

## NOTICE OF LODGMENT

### AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

#### Lodgment and Details

Document Lodged: Affidavit

File Number: ACT 2 of 2020

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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



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REGISTRAR

Dated: 15/03/2021 7:35 PM

#### Important information

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



**COMMONWEALTH OF AUSTRALIA**  
***Competition and Consumer Act 2010 (Cth)***

**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

File No: ACT 2 of 2020

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

Applicant: Port of Newcastle Operations Pty Limited (ACN 165 332 990)

**AFFIDAVIT**

I, Simon Byrnes, of Level 4, 251 Wharf Road, Newcastle in the State of New South Wales, lawyer, affirm:

1. I am the Chief Commercial Officer and General Counsel for Port of Newcastle Operations Pty Limited (**PNO**), the applicant in this proceeding. I am authorised to make this affidavit on PNO's behalf.
2. Except where otherwise indicated, I make this affidavit from my own knowledge acquired from my personal experience, and from my examination of certain documents and records of PNO which are made and kept in the normal course of, and for the purposes of, the business of PNO. Where I depose to matters from information or belief, I believe those matters to be true.
3. PNO claims confidentiality over the shaded parts of this affidavit on the basis that they contain commercially sensitive and confidential information concerning the business of PNO.
4. In this affidavit, I provide facts and information about:

Clayton Utz  
Level 15, 1 Bligh Street  
Sydney NSW 2000

A handwritten signature in black ink, appearing to read 'S Byrnes', is written over a horizontal line.

Telephone: 02 9353 4000  
Fax: 02 8220 6700  
Email: [blloyd@claytonutz.com](mailto:blloyd@claytonutz.com)  
Ref: Bruce Lloyd

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- a. the relevant charges levied by PNO at the Port of Newcastle (**Port**), and the relative significance of those charges to coal producers, by reference to recent trends in the coal export market and the volume of coal exported through the Port; and
- b. negotiations between PNO and coal producers whose coal is exported through the Port from around November 2019 to 2 April 2020, in respect of proposed long term bilateral discounted pricing arrangements for certain charges levied by PNO at the Port.

### **Qualifications and experience**

5. I have worked at PNO since February 2019, and have held my current role as Chief Commercial Officer and General Counsel since April 2019.
6. As General Counsel, I lead PNO's legal services division comprised of employed solicitors, secondees and external legal engagements. I am also responsible for overseeing the commercial, property, environment, business intelligence, planning, corporate governance, company secretarial and compliance management functions of PNO. Together with the Chief Financial Officer, Mr Nick Livesey, and the Deputy General Counsel, Ms Gabriella Sainsbury, I am responsible for leading PNO's pricing strategy and commercial negotiations from a legal perspective, and was authorised to represent PNO in the course of the dealing with producers generally (including in the specific dealings in the period December 2019 to March 2020 which are described in this affidavit in more detail below).
7. I hold Bachelor's degrees in Commerce (Finance) and Laws from the University of New South Wales, completed in 2005, and I am a graduate of the Australian Institute of Company Directors.

### **Relevant charges at the Port**

8. Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**) permits PNO to fix and levy certain types of charges at the Port as the port operator (as defined in the PAMA Act), including:
  - a. the navigation service charge (**NSC**) under ss 50 and 51, which is payable in respect of general use by vessels over 600 gross register tonnage (**GRT**) (including coal vessels) of the Port and its infrastructure. The NSC is payable by vessel owners or charterers (**vessel operators**) of vessels which enter the Port; and



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- b. the wharfage charge (**WhC**) under ss 61 and 62, which is payable in respect of the availability of a site at which stevedoring operations may be carried out. The WhC is paid by the owner of the cargo at the time it passes the vessel's rail.
9. The NSC is fixed and payable according to the gross tonnage of a vessel that enters the Port and uses the channels at the Port, referred to as "Vessel Gross Tonnage" (**GT**). GT refers to the capacity of the vessel using the channel, rather than the volume of coal or other cargo which might be loaded onto the vessel during its visit at the Port.
10. The WhC is calculated by reference to the quantity of cargo loaded or unloaded at the Port.
11. Under s 67 of the PAMA Act, a relevant port authority may enter into an agreement with a person liable to pay any kind of charge under Part 5. To the extent that such an agreement is made, s 67(3) provides that such agreement displaces any determination of the relevant port authority in relation to the charge. PNO is a "relevant port authority" under the PAMA Act: s 47.

#### **Grades of coal mined in Australia and exported through the Port**

12. Each year, large quantities of coal from mines in the Hunter Valley are exported through the Port. I am aware from my experience as Chief Commercial Officer and General Counsel for PNO that there are different grades of coal that are mined in, and exported from, Australia. These include:
  - a. **thermal coal** (or steaming coal), which is primarily used as an energy source for electricity generation and, to a lesser extent, as an ingredient in cement. The Newcastle Thermal Coal Spot Price is a key benchmark spot price for globally traded thermal coal; and
  - b. **metallurgical coal**, which is used to produce high grade coking coal and is an essential ingredient in the steelmaking industry. Metallurgical coal can be generally distinguished into three further sub-categories according to the quality grade of metallurgical coal:
    - i. hard coking coal;
    - ii. semi-soft coking coal; and
    - iii. pulverised coal injection (**PCI**) coal.
13. As a result of these different characteristics of thermal coal and metallurgical coal (including different energy content, and the different purposes for which each grade is used), there is



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little demand substitution between thermal and hard coking coal. I understand from my experience at PNO that thermal and semi-soft coking coal are somewhat interchangeable, but that this is only to a limited extent and mostly occurs when producers engage in arbitrage between the markets for thermal coal and semi-soft coking coal.

14. I am also aware from my experience at PNO that the majority of coal exported through the Port, and produced in the Hunter Valley, is thermal coal, followed by some semi-soft coking coal and some PCI coal. For example, for the 2020 calendar year, approximately 158 million tonnes (Mt) of coal was exported through the Port in 2020, comprising 131 Mt of thermal coal and 27 Mt of semi-soft coking and PCI coal combined. Hard coking coal, such as that produced in Queensland, is not exported through the Port. The Hunter Valley region in New South Wales and the Bowen-Surat region in central and south-west Queensland are the major coal mining regions of Australia.

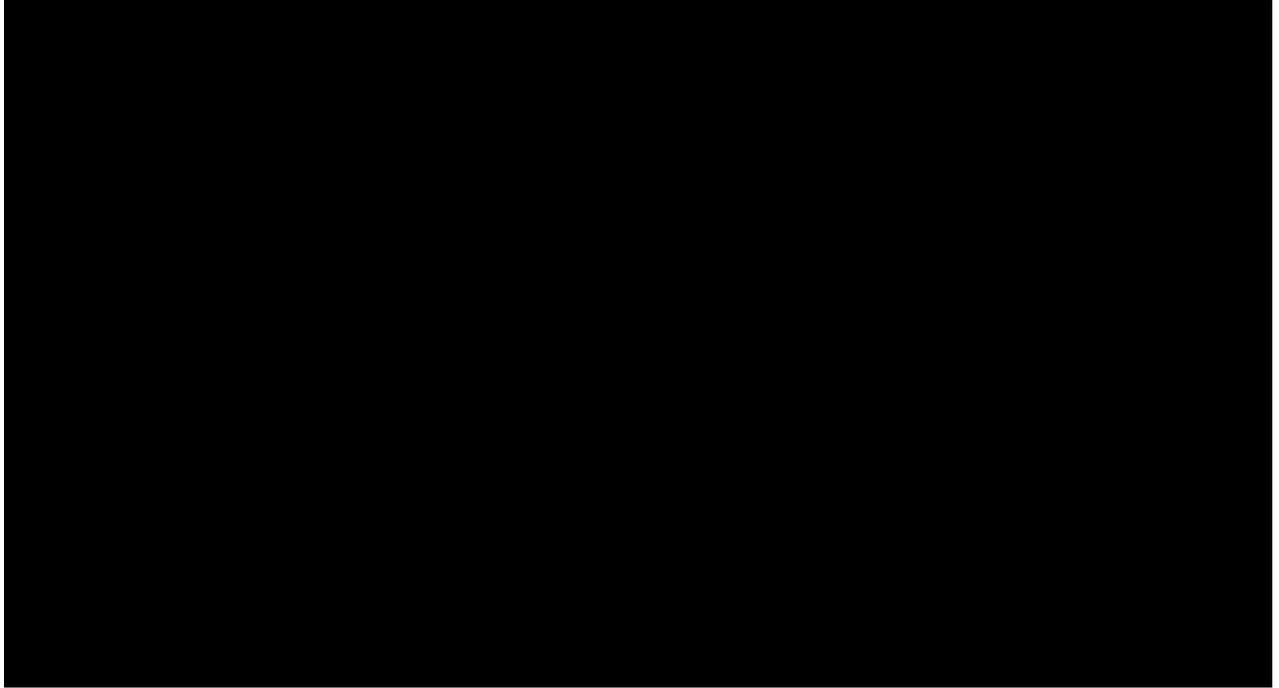
**Volumes of coal exported through the Port**

15. I am aware from my experience at PNO, including the inspection of PNO's business records, that PNO implemented a pricing review following the time that PNO assumed operation of the Port pursuant to a long-term lease over the Port with the State of New South Wales which commenced on 30 May 2014. That 2014 pricing review - the first in 20 years to be undertaken (other than for CPI increases) in respect of navigation service charges at the Port - took into account for the first time an assessment of the cost to the Port operator of providing the navigation service at the Port.
16. Following this pricing review, PNO removed the two-tiered NSC arrangement that was previously in place at the Port for coal vessels, which charged NSC rates up to a cap, depending on the GT of the vessel, and replaced this with a flat rate NSC per GT, with no cap. The new flat rate was announced on 1 July 2014, and effective from 1 January 2015. The table below compares the old (pre-1 January 2015) and new (post-1 January 2015) NSC rates:

	Prior to 1 January 2015	After 1 January 2015
NSC (GT <50,000) (per GT)	\$0.4292	\$0.6900
NSC (GT >50,000) (per GT)	\$0.9656	\$0.6900
Max. NSC (cap)	\$45,633.68	None



17. I have reviewed PNO's records of the total volume of coal exported through the Port. These records include a graph of the total volume of coal (Mt) exported through the Port by coal type (thermal coal or semi-soft coking coal) in each calendar year from 1997 to 2020, a copy of which is annexed and marked **Confidential Annexure SB-1** and extracted below:



18. As the graph above illustrates, the volume of coal exported through the Port year-on-year very substantially increased in the period from the mid-1990s until 2019 (by almost 300%).
19. Based on these records, I observe that, during the period CY2014 to CY2015 (during which the increase to the NSC was announced and implemented by PNO), and thereafter, total coal exports through the Port remained at high levels compared to the historical annual coal export volumes.
20. I also note that the volume of coal exported through the Port reached a record high of approximately 165 Mt in the period CY2019.
21. In 2020, notwithstanding changes in the volume of coal exported through the Port away from China to other destinations such as India, which I describe in more detail below, the overall volume of coal exported through the Port remained high by historical standards at similar levels to the export volumes achieved in the six year period from 2014 to 2019. This level of exports is forecast to continue in 2021.

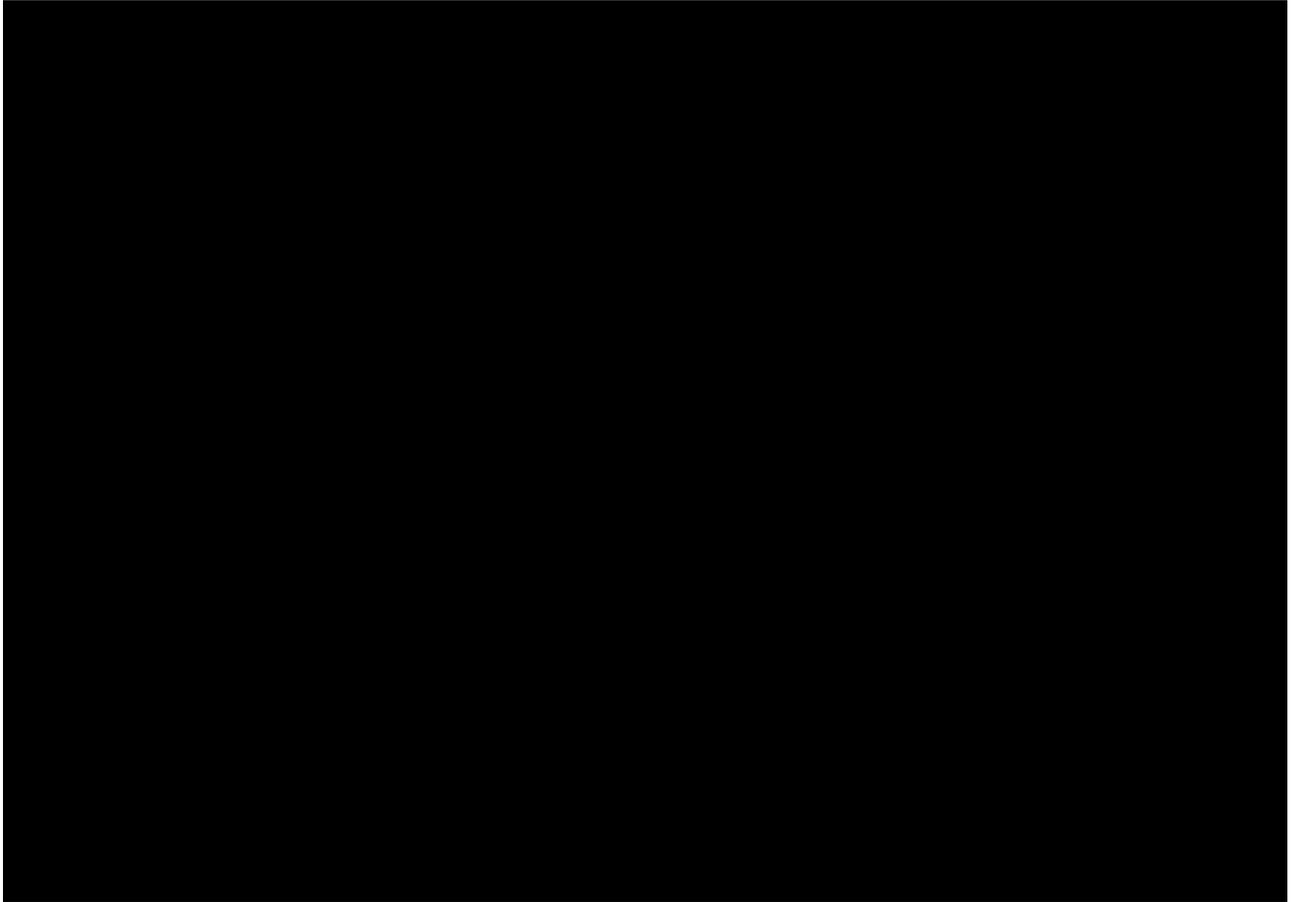


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22. I have also caused to be produced a graph which plots the world coal price on the same graph as the coal exports from the Port over time. That graph appears below and shows that the world coal price does not correlate to volumes exported through the Port.



23. PNO, as a leading export port for coal, retains Kpler, a leading data analytics service provider which reports data and analytics for various global commodity markets, to provide periodic reports which track export and production trends with respect to world coal markets, including tracking sources of demand from time to time, as well as the business of the PNO Business Intelligence department performing analyses in the ordinary course of business the results of which are available to me. I have also reviewed the following publicly available sources:

- a. the December 2020 "Resources and Energy Quarterly" report of the Commonwealth Department of Industry, Science, Energy and Resources available at: <https://publications.industry.gov.au/publications/resourcesandenergyquarterlydecember2020/documents/Resources-and-Energy-Quarterly-Dec-2020.pdf>;

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- b. an analysis of the global market for Australian coal by the Reserve Bank of Australia (RBA) available at <https://www.rba.gov.au/publications/bulletin/2019/sep/the-changing-global-market-for-australian-coal.html#fn0>; and
- c. the commodities price ("pink sheet") data published by the World Bank, available at <https://www.worldbank.org/en/research/commodity-markets>.

24. From these sources:

- a. I am aware that the increases in demand from 2010 onwards are largely as a result of the very significant increase over time in electricity generation and steel making requirements in China and, to a lesser extent, India, Korea and Japan which require coal as an input;
- b. I am aware that approximately 75-80% of Australia's thermal coal is exported, and that Indonesia and Australia are the two largest exporters of thermal coal globally;
- c. I am aware that, according to the RBA, China is by far the largest global consumer of thermal coal, accounting for nearly half of annual global consumption, and driving most of the growth in production in recent decades. Thermal coal exports to China have increased rapidly over the past decade, from less than 2% of Australian thermal coal exports in 2008, to around one-quarter as at 2019. Sustained economic growth over recent decades in India and other Asian economies has also contributed to increased global thermal coal consumption;
- d. it can be seen that global coal prices (including the benchmark Newcastle Thermal Coal Spot Price) are unpredictable and fluctuate on a daily basis and routinely by more than 1%. During the past five years, global thermal coal prices typically have ranged between approximately US\$49 per metric tonne (MT) and US\$119 per MT, and are currently around US\$86.7 per MT (as at February 2021); and
- e. I have caused to be produced a graph which plots the coal export destinations from the Port over the period 1997 to 2020. That graph appears below and is annexed and marked **Confidential Annexure SB-2**.



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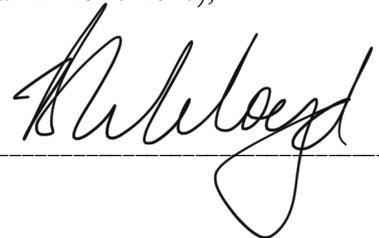
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**Relative significance of Port charges to coal producers**

25. In providing the below facts and information regarding the costs incurred by coal producers and coal purchasers relative to charges at the Port, I have caused a cost breakdown analysis to be prepared based on data as at around the time of PNO's 2014 pricing review which I describe at paragraphs 15-16 above. This analysis showed the post-1 January 2015 NSC and WhC as a proportion of buyer and seller costs of a tonne of coal exported through the Port as at Q1 2015. Annexed and marked **Confidential Annexure SB-3** is a copy of this cost breakdown, together with the working sheets which underpin the breakdown.
26. This analysis was based on the following integers:
- a. the average specifications of coal-export vessels calling at the Port during the period 2014-2015, being [CONFIDENTIAL TO PNO] [REDACTED] (based on PNO's records of vessels calling at the Port during this period);
  - b. Newcastle thermal coal spot price of \$84.02/tonne (based on publicly available data from the World Bank, which sets out the Newcastle thermal coal benchmark spot price as at March 2015);
  - c. export destination of Japan (approximately [CONFIDENTIAL TO PNO] [REDACTED] % of coal exported through the Port was exported to Japan in 2014-2015);



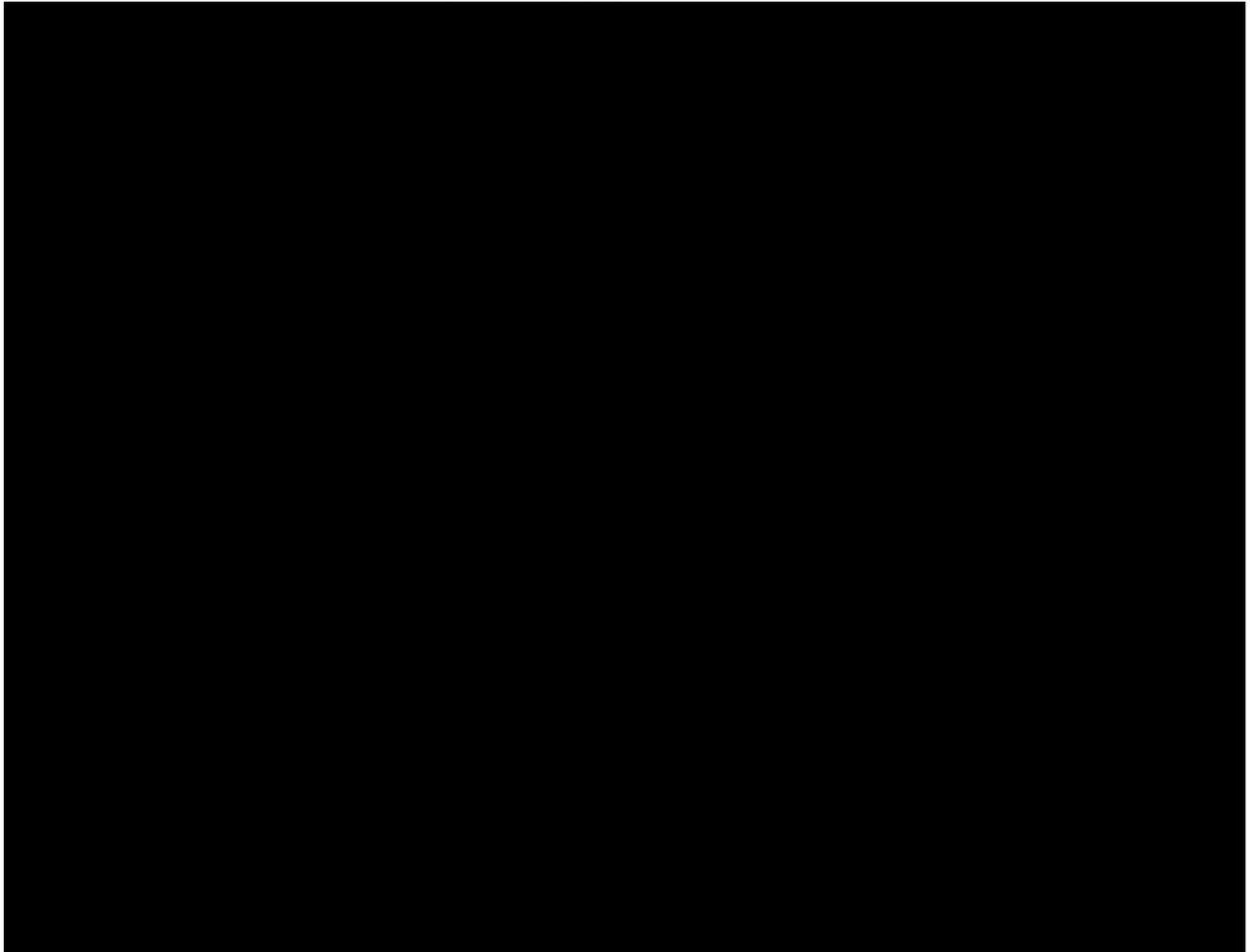
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- d. NSC of \$0.69/GT, WhC of \$0.0722 per revenue tonne; and
- e. pilotage charge levied by the Port Authority of New South Wales during the relevant period, Port Waratah Coal Services' (PWCS) terminal access charge during the relevant period, and other shipping costs as estimated by Wood Mackenzie in an analysis prepared in connection with the privatisation of the Port in 2014, which is available to me and other authorised officers of PNO in the ordinary course of PNO's business.

27. The coal cost breakdown analysis (being page 3 of SB-3) is extracted below:



28. This analysis shows that more than [CONFIDENTIAL TO PNO] ■% of the buyer cost comprises the coal price on world markets ([CONFIDENTIAL TO PNO] ■%) plus the cost of transportation to the foreign port (around [CONFIDENTIAL TO PNO] ■%). The NSC, paid by the buyer, represented on average approximately [CONFIDENTIAL TO PNO] ■% of the total costs incurred by coal buyers, while the WhC, paid by the producer, represented on average approximately [CONFIDENTIAL TO PNO] ■% of

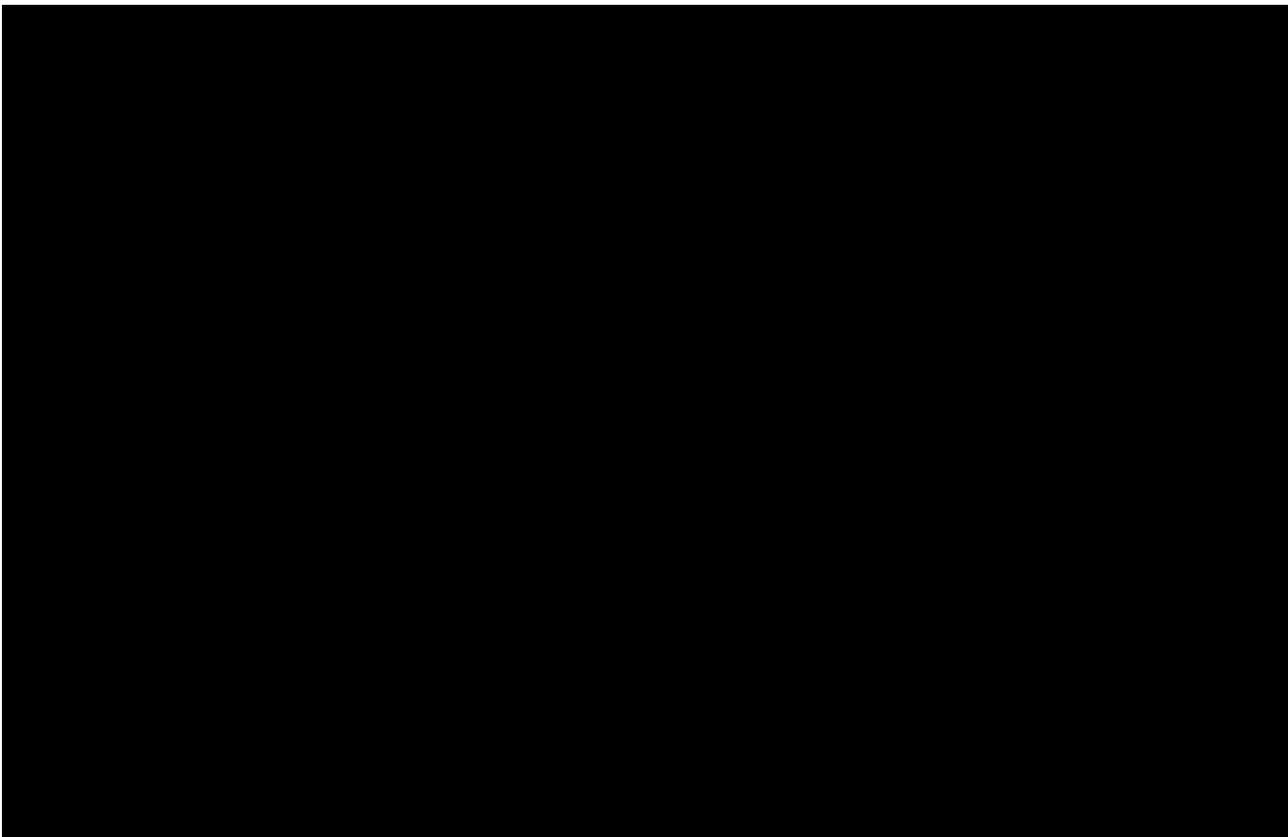
  
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the total costs incurred by coal producers whose coal is exported through the Port, as at 2014. These proportions are seen as the black lines in the graph above.

**Recent trends in the Australian coal export markets**

29. In providing the below facts and information, I have had regard to an update on coal trade results and export trends at the Port for February 2021 prepared for PNO by Kpler in the ordinary course of PNO's business (**February 2021 Kpler Update**), extracts from which are annexed and marked **Confidential Annexure SB-4**.
30. I am aware from my experience at PNO, including the inspection of PNO's business records, that from around September 2020, there has been a decline in coal exported through the Port to China. This decline is shown in the below extract from the February 2021 Kpler Update (being page 1 of annexure SB-4), which records a decline in coal exports to China through the Port of approximately **[CONFIDENTIAL TO PNO]** % from August to September 2019, and a further decline of **[CONFIDENTIAL TO PNO]** % from October to November 2019:

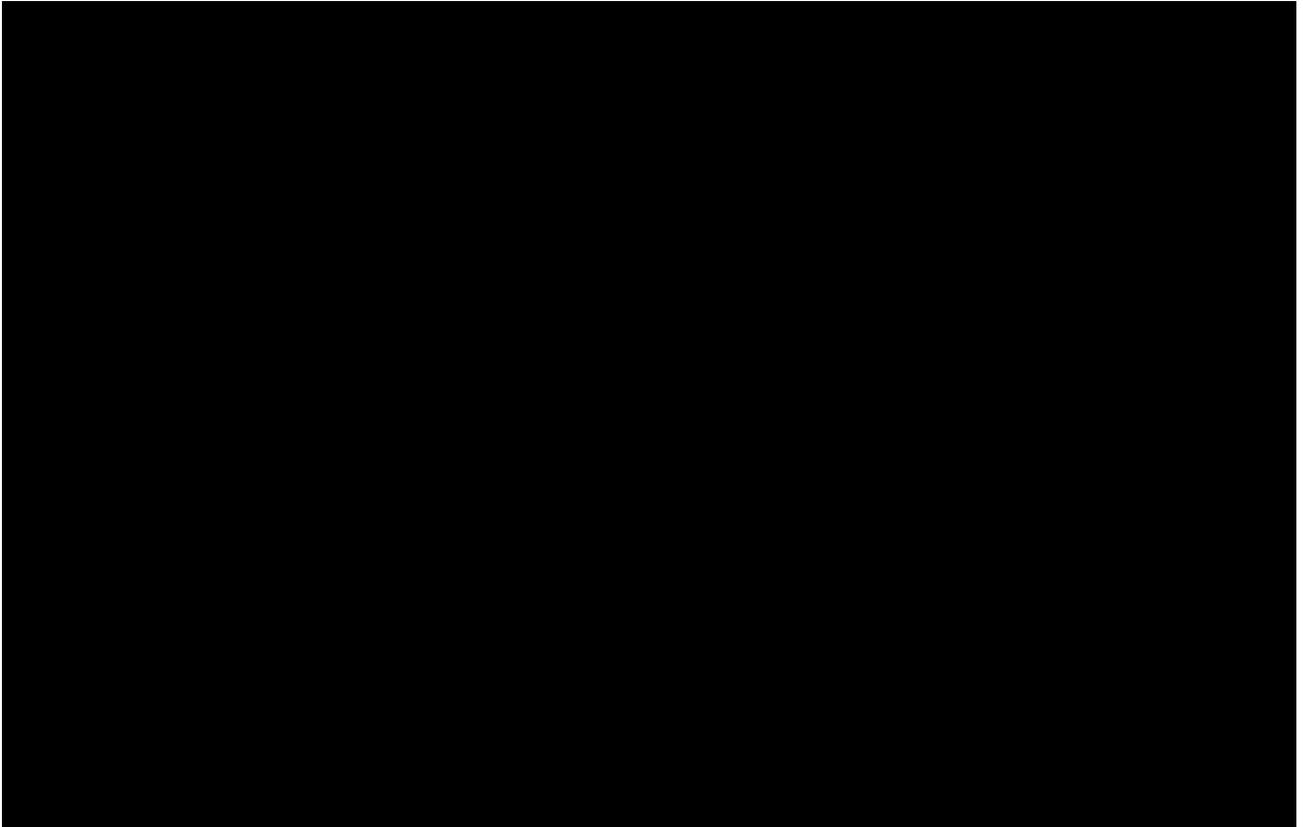


31. The February 2021 Kpler Update records show that, while China has reduced its volume of coal imports from Australia, it has increased imports of coal from other supplier countries. Most notably, as reflected in the below extract from the February 2021 Kpler Update (being

  
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page 2 of annexure SB-4, China has increased its coal imports from Indonesia by [CONFIDENTIAL TO PNO] █% from November to December 2020, and imported a record [CONFIDENTIAL TO PNO] █ of coal from Indonesia in December 2020:



32. Similarly, while the February 2021 Kpler Update shows that the volume of thermal coal exported to China from the Port has declined from around September 2020, exports to other countries have increased during that time. In particular, India has increased its imports of coal from Australia (exported through the Port) by approximately [CONFIDENTIAL TO PNO] █% from September to October 2020, and by around a further [CONFIDENTIAL TO PNO] █% from November to December 2020. Imports of Australian thermal coal from India reached a record high of [CONFIDENTIAL TO PNO] █ in January 2021. This is shown in the below extract from the February 2021 Kpler Update (being page 3 of annexure SB-4):

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### **Bilateral negotiations with coal producers**

33. From around November 2019, I, together with the Chief Executive Officer of PNO, Mr Craig Carmody, entered into negotiations on behalf of PNO with a number of coal producers whose coal is exported through the Port in relation to proposed long-term pricing arrangements for the NSC and WhC pursuant to the terms of a draft pricing deed (**Pro-forma Producer Deed**). I was assisted in my negotiations and engagement with coal producers by Ms Sainsbury.
34. The terms of the Pro-forma Producer Deed provided for special pricing arrangements, representing a 10-year discount to the standard NSC and WhC levied by PNO for coal vessels under its standard coal vessel charging arrangements. The Pro-forma Producer Deed provided for discounts to the NSC and WhC for vessels carrying coal produced by producers who had entered into the Pro-forma Producer Deed (**Covered Vessels**). The initial price for the NSC under the Pro-forma Producer Deed (\$0.81/GT) was substantially similar to the NSC levied by PNO under its 2019 Schedule of Port Charges (being \$0.78/GT), adjusted for inflation.
35. During the period from around November 2019 to 2 April 2020 (**Relevant Period**), I was involved in individual bilateral negotiations with representatives of the following ten coal



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producers in relation to various aspects of the Pro-forma Producer Deed which I describe in more detail below:

- a. **Bengalla** Mining Company Pty Ltd;
  - b. **BHP** Group Ltd (on behalf of its wholly-owned subsidiary, Hunter Valley Energy Coal Pty Ltd);
  - c. **Bloomfield** Collieries Pty Ltd;
  - d. **Centennial** Coal Company Ltd;
  - e. **Glencore** Coal Assets Australia Pty Ltd;
  - f. **Idemitsu** Australia Resources Pty Ltd;
  - g. **MACH Energy** Australia Pty Ltd;
  - h. **Peabody** Energy Australia Pty Ltd;
  - i. **Whitehaven** Coal Mining Ltd; and
  - j. **Yancoal** Australia Ltd.
36. With the exception of Bengalla, the coal producers listed above are currently, and were at all times during the Relevant Period, members of the New South Wales Minerals Council (**NSWMC**), the authorisation applicant in this proceeding, and include some of the largest coal producers operating in Australia. For example, in relation to Glencore:
- a. I have reviewed Glencore's 2020 "Corporate Profile - Australia" document, published on Glencore's website at: <https://www.glencore.com.au/en/publications/giabrochures/GLN%203092A%20GiA%20Brochure%202019-2020%20A5%2045-SR.pdf>. At page 17 of that document, Glencore describes itself as "*Australia's largest coal producer, with 17 mining operations across New South Wales and Queensland*"; and
  - b. I have also reviewed the 2019 annual report of Glencore plc, Glencore's ultimate parent company, published on Glencore plc's website at: <https://www.glencore.com/dam/jcr:79fd3300-ee50-4ee1-870d-6372274c71b5/glen-2019-annual-report-interactive.pdf>. This report states that, for the year ended 31 December 2019, Glencore plc recorded revenues from its Australian operations in thermal coal production of approximately US\$6 billion, and adjusted earnings before



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interest, taxes, depreciation and amortisation from its Australian operations in thermal coal production of approximately US\$2.3 billion.

37. These discussions typically involved in-person presentations to representatives from each producer in around November 2019 on the terms of the Pro-forma Producer Deed proposed by PNO, followed by subsequent telephone discussions and email correspondence with those representatives. A copy of the pro-forma presentation and the draft terms of the Pro-forma Producer Deed offered by PNO to producers in November 2019 is annexed and marked **Confidential Annexure SB-5**.

**Producers raised varied interests and different concerns during the bilateral negotiations**

38. [CONFIDENTIAL TO PNO] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

a. [REDACTED]  
[REDACTED]  
[REDACTED]  
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b. [REDACTED]  
[REDACTED]

79. [REDACTED]

**Interim authorisation**

80. On 2 April 2020, the Australian Competition and Consumer Commission granted interim authorisation under s 91 of the CCA in respect of the collective bargaining application lodged by NSWMC on 6 March 2020 (**Interim Authorisation**).

81. From the date of Interim Authorisation, I have not had any further bilateral, or collective, negotiations with any coal producers in relation to the Pro-forma Producer Deed. None of the individual producers with whom I had been in negotiations about the Pro-forma Producer Deed have contacted me to discuss progressing the Pro-forma Producer Deed since around 2 April 2020.

82. At all times since 2 April 2020, PNO has in its Schedule of Service Charges published on its website (available at <https://www.portofnewcastle.com.au/wp-content/uploads/2020/12/Schedule-of-Charges-2021-FINAL-.pdf>) made an express invitation to any producer to engage with PNO in respect of entering into the Pro-forma Producer Deed, an excerpt of which appears below:

**Note: Longer term bilateral arrangements**

**PON encourages Vessel Agents, Vessel Operators, Coal Producers and FOB coal consignees involved in the shipment of coal from the Port to contact PON directly to discuss entering into longer term discounted pricing arrangements with PON, based on the terms of the pro forma deed which is available [here for Vessel Agents](#) and [here for Coal Producers](#). Please refer in particular to Schedule 2 of this deed for discounted navigation service charge pricing available.**

**The graph below is indicative only of the forward 10 year price variance between standard coal vessel pricing and bilateral price deed coal vessel pricing (using an indicative assumption that CPI is 2.50%):**

Year	2020 Standard Price (\$1.0424) + CPI for 10 years	2020 Bilateral Price + 4%
2020	1.0424	0.81
2021	1.06	0.84
2022	1.08	0.87
2023	1.10	0.90
2024	1.12	0.93
2025	1.14	0.96
2026	1.16	0.99
2027	1.18	1.02
2028	1.20	1.05
2029	1.22	1.08
2030	1.24	1.11

[Signature]

[Signature]

83. To date, no producer has done so.

AFFIRMED by the deponent  
at Newcastle in New South Wales  
on 15 March 2021

Before me:



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BRUCE LLOYD  
SOLICITOR NSW

*Signature of deponent*



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