar loan could be interpreted, economically, as equivalent to the sum of an Australian dollar loan plus a foreign exchange forward contract.
2020	**Australian Securities and Investments Commission** **Breach of disclosure obligations** Expert report in reply submitted in the context of Federal Court proceedings brought by ASIC in relation to the materiality for the price of its securities of the January 2013 disclosure by Rio Tinto Limited of an impairment to the value of Rio Tinto Coal Mozambique assets.
2020	**JWS/Australian Securities and Investments Commission** **Breach of disclosure obligations** Expert report in reply submitted in the context of Federal Court proceedings brought by ASIC concerning the materiality for the price of its securities of information omitted from ASX disclosures made by GetSwift Limited.
2019-20	**Joint Action Funding/Representative proceeding** **Valuation of damages** Expert reports submitted to the New Zealand High Court in the matter of Eric Houghton versus parties associated with former listed entity, Feltex Carpets Ltd, on the extent of loss arising from the allotment of shares under an IPO for which the prospectus contained untrue statements.
2019-20	**Slater & Gordon/Representative proceeding** **Breach of disclosure obligations** Expert reports submitted in the context of proceedings before the Federal Court concerning the effect of certain disclosures on the price of ASX listed securities in Spotless Limited.
2019-20	**Arnold Bloch Leibler/Australian Funding Partners** **Appropriate funding commission** Expert reports and sworn testimony in the proceedings before the Victorian Supreme Court concerning the appropriate level of funding commission to apply in the context of the 2018 settlement of representative proceedings brought against Banksia Securities Limited.
2017-20	**Portfolio Law/Representative proceeding** **Misleading and deceptive conduct** Expert reports and sworn testimony in representative proceedings before the Federal Court concerning the effect of certain disclosures on the price of ASX listed securities in Myer Ltd.

2019	**Norton Rose Fulbright/Directors of QRxPharma** **Breach of disclosure obligations** Advice and analysis of the extent of potential damages arising from a shareholder class action alleging breach of disclosure obligations of the former ASX-listed entity, QRxPharma.
2019	**Elliot Legal/Representative proceeding** **Breach of disclosure obligations** Expert reports submitted in the context of proceedings before the Federal Court concerning the effect of certain disclosures on the price of ASX listed securities in Murray Goulburn Co-operative Company Limited.
2018	**Maurice Blackburn/Representative proceeding** **Misleading and deceptive conduct** Expert reports prepared in relation to Federal Court representative proceedings concerning the effect of certain disclosures on the price of ASX listed securities in Sirtex Medical Ltd.
2018	**William Roberts/Representative proceeding** **Misleading and deceptive conduct** Preliminary analysis on the extent of liability and potential damages arising from a shareholder class action alleging breach of disclosure obligations.
2017-18	**Australian Pipelines and Gas Association** **Allowed rate of return** Advice in relation to the rate of return guideline review being undertaken by the Australian Energy Regulator, including participation in the AER's concurrent expert evidence session one.
2017	**Slater and Gordon/Gasmere Ltd** **Share portfolio valuation** Expert report prepared in relation to Supreme Court of Victoria proceedings brought against Shaw and Partners concerning the appropriate valuation of a share portfolio, the subject of a damages claim following the collapse of Opus Prime.
2016-17	**Allens/QBE** **Shareholder class action** Advice and analysis on the extent of liability and potential damages arising from a shareholder class action alleging breach of QBE's ASX disclosure obligations**.**
2016	**Elliot Legal/Representative proceeding** **Misleading and deceptive conduct** Expert reports in representative proceedings in the Supreme Court of Victoria concerning the effect of certain disclosures on the price of ASX listed securities in Downer EDI Ltd.
2015-16	**Maurice Blackburn/Representative proceeding** **Misleading and deceptive conduct** Expert reports submitted to the Federal Court assessing the effect of alleged misstatements in relation to the annual accounts and associated going concern assumption in relation to Tamaya Resources Ltd (in liquidation).

2013-15	**Sydney Water Corporation** **Cost of capital estimation** Prepare three expert reports for submission to the Independent Pricing and Regulatory Tribunal (IPART) on the framework for determining the weighted average cost of capital for infrastructure service providers, and on estimation of an appropriate equity beta.
2012-15	**HWL Ebsworth/Confidential client** **Insider trading** Expert advice and analysis in the context of criminal proceedings alleging insider trading in certain ASX-listed securities (2012-13). Subsequent expert report filed in Supreme Court of Tasmania estimating price effects of inside information in context of 'proceeds of crime' proceedings.
2014	**Wotton Kearney/Genesys Wealth Advisors** **Misleading and deceptive conduct** Expert report submitted to the Supreme Court of Victoria assessing the accuracy of product disclosure statements and other information in relation to two fixed interest investment funds offered by Basis Capital.
2014	**TransGrid** **Cost of capital estimation** Preparation of an expert report for submission to the Australian Energy Regulator (AER) estimating the weighted average cost of capital for electricity network service providers.
2011-13	**Slater & Gordon/Modtech** **Shareholder damages assessment** Expert reports and testimony in representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of the ASX-listed entity, GPT.
2011-12	**Freehills/National Australia Bank** **Shareholder damages assessment** Expert advice in connection with representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of an ASX-listed entity.
2012	**Johnson Winter & Slattery/Victorian gas distributors** **Cost of equity estimation** Expert report submitted to the AER on the appropriate methodology for estimating the cost of equity under the capital asset pricing model.
2009-13	**Minter Ellison/Confidential client** **Misleading and deceptive conduct** Expert report and related advice in light of investor claims and pending litigation following the freezing of withdrawals from a fixed interest investment trust that primarily held US-denominated collateralised debt obligations (CDOs), as offered by a major Australian financial institution. Analysis undertaken included the extent to which the investment risks were adequately described in the fund documents, and the quantum of potential damages arising.
2011	**Barringer Leather/Confidential client** **Market manipulation** Expert report prepared in the context of criminal proceedings brought in the Supreme Court of NSW alleging market manipulation in the trading of certain ASX-listed securities.

2010-11	**Wotton Kearney/Confidential client** **Misleading and deceptive conduct** Expert report and analysis in light of investor claims and pending litigation following the freezing of withdrawals from two fixed interest investment trusts that primarily held US-denominated collateralised debt obligations (CDOs).
2010-11	**Maurice Blackburn/Confidential client** **Shareholder damages assessment** Analysis and advice in connection with representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of an ASX-listed entity.
2010-11	**Mallesons/ActewAGL** **Judicial review of rate of return determination** Expert report and testimony in Federal Court proceedings seeking judicial review of a decision by the Australian Energy Regulator of its determination of the risk free rate of interest in its price setting determination for electricity distribution services.
2009-11	**William Roberts/Clime Capital** **Shareholder damages assessment** Expert reports submitted in representative proceedings before the Federal Court alleging misstatement and/or breach of the continuous disclosure obligations of ASX-listed entity, Credit Corp.

Economic impact analysis

2021	**Seyfarth Shaw/Australian Fresh Produce Alliance** **Earnings of piece rate and hourly paid workers in horticultural sector** Expert reports submitted to the Fair Work Commission in the context of an application brought by the Australian Workers Union, assessing empirical evidence concerning both the level and relative earnings of piece rate and hourly paid workers in the horticultural sector.
2020	**Seyfarth Shaw/Patrick** **Effect of industrial action by stevedores** Expert report submitted to the Fair Work Commission assessing the economic impact on the Australian and NSW economies of notified protected industrial action by stevedores.
2020	**Seyfarth Shaw/DP World** **Effect of industrial action by stevedores** Expert reports submitted to the Fair Work Commission assessing the economic impact on the Australian and NSW economies of notified protected industrial action by stevedores.
2020	**Crown Solicitor for New South Wales** **Relative economic effects of government expenditure decisions** Expert reports and testimony before the NSW Industrial Relations Commission in relation to the relative effects on the NSW economy of salary increases for public sector employees, as compared with increased expenditure on infrastructure projects – in the context of the effects of the Covid-19 pandemic.

2019	**Seyfarth Shaw/Confidential client** **Effect of potential industrial action by stevedores** Analysis and draft expert report in the context of a potential application to the Fair Work Commission addressing the economic effect that various forms of industrial action by stevedores would be likely to have on the Australian economy.
2016-17	**Seyfarth Shaw/Confidential client** **Effect of potential industrial action by stevedores** Analysis and draft expert report in the context of a potential application to the Fair Work Commission addressing the economic effect that various forms of industrial action by stevedores would be likely to have on the Australian economy.
2015-16	**Airservices Australia** **Effect of potential industrial action by air traffic controllers** Analysis and draft expert report in the context of a potential application to the Fair Work Commission addressing the economic effect that certain forms of industrial action by Air Traffic Controllers would be likely to have on passengers, businesses, and the Australian economy.
2014	**Confidential client** **Effect of potential industrial action by tug boat operators** Analysis and draft expert report in the context of a potential application to the Fair Work Commission addressing the economic effect that certain forms of industrial action by tug boat operators would be likely to have on iron ore exports and the Australian economy.
2011	**Freehills/Confidential client** **Effect of potential industrial action by stevedores** Analysis and draft expert report in the context of a potential application to the Fair Work Australia addressing the economic effect that various forms of industrial action by stevedores would be likely to have on the Australian economy.

Valuation and contract analysis

2018-2020	**DLA Piper/Basslink Pty Ltd** **Damages valuation** Expert reports and testimony in arbitration proceedings concerning the extent of damages arising from the 2016 failure of the Basslink electricity interconnector cable between the Tasmanian and Victorian regions of the national electricity market.
2017-19	**DLA Piper & Arnold Bloch Leibler/Coal terminal users** **Price review arbitration** Expert reports and testimony in arbitration proceedings concerning the application of the price review clauses in the standard user agreement for Adani Abbot Point coal terminal.
2016	**SyCip Salazar Hernandez & Gatmaitan/Maynilad Water Services** **Concession contract dispute** Expert reports and testimony in arbitration proceedings concerning the application of the price review clauses in the Manila Water Concession agreements.

2015-16	**Clyde and Co/Apache Corporation** **Contract dispute** Expert reports submitted in the context of Supreme Court of Victoria proceedings concerning the appointment of receivers for Burrup Fertilisers Pty Ltd, in relation to the market price of gas available to supply an anhydrous ammonia plant on the Burrup Peninsula.
2015-16	**Raja, Darryl & Loh/Serudong Power Sdn Bhd (SPSB)** **Power purchase agreement arbitration** Expert reports submitted in the context of an international arbitration held in Kuala Lumpur concerning the interpretation of price indexation provisions in a power purchase agreement between SPSB and Sabah Electricity Sdn Bhd.
2015-16	**Australian Government Solicitor/Commonwealth of Australia** **Native title compensation** Expert reports and testimony before the Federal Court in relation to the native title compensation claim against the Northern Territory for certain acts extinguishing native title in the town of Timber Creek.
2014-15	**Minter Ellison/Foxtel Management Pty Ltd** **Assessment of reasonable licence fee** Expert reports prepared in the context of proceedings before the Copyright Tribunal concerning the appropriate valuation of the rights to be paid by Foxtel for the broadcast and communication of commercial recordings licensed by the Phonographic Performance Company of Australia.
2014-15	**Rahmat Lim & Partners/Port Dickson Power Berhad, Malaysia** **Power purchase agreement arbitration** Expert reports submitted in the context of an arbitration held in Kuala Lumpur concerning the interpretation of the price indexation provisions in a power purchase contract between Port Dickson Power Berhad and Tenaga Nasional Berhad.
2013	**Johnson Winter & Slattery/Origin** **Gas supply agreement price review** Analysis and advice on the implications of certain contract terms for the price of gas, to be determined in a potential arbitration concerning the terms of a substantial long term gas supply agreement.
2013	**Herbert Smith Freehills/Santos** **Gas supply agreement price review** Analysis and advice on factors influencing the market price of gas in eastern Australia, to be determined in a potential arbitration concerning the terms of a substantial long term gas supply agreement.
2012-13	**Herbert Smith Freehills/North West Shelf Gas** **Gas supply agreement arbitration** Expert reports on the implications of certain contract terms for the price of gas under a substantial long term gas supply agreement.
2012-13	**Allens/BHP Billiton-Esso** **Gas supply agreement arbitration** Analysis, advice and expert report on the implications of certain contract terms for the price of gas under a substantial long term gas supply agreement.

2012-13	**Gilbert + Tobin/Rio Tinto Coal Australia** **Price review arbitration** Analysis and expert reports prepared in the context of an arbitration concerning the price to be charged for use of the coal loading facilities at Abbott Point Coal Terminal.
2012	**King & Wood Mallesons/Ausgrid** **Power purchase agreement arbitration** Expert report prepared and filed in an arbitration on the in relation to the effect of the government's newly introduced carbon pricing mechanism on the price to be paid under a long term power purchase and hedge agreement between an electricity generator and retailer.
2011	**Kelly & Co/Santos** **Wharfage dues agreement arbitration** Expert report and testimony in arbitration proceedings to determine the 'normal wharfage dues' to be paid for use of the port facility at Port Bonython for the transfer of petroleum products to tanker ships from a processing terminal in South Australia.

Institutional and regulatory reform

2008-11	**Department of Sustainability and Environment** **Management of bulk water supply** Advice on the concept and merits of establishing market based arrangements to guide both the day-to-day operation of the bulk water supply system in metropolitan Melbourne, as well as the trading of rights to water between the metropolitan water supply system and those throughout the state of Victoria.

Sworn testimony, transcribed evidence[2]

2021	**Expert evidence before the Fair Work Commission on behalf of the Australian Fresh Produce Alliance, in the matter of an application by the Australian Workers Union to vary the Horticultural Workers Award 2020.** Expert reports, sworn evidence, via videolink, 20 July 2021 **Expert evidence before the Federal Court on behalf of Aucham Superfund, in the matter of the Aucham Superfund v Iluka Resources Limited** Expert reports, sworn evidence, via videolink, 8-9 April 2021
2020	**Expert evidence before the NSW Industrial Relations Commission on behalf of the Crown Solicitor for NSW, in the matter of the Crown Employees (Police Officers) and Paramedics and Control Centre Officers' awards.** Expert reports, sworn evidence, Parramatta, 7-8 October and 13 November 2020 **Expert evidence before Hon Robert French AC on behalf of Basslink Pty Ltd, in the matter of the State of Tasmania and Hydro Electric Corporation v Basslink Pty Ltd** Expert reports, sworn evidence, via videolink, 13-14 October 2020

[2] Past ten years only.

Expert evidence before the Supreme Court of Victoria on behalf of Australian Funding Partners, in the matter of Laurence John Bolitho v Banksia Securities Limited
Expert reports, sworn evidence, via videolink to Melbourne, 4 August 2020.

Expert evidence before the Supreme Court of Queensland on behalf of the QCoal group and Lake Vermont Resources, in the matter of Adani Abbot Point v QCoal, Sonoma Mine Management and Byerwen Coal (the QCoal Group), and Lake Vermont Resources
Expert reports, sworn evidence, Brisbane, 28 February 2020

2019

Expert evidence before the Federal Court on behalf of Ramsay Healthcare, in the matter of ACCC v Ramsay Healthcare
Expert reports, sworn evidence, Sydney, 9-10 December 2019

Expert evidence before Hon Michael McHugh AM, on behalf of the QCoal Group and Lake Vermont Resources, in the matter of Adani Abbot Point Terminal v QCoal, Sonoma Mine Management and Byerwen Coal (the QCoal Group), and Lake Vermont Resources
Expert reports, sworn evidence, Brisbane, 21 February 2019

2018

Expert evidence before the Federal Court on behalf of TPT Patrol, in the matter of TPT Patrol v Myer
Expert reports, sworn evidence, Melbourne 23 August 2018

Expert evidence before the Board of the Australian Energy Regulator, on behalf of the South Australian public lighting customers, in arbitration proceedings concerning public lighting charges
Expert reports, transcribed evidence, Melbourne, 7 May 2018

Expert evidence before the Board of the Australian Energy Regulator, on behalf of the Australian Pipelines and Gas Association, in the Review of Rate of Return Guidelines, Concurrent expert evidence session one
Joint expert report, transcribed evidence, Sydney, 15 March 2018

Expert evidence before the Federal Court on behalf of Changshu Longte Grinding Ball Co Ltd, in the matter of Changshu Longte v Anti-Dumping Review Panel and others.
Expert reports, sworn evidence, Sydney, 1 February 2018

2017

Expert evidence before the Competition Tribunal on behalf of CrownBet, in the application by Tabcorp for authorisation to acquire Tatts
Expert reports, sworn evidence, Melbourne, 30 May–1 June 2017

2016

Expert evidence before the Federal Court on behalf of Generic Health, in the matter of Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd
Expert reports, sworn evidence, Sydney, 14-15 December 2016

Testimony before an UNCITRAL arbitral tribunal on behalf of Maynilad Water Service Inc (MWSI), in the matter of MWSI v Republic of the Philippines
Report, sworn evidence, Singapore, 6 December 2016

Expert evidence on behalf of Powerco, at the Commerce Commission's Conference on the Cost of Capital matters
Transcribed evidence, public hearings, Wellington, 7 September 2016

Expert evidence before the Federal Court on behalf of plaintiffs, in the matter of HFPS v Tamaya
Expert reports, sworn evidence, Sydney, 13 May 2016

Expert evidence before an arbitral tribunal on behalf of Serudong Power Sdn Bhd (SPSB), in the matter of SPSB v Sabah Electricity Sdn Bhd (SESB)
Expert reports, sworn evidence, Kuala Lumpur, 27-28 April 2016

Expert evidence before the Federal Court on behalf of the Commonwealth of Australia, in the matter of Griffiths v Northern Territory
Expert reports, sworn evidence, Darwin, 24-25 February 2016

2015

Expert evidence before an arbitral tribunal on behalf of Port Dickson Power Berhad (PDP), in the matter of PDP v Tenaga Nasional Berhad (TNB)
Expert reports, sworn evidence, Kuala Lumpur, 28 January 2015

2014

Expert evidence before an UNCITRAL arbitral tribunal on behalf of Manila Water Corporation Inc (MWCI) in the matter of MWCI v Metropolitan Waterworks and Sewerage System (MWSS)
Expert reports, sworn evidence, Sydney (by videolink to Manila), 31 August 2014

Expert evidence before the Australian Competition Tribunal on behalf of the ACCC, in the matter of AGL Energy v ACCC
Expert reports, sworn evidence, Sydney, 10-11 June 2014

2013

Expert evidence before the Supreme Court of Victoria on behalf of Maddingley Brown Coal in the matter of Maddingley Brown Coal v Environment Protection Agency of Victoria
Expert reports, sworn evidence, Melbourne, 12 August 2013

Expert evidence before the Federal Court on behalf of Modtech in the matter of Modtech v GPT Management and Others
Expert reports, sworn evidence, Melbourne, 27 March 2013

2012

Expert evidence before the Supreme Court of Queensland on behalf of Origin Energy, in the matter of Origin Energy Electricity Ltd and Others v Queensland Competition Authority and Others
Expert reports, sworn evidence, Brisbane, 3 December 2012

2011

Expert evidence before the Federal Court on behalf of the Australian Turf Club and Australian Racing Board, in the matter of Bruce McHugh v ATC and Others
Expert report, sworn evidence, Sydney, 12 and 14 October 2011

Expert evidence in arbitration proceedings before J von Doussa, QC, on behalf of Santos in the matter of Santos, and Others v Government of South Australia
Expert report, sworn evidence, Adelaide, 13-15 September 2011

Expert evidence before a panel of arbitrators on behalf of UNELCO, in the matter of UNELCO v Government of Vanuatu
Expert report, sworn evidence, Melbourne, 23 March and 21 April 2011

Expert evidence before the Federal Court on behalf of ActewAGL, in the matter of ActewAGL v Australian Energy Regulator
Expert report, sworn evidence, Sydney, 17 March 2011

Deposition Testimony in Re Payment Care Interchange and Merchant Discount Litigation, in the United States District Court for the Eastern District of New York
Deposition testimony, District of Colombia, 18 January 2011

Speeches and publications[3]

2019

RBC Renewables and energy transition forum
Economic and regulatory forces affecting the transition
Panel discussant, Sydney, 12 September 2019

Competition Matters conference
Competition issues for Digital platforms
Panel discussant, Auckland, 26 July 2019

Competition Law Conference
Proof of collusion, or optical illusion?
Speech, Sydney, 25 May 2019

Clayton Utz – Equitable briefing series
Expert joint conferencing and reports
Panel discussant, Sydney, 16 May 2019

2018

RBC Capital Markets Global Infrastructure Forum
Australian utilities: current policy issues and industry trends
Panel discussant, Sydney, 13 March 2018

GCR 7th Annual Asia Pacific Law Leaders Forum
The role of algorithms: cartel enforcement in the era of artificial intelligence
Panel discussant, Singapore, 10 March 2018

2017

IPART 25th Anniversary Conference
Electricity and Water: Mutual Lessons
Speech, Sydney, 27 October 2017

Competition Law Conference
ACCC v Flight Centre: What was going on?
Speech, Sydney, 6 May 2017

Association for Data-driven Marketing and Advertising
Driving Customers to you: Insights from Location Data
Speech, Melbourne, 5 April 2017

GCR 6th Annual Asia Pacific Law Leaders Forum
Roadblocks and Solutions in Cross Border Mergers
Panel discussant, Singapore, 2 March 2017

2016

NSW Planning Assessment Commission
Economic Effects of Drayton South Mine on Upper Hunter Industry
Presentation to public hearing, Muswellbrook, 16 November 2016

[3] Past ten years only

2015

Electricity Networks Association Regulation Seminar, Brisbane
Participant in Expert Plenary Panel
Speech, Brisbane, 5 August 2015

NZ Commerce Commission Input Methodologies Review, Wellington
'Allocation of Risk' and 'New Technologies'
Panel Discussant, Wellington, 29 July 2015

Competition Matters Conference, Wellington
Disruptive Technologies
Chair, Discussion Panel, Wellington, 24 July 2015

Competition Law Conference
The Public Interest in Private Enforcement
Speech, Sydney, 30 May 2015

Singapore Aviation Academy, Singapore
Private Financing of Airport Infrastructure Expansions
Speech, Singapore, 5 March 2015

GCR 4th Annual Asia-Pacific Law Leaders Forum
Differences in using economics in EU and Asia Pacific
Speech, Singapore, 5 March 2015

AEMC Public Forum
East Coast Gas Market Review
Speech, Sydney, 25 February 2015

2014

Competition and Consumer Workshop, Law Council of Australia
An Economist's Take on Taking Advantage
Paper and Speech, Brisbane, 14 September 2014

Energy Networks 2014
Innovation and Economic Regulation
Speech, Melbourne, 1 May 2014

The Network Industries Quarterly, *Consumer Advocacy in Australian Regulatory Decision Making – 'Hard Choices Await',* Vol. 16, No 1, 2014
Ecole Polytechnique Federale de Lausanne, 31 March 2014

GCR 3rd Annual Law Leaders Asia Pacific
Role of Economists in Competition Law Enforcement in Asia-Pacific
Speech, Singapore, 6 March 2014

2013

University of South Australia – Competition and Consumer Workshop
Empirical test and collusive behaviour
Speech and participation game, Adelaide, 16 November 2013

Energy in WA Conference
Capacity Payments in the WEM – Time to Switch?
Panel Discussion, Perth, 21 August 2013

ACCC/AER Regulatory Conference
Designing Customer Engagement
Speech, Brisbane, 25 July 2013

Victorian Reinsurance Discussion Group
Australian Mining – When Opportunities and Risk Collide
Speech, Melbourne, 1 March 2013

NZ Downstream Conference
Investment and Regulation
Panel Discussion, Auckland, 25 July 2013

2012

Rising Stars Competition Law Workshop
Expert Evidence in Competition Cases
Speech, Sydney, 24 November 2012

KPPU – Workshop on the Economics of Merger Analysis
Theories and Methods for Measuring the Competitive Effects of Mergers
Speech, Bali, 19-21 November 2012

University of South Australia – Competition and Consumer Workshop
Reflections on Part IIIA of the Competition Act
Speech, Adelaide, 12 October 2012

NZ Downstream Conference
Lines company consolidation – what are the benefits and risks?
Panel discussion, Auckland, 6-7 March 2012

2011

Law Council of Australia - Competition Workshop
Coordinated effects in merger assessments
Speech, Gold Coast, 27 August 2011

ACCC Regulatory Conference
Adapting Energy Markets to a Low Carbon Future
Speech, Brisbane, 28 July 2011

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