

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:	Issues List
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



REGISTRAR

Dated: 8/02/2021 4:24 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: 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]

ACCC ISSUES LIST

PURPOSE OF THIS DOCUMENT

1. This Issues List has been prepared by the ACCC pursuant to Order 11 of the Directions made by the Tribunal on 25 November 2020.
2. The purpose of this Issues List is to assist interested third parties to make a submission to the Tribunal in the proceedings, should they wish to do so.
3. The ACCC has sought to identify issues for inclusion in this Issues List by reviewing the statements of facts, issues and contentions filed by those parties involved in the proceedings.
4. This Issues List is not intended to be the final list of issues to be considered by the Tribunal in these proceedings, nor does it represent the Tribunal's view of the issues that do or may arise. It reflects only the view of the ACCC as to the issues that the Tribunal may consider.

SHORT BACKGROUND TO THIS PROCEEDING

5. This proceeding concerns an application by Port of Newcastle Operations Pty Limited (**PNO**) for review of a determination by the ACCC under s 88(1) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) to authorise the NSW Minerals Council and other mining companies exporting goods through the Port of Newcastle (**Port**), to negotiate collectively with PNO in relation to the terms and conditions of access to the Port, including as to price.
6. The NSW Minerals Council applied to the ACCC for authorisation on behalf of itself and ten coal producers that export coal through the Port (all collectively defined as the **Authorisation Applicants**). The ten coal producers are: Glencore Coal Assets Australia Pty Limited, Yancoal Australia Limited, Peabody Energy Australia Pty Ltd, Bloomfield Collieries Pty Ltd, Centennial Coal Company Limited, Malabar Coal Limited, Whitehaven

Coal Mining Limited, Hunter Valley Energy Coal Pty Ltd, Idemitsu Australia Resources Pty Ltd, and MACH Energy Australia Pty Ltd.

7. The Authorisation Applicants sought authorisation from the ACCC on 6 March 2020 to:
 - 7.1. 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;
 - 7.2. discuss amongst themselves matters relating to the above discussion and negotiations; and
 - 7.3. 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**).
8. The Proposed Collective Bargaining Conduct is voluntary for all parties, including PNO, and does not include boycott activity by the collective bargaining group or the sharing of commercially sensitive information among the group.
9. The authorisation application related to the collective negotiation of access charges that apply to coal vessels entering the channels and berthing at the Port, and other issues relating to PNO's approach to the setting of access terms and conditions at the Port and PNO's capital expenditure plans.
10. On 2 April 2020, the ACCC granted interim authorisation to enable the Authorisation Applicants to commence collective discussions amongst themselves and negotiations with PNO in relation to the terms and conditions of access, including price, to the Port. Interim authorisation did not extend to entering into any collectively negotiated agreements.
11. On 27 August 2020, the ACCC granted authorisation in respect of the Proposed Collective Bargaining for ten years, until 30 September 2030.
12. On 17 September 2020, PNO applied to the Tribunal for review of the ACCC Determination.

ISSUES

A. The Role of the Tribunal in the review

13. The Tribunal's statutory function in this review is to undertake a rehearing of the matter.¹ The Tribunal's task is not to review whether the ACCC Determination was right or wrong on the material before it.
14. In performing this function, the Tribunal must apply s 90(7)(b) of the CCA, which provides that authorisation must not be granted unless the Tribunal is satisfied in all the circumstances that:

¹ Section 101(2) of the CCA.

- (i) the conduct would result, or be likely to result, in a benefit to the public; and
 - (ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.²
15. The ACCC's position is that in applying this test, the Tribunal should compare the likely future with the conduct for which authorisation is sought, with the likely future without such conduct.³ This is not the same as comparing a future in which the proposed conduct is authorised against a future in which it is not authorised.⁴
16. The Tribunal is to identify the benefits and detriments, or the *likely* benefits and detriments, of the proposed conduct on the basis of the materials before it in this matter, and determine whether the test in section 90(7)(b) is met.
17. The power to grant authorisation is discretionary.⁵ In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the CCA.⁶

Issue 1: How does the Tribunal properly exercise its functions in this review?

18. This is ultimately a legal question to be determined by the Tribunal. However, interested parties may wish to comment upon how the Tribunal should properly exercise its function, including as to the relevant legal test for the Tribunal to apply in this review.

B. Relevant market

Issue 2: In assessing public benefits and detriments, what is (are) the relevant market(s) in which to assess the competitive effects of the Proposed Collective Bargaining Conduct?

19. In its Determination, the ACCC identified that the most relevant area of competition affected by the Proposed Collective Bargaining Conduct is the market for access to certain port services at the Port that are supplied by PNO, including channel shipping services and wharfage, but not including landside coal loading infrastructure which is owned by other parties or marine pilotage services.⁷
20. The ACCC also considers the following as relevant areas of competition likely to be affected by the Proposed Collective Bargaining Conduct:

² PNO Statement of facts, issues and contentions (SOFIC), 14 December 2020, paragraph 55; NSWMC Statement of facts, issues and contentions (SOFIC), 28 January 2021, paragraph 20.

³ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,520 [117]; *Re 7-Eleven Stores Pty Ltd* [1998] ATPR ¶41-666 at 41-453; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [137].

⁴ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,521 [120]-[121].

⁵ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,517 [106]; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [138].

⁶ *Application by Medicines Australia Inc* [2007] ATPR ¶42-164 at 47,522 [126].

⁷ ACCC Determination, 27 August 2020, at 4.7.

- 20.1. the acquisition and disposal of exploration and/or mining authorities in the Hunter Valley region (the Tenements Market); and
- 20.2. the supply of specialist mining services such as geological and drilling services, and construction, operation and maintenance services in NSW.
21. The NSW Minerals Council submits that the primary market affected by the Proposed Collective Bargaining Conduct is the market for access to PNO's Port services.⁸ It also submits that the Proposed Collective Bargaining Conduct would likely promote a material increase in competition in a number of dependant markets, including those in paragraph 20 above.⁹
22. PNO notes that Hunter Valley coal producers participate in a global market for the supply of thermal coal.¹⁰
23. Interested parties may wish to comment on whether the areas of competition identified above are relevant for the purpose of assessing this matter, and whether any other areas of competition are relevant.

C. Public benefits and detriments

24. Section 90(7)(b) of the CCA requires the ACCC, and the Tribunal in this review, to consider the public benefits and the public detriments that would result, or be likely to result, from the Proposed Collective Bargaining Conduct.

a. Likely public benefits

Issue 3: What are the likely public benefits of the Proposed Collective Bargaining Conduct?

25. Interested parties may wish to comment on the following possible public benefits (as well as any others not included below).

Transaction cost savings

26. Each party to a negotiation and subsequent contract will incur transaction costs. Collective bargaining may result in lower transaction costs in some circumstances.
27. Interested parties may wish to comment upon:
- 27.1. How and to what extent would the Proposed Collective Bargaining Conduct be likely to result in transaction cost savings for coal producers and/or the target, as opposed to a series of bilateral negotiations? If so, what weight should be given to any transaction cost savings? Do transaction costs discourage coal producers from

⁸ NSWMC SOFIC, 28 January 2021, paragraph 64.

⁹ NSWMC SOFIC, 28 January 2021, paragraph 98.

¹⁰ PNO SOFIC, 14 December 2020, paragraph 24.

negotiating individually with PNO over access charges or result in coal producers having reduced access to expert advice, and why?

27.2.

More efficient investment as a result of coal producers having greater and more informed input into the Producer Deed and reduced information asymmetry

28. Collective bargaining could enable members of the collective to become more informed and engaged in negotiations, reducing information asymmetry. This could improve their ability to convince the target of the merits of their position and hence have greater input into contracts. This could lead to terms of supply that are more comprehensive and that better reflect the circumstances of the group and the target business, resulting in more efficient outcomes.
29. Transaction cost savings (referred to above) could also result in more (allocative or dynamic) efficient outcomes because parties are willing to invest more in preparation for and participation in negotiations if the cost of doing so is lower.
30. Interested parties may wish to comment upon:
 - 30.1. Do information asymmetries exist between PNO and coal producers, and if so, what are they and how would they impact parties?
 - 30.2. To the extent that there is asymmetry of information between PNO and individual coal producers, how and to what extent would the Proposed Collective Bargaining Conduct address that asymmetry? How and to what extent would it lead to more efficient terms and conditions of Port access in agreements between PNO and coal producers – for example, setting access charges at more efficient levels?

Increased competitiveness of Hunter Valley export coal industry

31. Collective bargaining may increase the competitiveness of the Hunter Valley export coal industry by promoting more effective negotiation of prices and increased price certainty, which could drive competition in the market.
32. Interested parties may wish to comment upon:
 - 32.1. Would the Proposed Collective Bargaining Conduct be likely to result in improved price terms and conditions of Port access for producers and therefore improve the competitiveness of coal exported from the Hunter Valley? How significant would a change in the navigation service charge have to be to impact the competitiveness of Hunter Valley coal in export markets?
 - 32.2. Whether, how and to what extent would the Proposed Collective Bargaining Conduct reduce pricing uncertainty?
 - 32.3. Whether, how and to what extent would the Proposed Collective Bargaining Conduct result in more timely resolution of industry-wide issues – such as forecast capital expenditure at the Port and cost allocation methodology?

Other benefits

33. Interested parties may also wish to comment on the following issues:

33.1. Are there any other public benefits likely to result from the Proposed Collective Bargaining Conduct? If so, how should the Tribunal take account of such public benefits in its assessment?

33.2. Are any of the benefits likely to result from the Proposed Collective Bargaining Conduct private in nature as opposed to public benefits? If so, how should the Tribunal take account of any private benefits in making its assessment?

b. Likely public detriments

Issue 4: What are the likely public detriments of the Proposed Collective Bargaining Conduct?

34. Some possible public detriments upon which interested parties may wish to comment include the following.

Potential for reduction in competition between Hunter Valley coal producers

35. A potential public detriment is that the Proposed Collective Bargaining Conduct could facilitate other anti-competitive conduct in the relevant market(s).

36. Interested parties may wish to comment upon:

36.1. In what ways and to what extent do coal producers compete with each other?

36.2. Would the Proposed Collective Bargaining Conduct be likely to:

36.2.1. Impact competition in any relevant markets by facilitating the exchange of commercially sensitive information between coal producers?

36.2.2. Adversely affect competition and/or efficient investment in any other markets in which coal producers participate – for example, rivalry in seeking access to coal handling terminals?

Potential to lose unique interests of bargaining group members

37. A potential public detriment is that collective bargaining could make it less likely that individual producers will be able to negotiate terms and conditions tailored to their own individual needs.

38. Interested parties may wish to comment upon:

38.1. Would the Proposed Collective Bargaining Conduct be likely to discourage individual coal producers from pursuing bilateral negotiations?

38.2. Would the Proposed Collective Bargaining Conduct make it less likely that individual coal producers will be able to negotiate terms and conditions tailored to their own needs, and/or be more likely to accept terms and conditions that reflect the needs of larger producers? Would coal producers be likely to voluntarily accept a collectively negotiated outcome that is 'worse' than what they could negotiate bilaterally? If so, in what circumstances?

38.3. To what extent would any of the above detriments be mitigated by the Proposed Collective Bargaining Conduct being voluntary?

Other detriments

39. Interested parties may also wish to comment on whether there are other public detriments that are likely to result from the Proposed Collective Bargaining Conduct.

D. Balance of public benefit and public detriments

Issue 5: How should the benefits and detriments be balanced? Is the net public benefit test in s 90(7)(b) met by the Proposed Collective Bargaining Conduct?

40. The Tribunal should weigh the likely public benefits and public detriments and determine whether the net public benefit test is satisfied in respect of the Proposed Collective Bargaining Conduct.

41. Interested parties may wish to comment upon:

41.1. In comparing the public benefits and detriments that are likely to arise in the future with and without the conduct, what is the relevant conduct that the Tribunal should have regard to?

41.1.1. What is the weight the Tribunal should give, if any, to statements by the target that it "does not intend to participate in collective negotiations"?¹¹ Can voluntary collective bargaining in such circumstances result, or be likely to result, in any public benefits or detriments?

41.1.2. What is the likely future with the Proposed Collective Bargaining Conduct?

41.1.3. What is the likely future without the Proposed Collective Bargaining Conduct?

E. Tribunal's discretion

Issue 6: If the test is met, how should Tribunal exercise its discretion? Should the conduct be authorised? Should any conditions be imposed?

¹¹ PNO SOFIC, 14 December 2020, paragraph 51. See PNO application for review by the Tribunal, 17 September 2020, paragraph 43.

42. The power to grant authorisation is discretionary. In exercising that discretion, the Tribunal may have regard to considerations relevant to the objectives of the CCA.
43. Interested parties may wish to comment upon:
- 43.1. If the likely public benefits of the Proposed Collective Bargaining Conduct outweigh the likely public detriments, should the Tribunal exercise its discretion to grant authorisation?
- 43.2. Should collective bargaining be considered presumptively harmful because it involves cartel conduct such that the discretion to authorise should only be exercised where there is a substantial net public benefit?¹² If so, would any net public benefit that would be likely to result from the Proposed Collective Bargaining Conduct in this case be substantial?
- 43.3. Should the Tribunal exercise its discretion and impose conditions? What, if any, conditions should be imposed?

F. Length of authorisation

44. Section 91(1) provides that an authorisation may be expressed to be in force for a specified period.

Issue 7: If authorisation is granted, what is the appropriate period of authorisation?

45. The ACCC granted authorisation for ten years. The length of authorisation is not in dispute between the parties.
46. Interested parties may wish to comment upon the appropriate period of any authorisation.

¹² PNO SOFIC, 14 December 2020, paragraph 63(a).